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1939

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(1910-1980)
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Jammu and Kashmir,*

PATNA SECTION

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| (5) 40 CRIMINAL LAW JOURNAL | (6) 179 TO 184 INDIAN CASES |



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TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
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PATNA HIGH COURT

1939

Chief Justice :

The Hon'ble Sir Arthur Trevor Harries, Kt., B.A., LL.B. (*Cantab*), Bar-at-law.

Puisne Judges :

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	19 P L T 892	88	178 I O 150		18 Pat 121		179 I O 170
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28	177 I O 999		17 Pat 687		5 B R 491		5 B R 207
	39 Cr L J 968		1939 P W N 162	133	1938 P W N 144	164	178 I O 803
	5 B R 45		5 B R 59		17 Pat 803		5 B R 140
29	177 I O 802	86	182 I O 632		180 I O 208	167	178 I O 362
	5 B R 17		5 B R 792		5 B R 863		5 B R 89
30	177 I O 799		20 P L T 898	135	1938 P W N 781	168	178 I O 357
	5 B R 21	89	19 P L T 208		180 I O 314		1939 P W N 46
32	177 I O 709		180 I O 201		20 P L T 316		5 B R 91
	5 B R 13		5 B R 360		5 B R 455	170	179 I O 161
33	177 I O 713	90	1938 P W N 765	137	178 I O 976		5 B R 198
	19 P L T 855		19 P L T 760		20 P L T 79	171	182 I O 446
	5 B R 15		178 I O 279		1939 P W N 166		5 B R 745
35	1938 P W N 754		17 Pat 714		5 B R 160	172	19 P L T 845
	19 P L T 801		5 B R 78	138	17 Pat 588		1939 P W N 832
	178 I O 180	95	1938 P W N 804		20 P L T 76		180 I O 839
	39 Cr L J 997		19 P L T 844		180 I O 983		40 Cr L J 419
	18 Pat 82		180 I O 863		5 B R 514		5 B R 499
	5 B R 58		5 B R 888	140	179 I O 128		17 Pat 622
40	179 I O 761	96	178 I O 505		5 B R 199	174	20 P L T 70
	5 B R 284		5 B R 110	141	19 P L T 840		1939 P W N 136
41	1938 P W N 710	97	17 Pat 549		1939 P W N 69		

A. I. R. 1939 Patna = Other Journals (Contd.)															
AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
174	180	I C	845	219	5	B R	818	270	180	I C	134	339	182	I C	678
	40	Cr L J	509		20	P L T	818		5	B R	357	FB	1939	P W N	523
	5	B R	501	221	182	I C	746	272	1939	P W N	120		40	Cr L J	687
178	1938	P W N	904		5	B R	819		182	I C	863		18	Pat	676
	179	I C	167	222	20	P L T	131		20	P L T	697		5	B R	799
	40	Cr L J	157		1939	P W N	192		5	B R	839	343	182	I C	645
	5	B R	203		182	I C	791	274	1939	P W N	197	SB	20	P L T	607
180	179	I C	400		5	B R	827		18	Pat	267		40	Cr L J	687
	5	B R	231	225	1939	P W N	41		183	I C	281		1939	P W N	620
181	17	Pat	658		179	I C	834		5	B R	893		18	Pat	580
	181	I C	450		20	P L T	346	276	180	I C	127		5	B R	795
	1939	P W N	175		5	B R	298		5	B R	356	347	1939	P W N	178
	5	B R	581	229	179	I C	593	277	20	P L T	32		183	I C	60
183	17	Pat	669		5	B R	248		1939	P W N	7		5	B R	855
	1939	P W N	95	230	18	Pat	378		183	I C	96	348	1939	P W N	260
	20	P L T	288		182	I C	821		5	B R	856		20	P L T	595
	180	I C	852		1939	P W N	641	278	20	P L T	170		183	I C	388
	40	Cr L J	516		5	B R	830		1939	P W N	157		40	Cr L J	797
	5	B R	505		20	P L T	726		18	Pat	271		5	B R	906
186	19	P L T	918	236	182	I C	457		183	I C	422	349	1939	P W N	35
	1939	P W N	23		20	P L T	613		5	B R	919		183	I C	217
	180	I C	858		5	B R	768	281	1939	P W N	155		40	Cr L J	751
	40	Cr L J	514	239	20	P L T	33		179	I C	896		5	B R	907
	5	B R	498		1939	P W N	52		40	Cr L J	276		20	P L T	736
187	1938	P W N	810		18	Pat	114		5	B R	319	350	179	I C	940
	179	I C	548		182	I C	796	282	20	P L T	139		5	B R	327
	40	Cr L J	220		5	B R	824		1939	P W N	108	352	20	P L T	86
	5	B R	246	242	1939	P W N	86		18	Pat	355		183	I C	48
188	19	P L T	897		180	I C	8		5	B R	902		5	B R	854
	181	I C	844		5	B R	344		183	I C	212	353	1939	P W N	64
	5	B R	683	248	20	P L T	275	285	180	I C	102		20	P L T	145
190	19	P L T	186	FB	1939	P W N	232		5	B R	337		183	I C	286
	181	I C	585		181	I C	579	287	182	I C	561		40	Cr L J	749
	5	B R	626		18	Pat	327		20	P L T	773		5	B R	894
194	17	Pat	751		5	B R	616		5	B R	781	354	179	I C	538
	1939	P W N	361	252	20	P L T	88	289	180	I C	81		5	B R	238
	181	I C	459		179	I C	840		20	P L T	856	356	180	I C	98
	5	B R	588		1939	P W N	271		5	B R	333		1939	P W N	263
198	1939	P W N	83		18	Pat	190	291	20	P L T	780		20	P L T	378
	182	I C	740		5	B R	303		183	I C	507		5	B R	341
	5	B R	816	253	179	I C	831		5	B R	959	358	179	I C	923
200	20	P L T	469		5	B R	297	292	179	I C	929		5	B R	320
	18	Pat	184	254	179	I C	586		20	P L T	313	360	180	I C	109
	182	I C	557		5	B R	247		40	Cr L J	318		1939	P W N	256
	5	B R	779	255	179	I C	890		1939	P W N	283		20	P L T	343
202	179	I C	419		5	B R	318		5	B R	322		5	B R	338
	5	B R	217	256	20	P L T	467	294	182	I C	569	362	1939	P W N	99
203	182	I C	450		182	I C	979		5	B R	777		183	I C	80
	5	B R	754		40	Cr L J	720	296	182	I C	618		5	B R	861
206	1939	P W N	66		1939	P W N	745		5	B R	785	364	182	I C	982
	20	P L T	164		5	B R	863	303	180	I C	72		20	P L T	677
	181	I C	176	257	179	I C	842		5	B R	332		5	B R	864
	40	Cr L J	538		5	B R	301	305	1939	P W N	407	369	20	P L T	161
	5	B R	539	258	180	I C	105	FB	20	P L T	497		179	I C	954
207	179	I C	295		5	B R	342		182	I C	721		5	B R	324
	20	P L T	117	260	180	I C	76		18	Pat	509	370	1939	P W N	222
	18	Pat	181		5	B R	330		5	B R	803		18	Pat	306
	5	B R	215	261	20	P L T	84	314	180	I C	335		20	P L T	663
209	20	P L T	105		1939	P W N	344		1939	P W N	215		183	I C	323
	1939	P W N	72		182	I C	831		40	Cr L J	337		5	B R	930
	182	I C	89		5	B R	836		5	B R	384	375	1939	P W N	8
	40	Cr L J	631	263	1939	P W N	50	316	183	I C	71		18	Pat	342
	5	B R	711		179	I C	845		5	B R	857		183	I C	400
	18	Pat	215		5	B R	304	320	179	I C	15		5	B R	938
216	182	I C	708	264	179	I C	828		40	Cr L J	196	380	180	I C	767
	5	B R	814		5	B R	296		5	B R	206		18	Pat	366
217	20	P L T	513	265	180	I C	95		1939	P W N	862		1939	P W N	604
	182	I C	989		5	B R	335	321	184	I C	508		5	B R	485
	5	B R	856	267	179	I C	803		6	B R	53	382	1939	P W N	16
218	179	I C	583		5	B R	295	323	183	I C	179		18	Pat	133
	5	B R	244	269	1939	P W N	217		5	B R	874		183	I C	374
219	1939	P W N	61		182	I C	454		20	P L T	825		5	B R	927
	182	I C	743		5	B R	746	339FB	20	P L T	460	385	1939	P W N	261

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AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
385	20	PLT	720	433	183	IC	523	514	18	Pat	261	570	185	IC	135
	183	IC	385	FB	5	BR	965		5	BR	524		6	BR	106
	5	BR	901	443	18	Pat	101	517	182	IC	223	571	181	IC	611
386	185	IC	144		1939	PWN	353		5	BR	734		18	Pat	323
387	180	IC	733		183	IC	499	518	181	IC	896		20	PLT	710
	5	BR	487		40	CrLJ	786		5	BR	704		5	BR	620
388	20	PLT	403		5	BR	955	519	182	IC	329	572	182	IC	188
	1939	PWN	330		20	PLT	802		5	BR	813		5	BR	730
	183	IC	224	448	1939	PWN	394	520	1939	PWN	607	575	181	IC	811
	40	CrLJ	759		20	PLT	579	SB	18	Pat	502		40	CrLJ	611
	5	BR	954		18	Pat	571		20	PLT	659		1939	PWN	671
389	20	PLT	175		184	IC	363		6	BR	34		5	BR	679
	1939	PWN	170		6	BR	45		184	IC	308		21	PLT	86
	18	Pat	253	451	1939	PWN	273	522	185	IC	557	577	1939	PWN	300
	183	IC	930		18	Pat	434		6	BR	200		20	PLT	420
	5	BR	924		20	PLT	619	525	20	PLT	495		181	IC	1001
392	1939	PWN	242		6	BR	56		1939	PWN	670		40	CrLJ	625
	18	Pat	404		184	IC	597		6	BR	24		18	Pat	450
	20	PLT	646	457	1939	PWN	319		40	CrLJ	887		5	BR	706
	183	IC	409		20	PLT	743		184	IC	230	580	181	IC	721
	5	BR	914		183	IC	866	526	18	Pat	193		20	PLT	685
397	180	IC	833		5	BR	1009		1939	PWN	591		5	BR	664
	5	BR	496	460	18	Pat	76		6	BR	88	587	181	IC	777
	1939	PWN	829		1939	PWN	346		185	IC	52		5	BR	676
399	20	PLT	415		20	PLT	748	530	182	IC	407	591	1939	PWN	700
	181	IC	275		184	IC	47		5	BR	736		20	PLT	929
	5	BR	546		6	BR	6	531	182	IC	153		185	IC	254
402	1939	PWN	37		40	CrLJ	837		20	PLT	638		6	BR	142
	18	Pat	204	462	20	PLT	787		5	BR	727	592	1939	PWN	667
	183	IC	428		6	BR	14	532	182	IC	610		185	IC	129
	5	BR	935		184	IC	113		20	PLT	585		6	BR	109
404	20	PLT	318	467	18	Pat	279		18	Pat	670	594	20	PLT	589
	180	IC	610		183	IC	770		5	BR	783		1939	PWN	635
	5	BR	457		5	BR	986		1939	PWN	850		6	BR	313
406	20	PLT	328	477	183	IC	855	534	182	IC	208		186	IC	232
	183	IC	467		5	BR	999		5	BR	732	597	20	PLT	700
	5	BR	948	488	1939	PWN	931	536	1939	PWN	598		1939	PWN	703
409	181	IC	172		20	PLT	399		18	Pat	698		185	IC	273
	5	BR	541		184	IC	504		184	IC	354		6	BR	144
411	181	IC	184		6	BR	51		6	BR	41	598	18	Pat	370
	18	Pat	318	490	180	IC	365		20	PLT	898		183	IC	56
	5	BR	537		20	PLT	321		41	CrLJ	1		5	BR	850
	21	PLT	138		1939	PWN	805	540	182	IC	132	601	18	Pat	539
413	180	IC	624		5	BR	394		5	BR	718		1939	PWN	677
	20	PLT	440	495	1939	PWN	200	548	20	PLT	303		20	PLT	765
	5	BR	462		181	IC	280		1939	PWN	334		6	BR	326
415	20	PLT	167		20	PLT	514		181	IC	651		186	IC	298
	183	IC	454		5	BR	548		5	BR	641	603	181	IC	734
	5	BR	945	497	185	IC	602	552	1939	PWN	251		20	PLT	703
416	180	IC	990		6	BR	218		20	PLT	427		5	BR	659
	20	PLT	432	499	181	IC	486		181	IC	638	607	18	Pat	395
	5	BR	516		20	PLT	563		5	BR	635		1939	PWN	611
421	20	PLT	124		5	BR	599	555	181	IC	572		20	PLT	932
	1939	PWN	114	500	181	IC	512		5	BR	613		6	BR	172
	183	IC	873		5	BR	600	559	181	IC	591		185	IC	373
	5	BR	1012	502	20	PLT	285		5	BR	621	611	18	Pat	544
425	20	PLT	404		1939	PWN	268	564	1939	PWN	341		1939	PWN	747
	183	IC	416		181	IC	482		181	IC	644		21	PLT	45
	5	BR	943		18	Pat	429		5	BR	645		185	IC	529
427	180	IC	795	504	5	BR	597	565	1939	PWN	392		6	BR	203
	5	BR	489		185	IC	250		182	IC	54	623	1939	PWN	680
428	185	IC	284	506	6	BR	141		40	CrLJ	629		20	PLT	715
	6	BR	148		181	IC	37		5	BR	710		185	IC	498
430	1939	PWN	229	509	5	BR	520	567	181	IC	1006		6	BR	187
	183	IC	371		181	IC	270		5	BR	705	625	18	Pat	485
	5	BR	922	512	5	BR	543	568	182	IC	184		1939	PWN	690
432	180	IC	791		20	PLT	874		18	Pat	499		6	BR	316
	20	PLT	426		1939	PWN	402		1939	PWN	688		186	IC	256
	5	BR	488		6	BR	30		20	PLT	718	630	1939	PWN	683
438	1939	PWN	367		184	IC	240		5	BR	729		20	PLT	752
FB	20	PLT	443	514	40	CrLJ	895	570	20	PLT	492		18	Pat	746
	18	Pat	459		1939	PWN	151		1939	PWN	530		6	BR	321
					181	IC	42		18	Pat	694		186	IC	269

34 A. I. R. 1939 Patna = Other Journals (Concl'd.)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
633	20 P L T 183 I C 5 B R	671 659 763 662 983 SB	6 B R 20 P L T 1939 P W N	215 667 938 FB 899 678 328 FB	19 Pat 185 I C 1939 P W N	123 682 353 683 832	185 I C 184 I C 20 P L T
636	18 Pat 185 I C 6 B R	590 179 117	6 B R 186 I C	263	20 P L T 185 I C	883 159 480	6 B R 18 Pat
659	20 P L T 1939 P W N 185 I C	659 712 594	1939 P W N 20 P L T 6 B R	807 682 905 159	6 B R 20 P L T 6 B R	184 771 157	20 P L T 6 B R 185 I C
							350 52 810 8 735 777 152 936

Other Journals = All India Reporter

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ILR	A I R	ILR	A I R	ILR	A I R	ILR	A I R	ILR	A I R
1	1939 P 122	204	1939 P 402	355	1939 P 282	509	1939 P 305	715	1940 P 6
13	" " 55	210	1940 " 87	366	" " 380	539	" " 601	723	" " 180
76	" " 460	215	1939 " 209	370	" " 598	544	" " 611	735	1939 " 683
82	" " 35	234	" PC 47	378	" " 230	571	" " 448	746	" " 630
101	" " 443	253	" P 389	395	" " 607	580	" " 343	756	1940 " 158
114	" " 239	261	" " 514	404	" " 392	590	" " 636	761	" " 142
121	" " 129	267	" " 274	417	1940 " 9	649	1940 " 54	768	" " 137
133	" " 382	271	" " 278	429	1939 " 502	654	" " 81	777	" " 7
141	" " 49	279	" " 467	434	" " 451	670	1939 " 532	783	" " 117
155	" " 7	306	" " 370	450	" " 577	676	" " 339	789	" " 76
171	" " 1	318	" " 411	459	" " 433	688	1940 " 107	805	" " 24
181	" " 207	323	" " 571	485	" " 625	694	1939 " 570	828	" " 40
184	" " 200	327	" " 248	499	" " 568	698	" " 536	839	" " 170
190	" " 252	342	" " 375	502	" " 520	708	1940 " 59	854	" " 161
193	" " 526								

5 Bihar Reports = All India Reporter

BR	A I R	BR	A I R	BR	A I R	BR	A I R	BR	A I R
1	1938 PC 259	81	1938 P 511	184	1938 P 478	283	1939 P 44	361	1939 P 155
5	" P 603	82	" " 497	185	" " 579	284	" " 40	362	" " 74
6	" " 306	88	" " 575	190	" " 567	286	" " 13	363	" " 133
9	1939 " 21	89	1939 " 167	193	" " 597	290	" " 23	365	" " 25
11	" " 41	91	" " 168	196	" " 525	291	" " 1	368	" " 97
12	" " 24	93	1938 " 507	197	" " 606	295	" " 267	377	" " 158
13	" " 32	94	" " 484	198	1939 " 170	296	" " 264	379	1938 " 593
14	1938 " 432	98	" " 550	199	" " 140	297	" " 253	381	1939 " 146
15	1939 " 33	104	" " 548	200	1938 " 607	298	" " 225	383	" " 95
16	" " 22	106	" " 514	202	1939 " 142	301	" " 257	384	" " 314
17	" " 29	110	1939 " 96	203	" " 178	303	" " 252	385	" " 151
18	1938 " 427	112	1938 " 538	205	1938 " 609	304	" " 263	389	" " 111
20	1939 " 18	113	" " 509	206	1939 " 320	305	" " 76	391	" " 109
21	" " 30	114	" " 502	207	" " 163	307	" PO 27	393	1938 " 578
22	1938 " 433	116	" " 556	208	1938 " 608	312	" " 22	394	1939 " 490
24	" PC 250	118	" " 527	209	1939 PC 1	318	" P 255	398	" " 122
26	" P 462	120	" " 529	215	" P 207	319	" " 281	402	" PO 6
27	" PC 254	122	" " 505	216	1938 " 577	320	" " 358	405a	1938 P 464
32	" P 451	124	" " 513	217	1939 " 202	322	" " 292	405b	1939 FO 1
36	1939 " 73	125	" " 524	219	1938 " 611	324	" " 369	446	" P 113
37	1938 " 437	127	" " 510	220	" " 539	326	" " 20	449	" PO 47
40	1939 " 27	128	" " 531	224	" " 471	327	" " 350	455	" P 135
41	1938 " 457	129	" " 487	226	" " 473	328	" " 17	457	" " 404
45	1939 " 28	139	" " 522	228	" " 476	329	" " 46	458	" " 5
46	1938 " 444	140	1939 " 164	231	1939 " 180	330	" " 260	460	" " 108
49	" " 447	143	1938 " 537	233	1938 " 618	332	" " 303	462	" " 413
53	1939 " 35	144	" " 562	237	1939 " 149	333	" " 289	463	" " 141
59	" " 83	149	" " 613	238	" " 354	335	" " 265	465	" " 144
61	" " 77	154	" PC 292	241	1938 " 569	337	" " 285	467	1938 " 468
64	" " 43	157	1939 " 8	244	1939 " 218	338	" " 360	471	" " 465
65	" " 47	160	" P 137	246	" " 187	341	" " 356	476	1939 PO 80
67	" " 45	161	1938 PC 277	247	" " 254	342	" " 258	482	" P 19
68	1938 " 545	165	" " 281	248	" " 229	344	" " 242	483	1938 " 622
71	1939 " 156	168	" " 290	249	" PC 11	349	" " 126	485	1939 " 380
73	" " 90	169	" P 610	252	" P 49	352	" " 118	487	" " 387
78	" " 161	171	" PC 295	258	" PC 14	356	" " 276	488	" " 482
79	" " 157	176	" P 559	264	" P 160	357	" " 270	488	" " 427
80	1938 " 573	178	" PC 284	265	" " 55	360	" " 89	489	" " 427

5 Bihar Reports = All India Reporter (Concl'd.)

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BR	AIR	BR	AIR	BR	AIR	BR	AIR	BR	AIR	BR	AIR	BR	AIR	BR	AIR
491	1939 P 129	597	1939 P 502	718	1939 P 540	819	1939 P 221	908	1939 PC 228						
495	" " 117	599	" " 499	727	" " 531	820	" " 81	914	" P 392						
496	" " 397	600	" " 500	729	" " 568	823	" " 107	919	" " 278						
498	" " 186	601	" PC 98	730	" " 572	824	" " 239	922	" " 430						
499	" " 172	613	" P 555	732	" " 534	827	" " 222	924	" " 389						
501	" " 174	616	" " 248	734	" " 517	830	" " 230	927	" " 382						
505	" " 183	620	" " 571	736	" " 530	836	" " 261	930	" " 370						
508	" " 7	621	" " 559	737	" PC 174	837	" " 116	935	" " 402						
514	" " 138	626	" " 190	741	" " 163	839	" " 272	938	" " 375						
516	" " 416	631	" PC 152	745	" P 171	841	" PC 213	943	" " 425						
520	" " 506	635	" P 552	746	" " 269	847	" " 178	945	" " 415						
524	" " 514	639	" PC 150	747	" PC 167	850	" P 598	946	" PC 200						
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- Pakala Narayanaswami v. Emperor, (1938) 17 Pat 15 = 19 P L T 432=1938 P W N 338 Reversed in A I R 1939 P C 47.
- Ram Chandra Nayak v. Gharbharan Ahir, (1930) 11 P L T 866 = 132 I C 112 Overruled in A I R 1939 Pat 433 (F B).
- Shiva Prosad Singh v. Mt. Deoki Kuar, (1938) 4 B R 516 = A I R 1938 Pat 379=175 I C 61 Reversed in A I R 1939 Pat 356.

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Patna High Court



*** A. I. R. 1939 Patna 1**

DHAVLE AND AGARWALA JJ.

Mt. Anuragi Kuer — Defendant —
Appellant.

v.

Parmanand Pathak and another —
Plaintiffs — Respondents.

Appeal No. 602 of 1936, Decided on 27th September 1938, from Appellate decree of Addl. Dist. Judge, Gaya, D/- 13th August 1936.

*** Hindu Law—Religious endowment — Succession—Founder acting shebait during his life but making no disposition of shebaitship to take effect after his death — No usage, course of dealing, or other circumstance showing special mode of devolution — Succession to office of shebait is governed by ordinary Hindu law of succession — If founder is succeeded by female heir she takes limited interest—After her death next heir takes as full owner.**

Where a founder of a temple acts as the shebait during his lifetime but makes no disposition of the shebaitship to take effect after his death and there is no usage, course of dealing and some other circumstances showing a special mode of devolution, the management and control of the shebait property, besides the right of acting as ministrant to the deities — the two together constituting the shebaiti right—follow the line of inheritance from the founder. If the founder is succeeded by a female, she takes only limited interest under the ordinary Hindu law, and after her death the next male heir in the line of inheritance, takes the shebaiti as full and absolute owner. Such an heir does not take a mere life-estate in the office with the remainder presently vested in the next taker. The entire estate is vested in him though his powers of alienation are qualified and restricted. The succession to the office of shebait and the income of the estate is according to the ordinary Hindu law of succession: *Case law referred.*
[P 2 C 2; P 3 O 1; P 4 C 1]

Dr. D. N. Mitter and G. P. Singh —
for Appellant.

S. M. Mullick and K. N. Varma —
for Respondents.

Dhayle J.—This is an appeal by the defendant in a suit for the establishment of the plaintiffs' shebaiti right to certain temples founded by one Hanuman Pathak, brother of the great-grandfather of the plaintiffs. Plaintiffs' case was that Hanuman was a member of a joint Hindu family and established the temples from the income of the joint family among other sources and dedicated certain self-acquired properties to them. Hanuman died in Aghan 1315, leaving behind a widow named Rajbansi Kuar and a grandson by a predeceased daughter, Mahabir Misser, besides one brother Debi, his son Madho, and Ragho, Debi's grandson by a predeceased son. Debi died shortly after, and apparently also Madho, leaving him surviving a son Sarju, father of the plaintiffs. In September 1908, an ekrarnama, Ex. A, was executed by Ragho and Sarju on one hand and Rajbansi Kuar and Mahabir Missir on the other, according to which Rajbansi Kuar was to be shebait for life and was to be succeeded by Mahabir as "absolute proprietor" of the shebaiti interest, subject only to a right of pre-emption reserved in favour of the other executants and their heirs in case any pressing necessity of the temples compelled a transfer of any of the temple properties. According to the plaintiffs, this ekrarnama was invalid and did not operate to confer upon Mahabir any powers other than those of a shebait appointed by the family. Rajbansi Kuar died about a year after the ekrarnama, and Mahabir succeeded her as shebait. In August 1932, Mahabir executed a deed of gift in favour of the defendant in respect of the temples and their properties besides certain properties acquired by Mahabir himself and dedicated to the temples. Plaintiffs

claimed that the temples were their family 'deo-asthans,' that Mahabir had no right to appoint the defendant to be shebait, and that they had the right themselves to work as shebait or appoint others as such. Mahabir was not impleaded as a party to the suit, the reason apparently being that he died shortly after the deed of gift in favour of the defendant while the suit was instituted in May 1934.

The trial Court found that the temples and the temple properties were the self-acquired properties of Hanuman; and there has been no further dispute on this point. It held that the shebaiti right followed the line of inheritance from the founder and that Mahabir thus became absolutely entitled to it after the death of Rajbansi Kuar, so that the ekrarnama, Ex. A, merely acknowledged and ratified the existing right of Rajbansi Kuar and after her of Mahabir Missir in the shebaitship. Mahabir's gift in favour of the defendant was found by the learned Munsif to be no more than the appointment of the defendant as the next shebait after Mahabir for the worship of deities, and therefore valid under the ruling in 17 Cal 557.¹ Even if the gift were to be regarded as invalid, the plaintiffs were not, in the view of the learned Munsif, entitled to claim the shebaitship as heirs of the founder since the shebaiti right had vested in Mahabir as full owner. The plaintiffs had not even made any claim as heirs of Mahabir, and therefore the learned Munsif dismissed the suit.

The plaintiffs appealed, and the Additional District Judge who heard the appeal allowed it, holding that Mahabir had only "a life interest" in the shebaiti right, that the ekrarnama, Ex. A, was not competent to convert that interest into an 'absolute right', that Mahabir had no right by his deed of gift in favour of the defendant to alter the line of succession to the shebaitship "by reason of the existence of the plaintiffs who are the heirs of Hanuman as his collaterals after Mahabir", that

on the extinction of Hanuman's direct line of succession with the death of Mahabir as the last shebait, the shebaiti right must be deemed to have reverted to the line of the founder Hanuman,

and that

consequently the plaintiffs as collaterals and heirs of Hanuman are entitled to succeed to the shebaitship and the disputed property.

1. *Khetter Chunder Ghose v. Haridas Bundo-padhya*, (1890) 17 Cal 557.

It has been contended on behalf of the defendant-appellant that the lower Appellate Court was wrong in holding that Mahabir had no more than a life estate or life interest so that on his death the shebaiti right reverted to the line of the founder. In 17 Cal 3² it was contended by Mr. Mayne for the respondent that neither by general law nor by special custom was it shown in the case that the shebaitship descended to the heirs of the founder. This contention was negatived by their Lordships of the Judicial Committee who held that

according to Hindu law, when the worship of a Thakur has been founded, the shebaitship is held to be vested in the heir's of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some other circumstances to show a different mode of devolution.

In the present case the founder Hanuman acted as shebait during his life but made no disposition of the shebaitship to take effect after his death, and there is no question of any usage, course of dealing or other circumstances to show a special mode of devolution. The management and control of the endowed property besides the right of acting as ministrant to the deities—the two together constituting the shebaiti right—therefore "follows the line of inheritance from the founder", as Sir Arthur Wilson said in 32 Cal 129.³ Now the Hindu law of inheritance makes a distinction between the sexes in that a male heir becomes full owner of the property inherited by him and transmits it on death to his own heirs, while a female heir (barring such Bombay exceptions as gotraja females) only takes as a limited owner, the property passing on her death not to her heirs but to the next heir of the last full owner. It may be safely assumed that this principle applied to Rajeshwar Kuar's inheritance of the shebaiti interest from Hanuman. But did Mahabir take a similarly limited interest, or was he full owner of the shebaiti as a male heir? The powers of alienation possessed by him were no doubt restricted in much the same way as those of a female heir or the manager for an infant heir, 2 I A 145,⁴ but this does not bear directly on

2. *Gossami Sri Gridharaji v. Romanlalji Gossami*, (1890) 17 Cal 3=16 I A 137=5 Sar 350 (P C).

3. *Jagadindra Nath Roy v. Hemanta Kumari Dasi*, (1905) 32 Cal 129=31 I A 203=8 Sar 698=8 C W N 809 (P C).

4. *Prosunno Kumari Debya v. Golab Chand Baboo*, (1875) 2 I A 145=23 W R 253=3 Sar 449=3 Suther 102 (P C).

the nature of the interest taken by him as regards future devolution. It is also well settled that no shebait can alter the line of succession laid down by the founder, but this again is far from inconsistent with a male who inherits a shebaiti interest taking as full owner as in the inheritance of immovable property of a secular character.

The way in which this right or interest devolves can be gathered from such cases as 3 W R 152⁵ and 33 Cal 507.⁶ In the former of these cases it was held that the right of one member of a joint family to a turn of worship and other shebaiti privileges which he had assigned to a competent Brahmin, 'devolved', on his death without heirs, "to the other surviving members of the joint family". This was followed in the case in 33 Cal 507,⁶ another Mitakshara case, in which it was held that the son became entitled by birth to a share "not only in the family property but also jointly as shebait of debuttar property" and could therefore have an alienation by his father and uncle set aside as not for the benefit of the idol. A Mitakshara coparcener is not in these parts entitled to alienate his share in the joint family property at his pleasure, and far less to leave it by will. In 35 Cal 226⁷ the question arose with reference to a shebaiti held by a Dayabhaga family, and it was ruled, as the placitum puts it, that a shebait is a manager, or quasi trustee for the benefit of the idol, and therefore has no power to alienate the hereditary office of shebaitship by will.

There were certain observations made in this case to the effect that a shebait holds his office for life, but it was pointed out in 22 C L J 404⁸ that

this does not signify that he has a life interest in the office with the remainder presently vested in the next taker. The entire estate is vested in him, though his powers of alienation are qualified and restricted.

It was further pointed out how when the last shebait, validly appointed by the founder, does not take the shebaitship *absolutely*,

the office vested in persons who at the time constitute the heirs of the founder, and when the

office has so vested in them, upon the death of each member of the group, it passes by succession to his heir

(The italics are mine). This was followed in 50 C L J 382⁹ where Rankin C. J. said that "consistently not only with the will in the case but also with ordinary principle applicable to this matter", the plaintiff was entitled to make out a right to be one of the shebaits of the Thakur by showing not necessarily that he was an heir of the founder but that he was an heir of Soshi Bhusan, a son of the founders who had actually been the shebait for a long time, and who, under the will, was to have been a shebait during his life to be succeeded by his son absolutely. In 23 Mad 271¹⁰ their Lordships of the Judicial Committee accepted Mr. Mayne's contention that it would be in contravention of the Hindu law of inheritance to hold that an endowment of a heritable character should be held in a series of successive life estates by the heritors; the origin of the endowment was assumed to be a gift from the founder, the right to the management had been treated as hereditary, and Sir Richard Couch referred to the well-known *Tagore's case*¹¹ and said that

the Hindu law of inheritance did not permit the creation of successive life estates in this endowment.

In his order of reference to the Full Bench in 60 Cal 452,¹² Rankin C. J. was inclined to question whether the affiliation of the rules in the *Tagore's case*¹¹ to shebaits was not to be treated as an obiter and whether, unless the shebaiti right is regarded purely as an appointment to an office for life, there would not logically be an end of the founder's right to lay down rules of succession of any kind free from the restrictions laid down in the *Tagore's case*.¹¹ The Full Bench held that the founder has the right but "subject to the restriction that he cannot create any estate unknown or repugnant to Hindu law." This was referred to, with evident approval, by the

5. Ukoor Doss v. Chunder Sekhur Doss, (1865) 3 W R 152.

6. Ram Chandra Panda v. Ram Krishna Mahapatra, (1906) 33 Cal 507.

7. Rajeshwar Mullick v. Gopeshwar Mullick, (1908) 35 Cal 226=7 C L J 315=12 C W N 323.

8. Kunjamani Dasi v. Nikunja Behari Das, (1916) 3 A I R Cal 312=32 I C 823=22 C L J 404=20 C W N 314.

9. Panchanan Banerjee v. Surendra Nath, (1930) 17 A I R Cal 180=126 I C 36=50 C L J 382.

10. Gnanasambanda Pandara Sannadhi v. Velu Pandaram, (1900) 23 Mad 271=27 I A 69=7 Sar 671=10 M L J 29 (P C).

11. Jatendro Mohun Tagore v. Juttendro Mohun Tagore, (1872) 1 A Sup Vol 47=9 Beng L R 377=18 W R 359=3 Sar 82 (P C).

12. Manohar Mukerji v. Bhupendranath Mukerji, (1932) 19 A I R Cal 791=141 I C 544=60 Cal 452=56 C L J 468=37 C W N 29 (F B).

Judicial Committee in 63 I A 448,¹³ in which it was held that a testamentary disposition confining the shebaitship to the then next eldest male lineal descendant was invalid and that

the succession to the office of shebait and the income of the estate must be according to the ordinary Hindu law of succession.

The shebaiti in the present case must therefore have descended according to the ordinary Hindu law; and while Rajbansi Kuar only took a widow's limited "estate" in it, Mahabir, the next heir at her death took as full owner. The view of the lower Appellate Court that though Mahabir was an heir of the founder he took only a life interest in the shebaiti cannot therefore be upheld. The learned District Judge proceeded to conclude that the ekrarnama of 1908 was invalid in so far as it converted Mahabir's life interest into an absolute right "which implies the creation of a fresh line of succession from Mahabir." Mahabir however, as I have already said, took the shebaiti as full owner, even apart from the ekrarnama, and the trial Court was right in holding that the ekrarnama only acknowledged and ratified the right of Mahabir. In fact the ekrarnama is only of value in the present case as showing how little the joint family, from which the plaintiffs are descended had to do with the temples and the endowed property. This document makes it perfectly clear that the temples are not "the family deo-asthans of the plaintiffs." Hanuman (who is called Sadhu Hanuman Saran Pathak in the ekrarnama) founded them after becoming a Baisnav, though without a formal separation from his brothers; the properties endowed by him had been acquired by him after his renunciation of the world (as the ekrarnama put it); and under the ekrarnama Hanuman's widow and daughter's son took nothing of the joint family property except 3 kathas of land for a residential house, while his brother's grandsons took the rest of the property of the joint family and renounced all claim to the shebaiti except a right of pre-emption.

On the footing which was deliberately adopted in the ekrarnama the thakurbaris were the personal concern of Hanuman and Hanuman alone, and the joint family had really nothing to do with them. It is there-

fore idle for the plaintiffs to say, as they have done in the plaint, that Hanuman's brother's grandsons by the ekrarnama appointed Mahabir as shebait in their own place; and the finding of the lower Appellate Court that on the extinction of Hanuman's direct line of succession with the death of Mahabir as the last shebait, the shebaiti right must be deemed to have reverted to the line of the founder, is erroneous, because Mahabir, having taken the shebaiti as full owner, the shebaiti must next go to his heirs. There cannot be any question of reverter, properly so called, on the death of an heir who was full owner, though the shebaiti might perhaps, somewhat loosely, have been said to revert to the plaintiffs on Mahabir's death if the plaintiffs had been Mahabir's heirs. But a maternal grand-father's brother's great-grandsons do not stand very high in the list of Mitakshara heirs; being bandhus, they can only come in after all sapindas and samanodakas: see Mitakshara, Ch. 2, S. 6 (1). The plaintiffs moreover did not claim as heirs of Mahabir at all. The lower Appellate Court seems to have fallen into some confusion on this question of reverter on the death of Mahabir, and to have mixed it up with the right of the heirs of the founder to nominate a shebait when the line of shebaits appointed by the founder becomes extinct: 40 Mad 612.¹⁴ There was no appointment by the founder in the present case, and Mahabir really took the shebaiti as the founder's daughter's son and heir.

It follows that the suit as framed ought to have been dismissed. In this view it is not necessary to pronounce on the validity of the deed of gift executed by Mahabir in 1932. As a matter of fact this deed, though an exhibit in the case, has not been printed nor placed before us in any other way. The trial Court found that it was in fact

not an alienation of the trust property, but a deed nominating the defendant as the next shebait after Mahabir Missir, and the recitals are quite clear indicating that the defendant was to manage the trust properties and do the seva-puja of the Thakurjis.

This does not seem to have been controverted in the lower Appellate Court; and it is not improbable that, as held by the trial Court on the authority of 17 Cal 557,¹ the deed is supportable as a deed of agreement for the worship of the idols, Mahabir

13. Ganesh Chunder v. Lal Behary, (1936) 23 A I R P C 318=164 I C 347=63 I A 448 (P C).

14. Gauranga Sahu v. Sudevi Mata, (1918) 5 A I R Mad 1278=41 I C 589=40 Mad 612=32 M L J 597 (F B).

having no family except himself at the time. But, in any case, the validity of the deed of gift can only arise between the donee and whoever may be Mahabir's heirs under the Hindu law. We have no right to assume, in the absence even of any assertion by the plaintiffs to that effect, that Mahabir left no agnatic relations at all who would of course come before the plaintiffs. The result is that the appeal must be allowed, and the suit dismissed with costs in all Courts.

Agarwala J.—I agree.

R.M./R.K. *Appeal allowed.*

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VARMA AND ROWLAND JJ.

Sheo Gobind Koeri — Defendant —
Appellant.

v.

Ram Asray Singh, Plaintiff and
another, Defendant — Respondents.

Appeal No. 673 of 1937, Decided on 26th August 1938, from appellate decree of Addl. Dist. Judge, Shahabad, D/- 6th July 1937.

Transfer of Property Act (1882), S. 53—Plaintiff sought to be defeated by fraudulent and colourable transfer, which is sham transaction, is not limited to remedy of S. 53—Suit by plaintiff held maintainable otherwise than under S. 53.

There is no rule of law that a plaintiff, who has been sought to be defeated by a fraudulent and colourable transfer, which is a sham transaction, is limited to the remedy of S. 53. [P 6 C 1]

P obtained a money decree against A, which on appeal was confirmed on 2nd July 1938. A executed on 6th July 1928 a document, purporting to be a rehan bond in favour of B, mortgaging certain properties. P executed his money decree on 18th June 1931 and bought as being properties of his judgment-debtor, i. e. A, certain property which was covered by the mortgage in favour of B. When P sought to obtain delivery of possession, he was opposed, the claim being put forward that B was mortgagee in possession of the property. P thereupon brought a suit against A and B to recover possession of the lands, alleging that the alleged rehan bond was merely a colourable transaction executed by A in favour of B, passing neither title nor possession but designed merely to defeat P's claim :

Held that the suit was maintainable. There was no bar to P succeeding on the strength of his title after obtaining a declaration that the nominal transfer by A in favour of B was a colourable and sham transaction : *A I R 1921 Pat 53, Expl. and Rel. on ; A I R 1916 P C 238 and 35 Cal 551 (P C), Rel. on.* [P 6 C 2]

Mahabir Prasad and Tarkeshwar Nath
— *for Appellant.*

Rowland J. — This second appeal is by defendant 2 in the original suit. The claim of the plaintiff was to recover possession of certain lands on the following allegations : The plaintiff had obtained a money decree on 6th September 1927 which on appeal was confirmed on 2nd July 1928 against defendant 1. Defendant 1 executed on 6th July 1928 a document purporting to be a rehan bond for a consideration of Rs. 1200 in favour of defendant 2 and secured on certain properties which are among those comprised in this litigation. The plaintiff executed his money decree on 18th June 1931 and bought as being the properties of his judgment-debtor the immovable property now in suit on 8th December 1931. When the plaintiff sought to obtain delivery of possession on 13th February 1933 he was opposed, the claim being put forward that defendant 2 was mortgagee in possession of the property.

The plaintiff alleges that the alleged rehan bond is a mere colourable transaction executed by defendant 1 in favour of his brother-in-law, defendant 2, passing neither title nor possession but designed merely to defeat the claim of the plaintiff. The defence was that the rehan bond was genuine and for consideration and defendant 2 was in possession on his own account under it. Among the properties auction-purchased by the plaintiff is one bearing Survey Plot No. 407 which is not covered by the defendant's document and to which the plaintiff's title is not denied by the defendant. The Munsif accepted the case of the defendant and while giving the plaintiff a decree for his title and possession over plot No. 407 he dismissed the remainder of the claim. On appeal by the plaintiff the lower Appellate Court has held that the alleged transaction between defendant 1 and defendant 2 was a colourable transaction, that defendant 2 neither paid consideration for the rehan bond nor got possession of the rehan property, and that the circumstances, which he set forth in detail, left no room for doubting the fraudulent character of the rehan bond. He denounced the bond as a farzi document brought into existence by defendant 1 in favour of defendant 2 without consideration for defeating the debts of the plaintiff. He allowed the appeal and decreed the suit in full with costs and future mesne profits.

In second appeal it is contended that such a suit as this is not maintainable; the

claim is in substance one of the nature provided for by S. 53, T. P. Act, but the plaintiff is not entitled to maintain such a suit for he is not in a position to prefer a claim on behalf of the creditors generally, the property being no longer property of defendant 1 but, assuming the plaintiff's claim to be correct, having been purchased by the plaintiff himself. It is contended that failing a suit under S. 53, T. P. Act, there is no other manner in which a transfer can be avoided; therefore the suit should have been dismissed as not maintainable, and reference has been made to 6 P L J 48.¹ The argument appears to rest on some confusion of thought. There is no rule of law that a plaintiff who has been sought to be defeated by a fraudulent and colourable transfer, which is a sham transaction, is limited to the remedy of S. 53, T. P. Act. The plaintiff's claim is different; it is based on an allegation that the alienation was collusive and fictitious. If this is established then the title to the property remained with the transferor and did not pass to the transferee. It does not therefore need to be transferred back by the Court. The distinction between the two classes of cases is noticed by Sir Lawrence Jenkins delivering the judgment of the Privy Council in 44 Cal 662,² where reference is made to an allegation in the plaint that the judgment-debtor, Babu Chhatrapat Singh, was, and always remained, the real owner of the properties in dispute.

In the opinion of his Lordship, strictly this means that the transaction was benami and not that it was a fraudulent transfer within the meaning of Sec. 53, T. P. Act. The difference is distinct, though it is often slurred.

The position regarding title when parties have entered into a benami transaction was also examined by the Privy Council in 35 Cal 551,³ where Lord Atkinson, after stating that a benami conveyance is not intended to be an operative instrument, quoted with approval a passage from Mayne's Hindu Law as to benami transaction :

Where a transaction is once made out to be a mere benami it is evident that the benamidar absolutely disappears from the title. His name is

simply an alias for that of the person beneficially interested.

In the case which was cited before us, 6 P L J 48,¹ it was pointed out by Das J. that the suit which he was considering would be improperly framed and not maintainable if it be regarded as one under Sec. 53, T. P. Act, to obtain a declaration that the conveyance in question is voidable at the instance of the creditors of the transferor. He went on to point out that the suit which he was considering was not such a suit; it did not fall under Sec. 53, T. P. Act, but was a suit to obtain possession of the property. That being the primary object of the action, the fact that the plaintiffs as a preliminary to this asked for a declaration that the conveyance was a fraudulent conveyance did not change the character of the action. He said that the primary object of an action under S. 53 of the Act was to make the assets of the transferor available to the general body of creditors, but that was not the object here. He treated the suit therefore as a suit to recover possession on the strength of the title acquired by the plaintiffs by a sale held in execution of their decree and affirmed the decision of the Courts below allowing the claim. The facts are entirely on all fours with those of the case before us; and it is perfectly clear that there is no bar to the plaintiff succeeding on the strength of his title after obtaining a declaration that the nominal transfer by defendant 1 in favour of defendant 2 was a colourable and a sham transaction. The main contention for the appellant fails therefore.

But in the order portion of the learned District Judge's judgment it seems to be directed that the plaintiff is to get future mesne profits on the entire property in suit. If so, that direction loses sight of the fact that plot 407 was not claimed by either of the defendants and there does not seem to be any proof that the plaintiff was kept out of possession of it. Mesne profits therefore ought to be allowed on the other property in suit excluding plot 407. With this modification I would dismiss the appeal.

Varma J. — I agree. The main point argued by the learned advocate on behalf of the appellant appears to have been based practically on the statement in para. 8 of the plaint which runs as follows :

Defendant 1 was repeatedly asked to deliver possession of the land in suit to the plaintiff and defendant 2 was asked to declare the said rehan

1. *Sri Thakurji v. Narsingh Narain Singh*, (1921) 8 A I R Pat 53=63 I C 788=6 Pat L J 48=2 P L T 217.

2. *Mina Kumari Bibi v. Bijoy Singh Dudhuria*, (1916) 3 A I R P C 238=40 I C 242=44 Cal 662=44 I A 72 (P C).

3. *Petherpermal Chetty v. Muniandy Servai*, (1908) 35 Cal 551=35 I A 98=7 C L J 528=12 C W N 562 (P C).

deed to be useless, but the said defendants do not pay any heed. Hence the necessity for the suit. Besides other grounds, this suit is also filed for the benefit of the plaintiff and all other creditors, should there be any bona fide creditor, under Section 53, T. P. Act.

But when we look into the relief portion of the plaint, the plaintiff sought the following relief :

The Court may be pleased to hold and declare that the rehan deed, dated 6th July 1923, executed by defendant 1 in favour of defendant 2, is quite fraudulent and without consideration and was executed to avoid payment of the debt due to the plaintiff and that the same is invalid in law and defendant 2 has acquired no title thereunder. After the above declarations, the Court may be pleased to award possession and occupation of the land in suit mentioned in Sch. A, to the plaintiff.

It will be seen that the relief actually sought in this case is hardly distinguishable from the relief sought in 6 P L J 48¹ which has been referred to by the learned advocate for the appellant and has been discussed at length by my learned brother. The appeal must be dismissed with the modification indicated above.

R.M./R.K. *Order accordingly.*

A. I. R. 1939 Patna 7

MOHAMAD NOOR AND CHATTERJI JJ.

Baiju Lal Marwari and others —

Appellants.

v.

Thakur Prasad Marwari and others —

Respondents.

Appeal No. 57 of 1935, Decided on 22nd September 1938, from original decree of Sub-Judge, Godda, D/- 16th April 1934.

(a) Civil P. C. (1908), O. 34, R. 1 — Decree-holder attaching mortgage property in execution of money decree is not necessary party to subsequent mortgage suit, either under O. 34, R. 1 or under old S. 91, T. P. Act.

Attachment does not create any legal charge upon the attached property nor does it confer any title on the person attaching. Therefore a decree-holder who attaches the mortgaged property of his judgment-debtor in execution of his money decree is not a necessary party to the subsequent mortgage suit in respect of the property attached : *Case law referred ; 6 I A 88 (P C) ; 17 I A 194 (P C) and A I R 1933 P C 134, Disting.* [P 8 C 2 ; P 10 C 2 ; P 11 C 2]

Such an attaching decree-holder is not a necessary party to the mortgage suit even under the old S. 91, T. P. Act, because though such decree-holder may have a right to redeem the mortgage under old S. 91, it cannot be said that he has an interest in the right of redemption within the meaning of O. 84, R. 1, Civil P. C. : *A I R 1931 Cal 763 and A I R 1921 Mad 30, Rel. on ; 23 All 467, Disting. ; A I R 1917 All 110, Dissent.* [P 11 C 2 ; P 12 C 1]

(b) Mortgage — Redemption — Suit for — Attaching decree-holder purchasing mortgage property subject to mortgage — His suit for redemption after property is sold in execution of mortgage decree is not tenable.

Where a decree-holder in execution of his money decree attaches the mortgage property of his judgment-debtor and at auction sale purchases the same subject to the encumbrance of the mortgage but does not redeem the mortgage, his right of redemption as purchaser is extinguished by the sale of the mortgage property in execution of the mortgage decree and his suit for redemption after the mortgage sale is wholly untenable. [P 12 C 1]

(c) Civil P. C. (1908), O. 21, Rule 103 — Attaching decree-holder purchasing mortgage property and obtaining possession — Not made party in mortgage suit — Dispossessed by purchaser of same property at mortgage sale — His application under O. 21, R. 100 dismissed — Suit for redemption on ground that mortgage sale not binding held fell under O. 21, R. 103.

A decree-holder who had attached judgment-debtor's mortgaged property in execution of his money decree, purchased the same and obtained possession but was subsequently dispossessed by the purchaser of the same property in execution of the mortgage decree. The attaching decree-holder applied under O. 21, Rule 100 complaining of the dispossession, but his application was dismissed. Subsequently he filed a suit for redemption and based his claim on the fact that as he was not made a party to the mortgage suit, the mortgage decree and sale were not binding on him and therefore as auction-purchaser being in rightful possession of the disputed property could not be dispossessed therefrom :

Held that the suit fell under O. 21, R. 103 and the mere fact that in the suit the decree-holder sought to recover possession on redemption could not be a ground for holding that he did not claim right to the present possession of the property.

[P 13 C 1]

L. K. Jha, M. N. Pal and K. Dayal —
for Appellants.

Dr. D. N. Mitter, N. C. Ray, G. N. Mukherji and P. B. Ganguli —
for Respondents.

Chatterji J.—The material facts of this case may be briefly stated as follows : By three deeds of mortgage executed in 1909 and 1910 the defendants third party hypothecated their entire interest in the two estates, namely Mahal Ghat Lachhmipur and Mahal Kuraba mentioned in Sch. A of the plaint to the second group of the defendants first party who may be called the Mahton defendants. Subsequently these Mahton defendants assigned their 8 annas interest in the mortgages to the first group of the defendants first party who may be called the Marwari defendants. The present plaintiffs in execution of a money decree against the defendants third party attached certain shares in the said two

estates on 26th March 1917 and purchased the same on 9th September 1918 and obtained delivery of possession on 16th November 1919. In the meantime, on 1st February 1918, the defendants first party brought two mortgage suits on the aforesaid mortgage deeds against the defendants third party and obtained decrees on 18th December 1918. In execution of these decrees they purchased the mortgaged properties on 28th May 1923 and obtained delivery of possession on 21st and 23rd December 1923. The plaintiffs being thus dispossessed filed an application under O. 21, R. 100, Civil P. C., before the Subordinate Judge of Godda, but meanwhile the settlement operations in Santal Parganas having been notified, the application was ultimately transferred to the settlement Court for disposal by order of this Court in view of the special provisions of law in the Santal Parganas. Eventually the application was dismissed by the order of the Divisional Commissioner dated 4th August 1927. The plaintiffs thereupon instituted the present suit on 30th July 1930 claiming among other reliefs possession of the disputed properties upon redemption of the mortgages on the ground that they as attaching decree-holders were necessary parties to the mortgage suits and not having been made parties, their rights were not affected by the mortgage decrees and sale. The defendants second party were impleaded as they got themselves recorded in the settlement proceedings as co-sharers with the defendants first party.

It may be mentioned here that the defendants third party by virtue of a compromise with the defendants first party got the lands specified in Sch. B of the plaint which appertain to Mahal Ghat Kuraba, and these lands were recorded during the settlement proceedings as their raiyati lands. The plaintiffs sought a declaration that such record was illegal and the defendants third party could not acquire any raiyati right in those lands. The plaintiffs' claim with regard to these lands, though negatived by the Court below, has not been pressed in this appeal and no further reference to it will be necessary. The main contest in the suit was by the defendants first party whose defence inter alia was that the plaintiffs were not necessary parties to the mortgage suits, that the mortgage decrees and the sale held in execution thereof are binding on them, that their

purchase during the pendency of the mortgage suits is affected by *lis pendens*, that they have no right to maintain this suit and that the suit is barred by limitation. The learned Subordinate Judge has given effect to all these defences and dismissed the suit. Hence this appeal by the plaintiffs.

The most important point for consideration in this appeal is whether the plaintiffs as attaching decree-holders were necessary parties to the mortgage suits under O. 34, R. 1, Civil P. C. The learned advocate, Mr. L. K. Jha appearing for them, contends, in the first place, that an attachment followed by an order for sale creates a charge on the attached properties and therefore an attaching decree-holder is a necessary party to a mortgage suit and, in the second place, that under the specific provision of Cl. 91 (f), T. P. Act, as it stood before the amendment of 1929 an attaching decree-holder had the right to redeem and therefore he had an interest in the right of redemption within the meaning of O. 34, R. 1, Civil P. C. The nature and effect of an attachment will have to be determined with reference to the provisions of the Civil Procedure Code. The mode of effecting attachment of immovable property is prescribed in O. 21, R. 54 of that Code as follows:

Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

The effect of an attachment, as laid down in S. 64 of the Code, is that

any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

It is reasonably plain that an attachment merely prevents private alienations; it does not affect court sales. If this is so, it follows as a necessary corollary that an attachment does not create any charge upon the attached property, otherwise a court sale would be affected by such charge. Take, for instance, a case where two decree-holders have attached the same property in execution of their respective money decrees but for some reason or other the decree-holder whose attachment is later succeeds in selling the property, the other decree-holder whose attachment is prior cannot again bring the property to sale and if he

does so the sale will be quite ineffective. This is a self-evident proposition, and if any authority is needed, a reference may be made to the decisions of this Court in 2 P L T 240¹ and 12 P L T 639.² The contention that an attachment creates a charge is also inconsistent with the provisions of S. 73 and O. 21, R. 57, Civil P. C. S. 73 which relates to rateable distribution lays down that :

Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons.

Under this Section the proceeds of a sale brought about by an attaching decree-holder are made proportionately available to another decree-holder who may have just put in his application for execution immediately before the sale and had no time to take out attachment. What then becomes of the charge supposed to be created by the attachment? Again O. 21, R. 57 lays down that :

Upon every order dismissing an execution case in which there is an attachment, the attachment shall cease unless the Court otherwise directs.

The result would have been quite otherwise if the attachment really created a charge. Their Lordships of the Judicial Committee in 24 I A 170³ and 41 I A 251⁴ have held that attachment merely prevents private alienation but does not confer any title. This is also the view adopted by the High Courts of Calcutta, Madras, Bombay and Lahore : see 29 Cal 428,⁵ 58 Cal 598,⁶ A I R 1938 Mad 360,⁷ 29 Bom 405⁸ and 3 Lah 414.⁹

Mr. L. K. Jha in support of his contention that an attachment followed by an order for sale creates a charge on the attached property relies on the decisions of the Judicial Committee in 6 I A 88,¹⁰ 17 I A 194¹¹ and 60 I A 167.¹² In 6 I A 88¹⁰ the question before their Lordships was whether when the undivided interest of a member of a joint Hindu family governed by the Mitakshara School was attached and ordered to be sold in execution of a money decree against him and he died before the property was actually sold, his interest passed by the sale to the auction-purchaser or by survivorship to the surviving coparceners. Their Lordships held that the effect of the execution sale was to transfer the judgment-debtor's undivided share to the purchasers, the execution proceedings having at the time of the judgment-debtor's death gone so far as to constitute in favour of the execution creditor a valid charge thereon which could not be defeated by the judgment-debtor's death before the actual sale. The effect of the sale had to be considered with reference to the peculiar constitution of a joint Mitakshara family. Under the Mitakshara law so long as the family is joint no member has any defined share nor can he alienate his own undivided interest for payment of his personal debt. He has however a right to obtain partition of his share which he can enforce at any time.

As a rule of equity, justice and good conscience it has been held from the earliest times that a creditor who has obtained a decree for money against a member of a joint Mitakshara family may realize his decree by attachment and sale of his judgment-debtor's undivided interest in the family properties during his lifetime, and the auction-purchaser as the representative-in-interest of the judgment-debtor can enforce the right to obtain partition which primarily belonged to the latter. Where however the judgment-debtor dies before the decree is executed, his interest passes by survivorship to the surviving coparceners and is not available for the satisfaction of the decree. To determine the limits

1. Harnandan Marwari v. Pran Nath Roy, (1921) 8 A I R Pat 409=61 I C 922=2 P L T 240.

2. Ganga Ram Gulraj Ram v. Mukhtiram Marwari, (1931) 18 A I R Pat 405=134 I C 616=11 Pat 250=12 P L T 639.

3. Moti Lal v. Karrab-ul-Din, (1898) 25 Cal 179=24 I A 170=7 Sar 222=1 C W N 639 (P C).

4. Raghunath Das v. Sundar Das Khetri, (1914) 1 A I R P C 129=24 I C 804=42 Cal 72=41 I A 251 (P C).

5. Frederick Peacock v. Madan Gopal, (1902) 29 Cal 428=6 O W N 577 (F B).

6. O. L. Kiernander v. Benimadhab Khettri, (1931) 18 A I R Cal 763=134 I C 561=58 Cal 598.

7. Manickam Chettiar v. Income-tax Officer, Madura, (1938) 25 A I R Mad 360=174 I C 423=1 L R (1938) Mad 744=(1938) 1 M L J 851 (F B).

8. Jitmand Ramanand v. Ramchand Nandram, (1905) 29 Bom 405=7 Bom L R 488.

9. Ram Bhaj Datta v. Ram Das, (1923) 10 A I R Lah 261=69 I C 720=3 Lah 414.

10. Suraj Bunsu Koer v. Sheo Pershad Singh, (1880) 5 Cal 148=6 I A 88=4 Sar 1=4 C L R 226 (P C).

11. Madho Prashad v. Mehrban Singh, (1891) 18 Cal 157=17 I A 194 (P C).

12. Anantapadmanabhaswami v. Official Receiver, Secunderabad, (1933) 20 A I R P C 134=142 I C 552=56 Mad 405=60 I A 167 (P C).

within which the rights of the judgment-creditor can be enforced against an undivided share of the judgment-debtor the judicial decisions have laid down that the judgment-debtor's undivided share is made available if it has been attached in execution during his lifetime, so that if he dies after the attachment his undivided share will not pass by survivorship to the surviving coparceners but will be liable to be sold under the attachment. To this extent their Lordships in deciding 6 I A 88¹⁰ held that the attachment created a charge on the judgment-debtor's undivided share. Of course in that case there was not only an attachment but an order for sale before the death of the judgment-debtor, and great stress is laid upon this fact by Mr. Jha because, as he points out, in the present case the order for sale was passed on 30th January 1917, that is prior to the institution of the mortgage suits. To my mind their Lordships in 6 I A 88¹⁰ referred to the order for sale simply to emphasize the fact that the execution proceeding had passed through all the necessary stages preceding the sale when the judgment-debtor died. The real determining factor however was the attachment because by virtue of an attachment the decree-holder acquires a right to have the attached property kept in custodia legis for the satisfaction of his judgment-debt. Thus 6 I A 88¹⁰ is no authority for the broad proposition that attachment creates a charge on the attached property. With reference to this case Mr. Mayne in his *Treatise on Hindu Law*, Edn. 9, at p. 450, observes as follows :

In speaking of an attachment as constituting a 'charge' in favour of the judgment-creditor, their Lordships were obviously using the term 'charge' in a general and not in a strictly legal sense.

In the case in 17 I A 194¹¹ the facts were quite different. There a suit was brought by the surviving coparcener to set aside a sale of joint family property effected by a deceased coparcener without his consent and without any justifying necessity. Their Lordships held, affirming the lower Court's decision, that the sale was invalid under the Mitakshara law and on the death of the alienating coparcener his undivided interest passed by survivorship to the plaintiff. In the course of their judgment their Lordships referred to the decision in 6 I A 88¹⁰ which was relied upon by the appellant there in support of

his contention that he (the purchaser) was at least entitled to an equitable charge on his deceased vendor's share for the consideration paid by him. As regards the next case in 60 I A 167,¹² no doubt, their Lordships referred to the decision in 6 I A 88¹⁰ and made certain observations which may perhaps be construed to have shaken the authority of the decisions in 24 I A 170³ and 41 I A 251,⁴ but their Lordships in view of the facts of the particular case before them expressly said that it was irrelevant to consider whether attachment created a lien or charge or conferred title. The decision in 24 I A 170³ and 41 I A 251⁴ definitely lay down that an attachment merely prevents private alienation but does not confer any title, and so long as these decisions stand the courts in India are bound to follow them. Thus, none of the decisions of the Judicial Committee cited by Mr. Jha really supports his contention. He also refers to Sir Rashbehary Ghose's *Mortgage*, Edn. 5, at p. 146, where the following passage occurs :

It does not fall within the scope of the present lecture to discuss the subject at length; and I will only content myself with the remark that though an attachment does not confer any title but only prevents alienation, it cannot be said that it creates no kind of charge; though there are certain expressions in some reported cases which if detached from the context might lend support to the notion that an attachment does not operate as a charge on the property.

The charge contemplated here cannot, in my opinion, be said to be a legal charge which would operate with all its legal consequences in all cases. At best it amounts to an equitable charge which serves the equities in favour of the attaching creditor according to the necessities of the case, the whole object of the attachment being to make the attached property available for the satisfaction of the decree. Upon the foregoing considerations I am not prepared to hold that an attachment creates any title in or charge upon the attached property : by charge I mean legal charge.

Mr. Jha's next contention is based on old S. 91, Cl. (f), T. P. Act. That Section which was in force at the time of institution of the mortgage suits in question stood as follows :

Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property ; (a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property ; (b) any person having any interest

in or charge upon, the right to redeem the property; (c) any surety for the payment of the mortgage debt or any part thereof; (d) the guardian of the property of a minor mortgagor on behalf of such minor; (e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot; (f) the judgment-creditor of the mortgagor when he has obtained execution by attachment of the mortgagor's interest in the property; (g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

The present S. 91 after the amendment of 1929 stands as follows:

Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same; (b) any surety for the payment of the mortgage debt or any part thereof or (c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

Here it will be necessary to refer to the provisions of O. 34, Rule 1 which are as follows:

Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Under the express provision of the old S. 91, Cl. (f), an attaching decree-holder would be entitled to redeem or institute a suit for redemption. But, still the question remains whether such right would amount to an interest in the right of redemption within the meaning of O. 34, Rule 1, Civil P. C. Apparently it may look as if a person who is entitled to redeem has an interest in the right of redemption. But upon a comparison of Cls. (b) and (f) of the old S. 91 it will appear that the Legislature recognized a distinction which puts an attaching decree-holder in a different position from a person having an interest in the right of redemption, otherwise the separate provision in Cl. (f) for the attaching decree-holder, if really he could come under Cl. (b) as a person having an interest in the right of redemption, would be quite redundant. S. 91 enumerates the class of persons entitled to redeem and amongst them those who have an interest in, or charge upon, the property or the right of redemption are put under Cls. (a) and (b) of the old Act which correspond to Cl. (a) of the new Act. Such persons only, in my opinion, come under the purview of O. 34,

R. 1, Civil P. C. Looking to the plain phraseology of the different clauses of the old S. 91, T. P. Act, it is rather difficult to hold that an attaching creditor coming under Cl. (f) has the same interest as a person coming under Cl. (b) of that Section. A fortiori an attaching decree-holder does not fall within the class of persons contemplated by O. 34, R. 1, Civil P. C. I am supported in this view by the decision of the Calcutta High Court in 58 Cal 598⁶ and of the Madras High Court in 44 Mad 232.¹³ A contrary view appears to have been taken by the Allahabad High Court in 23 All 467¹⁴ and in 39 All 536.¹⁵ The case in 23 All 467¹⁴ was decided entirely on equitable consideration as will appear from the following passage from the judgment of Aikman J. at page 471:

The defendants-respondents in their suit upon their mortgage transgressed the provisions of S. 85, T. P. Act, by not impleading a person of whose interest in the mortgaged property they had notice, namely the attaching creditor. He not being a party, and the mortgagor confessing, the case was rushed through, and a decree for possession passed in favour of the respondents. Had the respondents complied with the provisions of the law, and had the usual period been fixed within which redemption might be effected, it cannot be doubted that the plaintiff-appellant here who bought the judgment-debtor's interest in the property six days after the date of the respondents' decree, would have availed himself of the right to redeem. In my opinion it would be inequitable to hold that he had been deprived of that right by the illegal action taken by the respondents.

In the other case, 39 All 536,¹⁵ the decision proceeded on the ground that the right to redeem which was conferred on the persons mentioned in the old S. 91, T. P. Act, seemed to be the same right to redeem in all cases, the same right which the mortgagor himself had, without considering the further question whether all the persons mentioned in the Section were persons having an interest in the property comprised in the mortgage within the meaning of Sec. 85, T. P. Act, (now O. 34, R. 1, Civil P. C.), that Section being applicable to the facts of that case. It was practically assumed in that case that an attaching decree-holder, by virtue of the right conferred on him by the old S. 91, Cl. (f), T. P. Act, was a necessary party to a mortgage suit. From this

13. Chamiyappa Tharagan v. Rama Ayyar, (1921) 8 A I R Mad 80=62 I C 121 = 44 Mad 232=40 M L J 65.

14. Ghulam Husain v. Dina Nath, (1901) 23 All 467=1901 A W N 143.

15. Lakhpat Rai v. Fakhr-Ud-Din, (1917) 4 A I R All 110 = 41 I C 190 = 39 All 536 = 15 A L J 471.

view I express may respectful dissent. In the present case the plaintiffs, in my opinion, were not necessary parties to the mortgage suits in question.

There is a still greater difficulty in the way of the plaintiffs. Whatever rights they might have as attaching decree-holders their attachment and with it those rights came to an end when they became the purchasers of the attached properties on 9th September 1918. After their purchase, they could no longer exercise their right of redemption as attaching decree-holders. It was however open to them, as purchasers to exercise that right. Their purchase was made during the pendency of the mortgage suits, and the sale proclamation (Ex. G-1) shows that the sale was held subject to the encumbrances of the defendants first party. The mortgaged properties were, as already stated, sold in execution of the mortgage decree on 28th May 1923. The plaintiffs had thus sufficient opportunity to redeem the mortgages. The present suit has been brought by them in their capacity of purchasers, their rights as attaching decree-holders having already vanished. It is now futile for them to claim the right of redemption which has long been extinguished by the mortgage sale. In this view the plaintiffs' claim is entirely untenable.

Coming then to the question of *lis pendens*, the crucial point of time is the date of the institution of the mortgage suits. If, as the plaintiffs contend, they by virtue of their attachment had a charge on the attached properties and were consequently necessary parties to the mortgage suits, I do not see how *lis pendens* applies. No doubt the plaintiffs' purchase was during the pendency of the mortgage suits but if they had pre-existing rights quite independent of their rights as purchasers, those rights could not be affected by the result of the suit to which they were not parties. Dr. D. N. Mitter, on behalf of the respondents, relying on the decision of the Judicial Committee in 18 P L T 615¹⁶ contends that the plaintiffs' purchase was affected by *lis pendens* even though they might have a charge in their favour created by the attachment. I am afraid the case cited does not support this contention at all. In that case both the attachment and sale were subsequent to the preliminary mort-

gage decree and were therefore held to be subject to *lis pendens*. The point taken by Dr. Mitter is that *lis* in a mortgage suit continues until the mortgaged properties are sold. This is undoubtedly so, but a person acquiring an interest in the mortgaged properties subsequent to the preliminary decree cannot be heard to say that he should have been impleaded in the mortgage suit. However, I have held that the attachment did not create any charge and whatever rights it might have created came to an end when the plaintiffs purchased the properties. In this view their purchase was obviously affected by *lis pendens*. They purchased the right, title and interest of their judgment-debtors who were parties to the mortgage suits and as their representatives-in-interest would be certainly bound by the decrees passed in those suits.

The last question is that of limitation. Dr. Mitter contends that the suit is barred by limitation by the one year rule prescribed by Art. 11-A as well as Art. 12, Limitation Act. As regards the latter Article, the contention is that the plaintiffs ought to have prayed for setting aside the sale within one year. But this aspect of the case does not arise. The plaintiffs' case is that they are not bound by the sale at all and in that case they were not required to set it aside and therefore no question of limitation would arise. On the other hand, if the plaintiffs are bound by the sale, their case must fail on the merits. As regards Art. 11-A, Limitation Act, the question turns on whether the present suit is one brought under the provisions of O. 21, R. 103, Civil P. C. That Rule runs thus:

Any party not being a judgment-debtor against whom an order is made under R. 98, R. 99 or R. 101 may institute a suit to establish the right which he claims to the present possession of the property ; but subject to the result of such suit (if any), the order shall be conclusive.

Mr. Jha contends that the present suit does not come within this Rule because it is really a suit for redemption and not for establishment of the right to the present possession of the property. This contention, though it may at first sight appear to have some force, is quite fallacious. The order (Ex. 5) passed in the proceeding under R. 100 shows that there the plaintiffs claimed possession on exactly the same grounds as in the present suit with the only difference that in the present suit there is a prayer for redemption which was not and

16. *Parmeshari Din v. Ramcharan*, (1937) 24 A I R P C 260=169 I C 657=31 S L R 652=18 P L T 615 (P C).

could not be made in the previous proceeding. The right which was asserted there and is also claimed here is based on the fact that the plaintiffs, not being parties to the mortgage decree and sale, are not bound by the same and therefore they, as auction-purchasers being in rightful possession of the disputed properties, could not be dispossessed therefrom by the defendants first party. The mere fact that in the present suit the plaintiffs seek to recover possession upon redemption can be no ground for holding that they do not claim the right to the present possession of the disputed properties. In fact possession is the substantial relief claimed. In my opinion, the present suit is one under O. 21, R. 103, Civil P. C., and not having been brought within one year, it is barred by limitation. In the result, I would dismiss the appeal with costs.

Mohamad Noor J.—I entirely agree.

N.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 13

MANOHAR LALL J.

Madan Lall — Appellant.

v.

Lakshmi Narain — Respondent.

Appeal No. 660 of 1936, Decided on 11th August 1938, from appellate decree of Sub-Judge, Second Court, Monghyr, D/- 30th April 1936.

(a) Appeal — Court-fee — Appeal valued at one figure contended should have been valued at another figure — Court-fee stamp in either case same — Appeal held could be valued at either figure.

An objection was raised to the valuation of the appeal at a particular figure and it was contended that it should be valued at another figure. The stamp to be paid on either figures was of the same value :

Held the appeal could be valued at any of the two figures. [P 14 C 2]

(b) Second Appeal—Absence of reasonable and probable cause in actions for malicious arrest—High Court can enquire into in second appeal.

The High Court has jurisdiction to interfere in second appeal with the findings of Courts below as to absence of reasonable and probable cause and as to the existence of malice in a suit for damages for malicious arrest : *A I R 1916 Pat 174 and 4 Cal 583, Rel. on.* [P 14 C 2]

(c) Malicious arrest — Suit for damages — Decree silent as to mode of execution—Decree-holder proceeding against person of judgment-

debtor by securing his arrest—Decree-holder cannot be said to be actuated by unreasonable and improper conduct and liable to pay damages to judgment-debtor.

It is open to a litigant or a lawyer to take the view that where the decree is silent, as to the manner of execution, he may reasonably attempt to execute it by proceeding against the person or the personal property of the judgment-debtor and if he does so however maliciously, he cannot be said to be actuated by any unreasonable or improper conduct so as to found a suit for damages for malicious arrest. Although S. 95, Civil P. C., gives right to a party to claim compensation in certain circumstances, yet there is no provision in the Code for a situation resulting from the execution of decrees against the person or property of the judgment-debtor for the obvious reason that the terms of the decree under execution itself must decide the rights of the parties : *A I R 1916 Pat 174 and 4 Cal 583, Foll. ; A I R 1925 Bom 118 and A I R 1931 Pat 328, Disting. ; A I R 1934 Pat 187 ; A I R 1931 Pat 177 and M. A. No. 88 of 1932, Ref.* [P 16 C 2; P 17 C 1]

Murari Prasad and S. P. Srivastava —
for Appellant.

K. N. Lall — *for Respondent.*

Judgment. — This is an appeal by the defendant against the appellate decree of the learned Subordinate Judge of Monghyr affirming the decision of the Munsif decreeing the suit of the plaintiff for damages for his malicious arrest in execution of an ex parte decree passed by the Small Cause Court of the Second Munsif of Monghyr under circumstances which are somewhat peculiar. The plaintiff in the Small Cause Court suit instituted his suit on the foot of a handnote which was executed jointly by the father of the respondent and one Basiruddin. I was informed that Basiruddin was the principal defendant who had taken the money, but the father had stood as his surety and became liable as a joint executant on the handnote. The suit which was instituted by the appellant was decreed by the Small Cause Court Judge ex parte, as stated already. Thereafter the appellant took out execution of the ex parte decree by asking for warrant of arrest against the father and later on against the son, that is to say, the respondent. When the respondent was arrested while in service, he was produced before the Munsif in the execution department and on hearing his objection he was released. The order of release is not before me but it is common ground that the learned Munsif in the execution department came to the conclusion that the decree-holder had no right to arrest the respondent in execution of this decree which was interpreted as negating any

personal liability on him. The respondent then instituted the present suit for recovery of damages for malicious arrest asking for a decree for a total sum of Rs. 135, namely Rs. 125, as damages, and costs and Rs. 10 as costs incurred in getting his release and some other incidental expenses.

The principal respondent's attack on the facts was that the decree in the Small Cause Court suit was obtained behind his back fraudulently and without service of notice to him. He sought to make out that in this way he was prevented from putting forward his defence before the Small Cause Court. But the Courts below have concurrently come to the conclusion that the allegation of the respondent that summons was not served on him was false. Therefore it must be taken as established that the respondent with a notice of claim against him deliberately absented himself from contesting the action and allowed the decree to be passed against him. The decree of the Small Cause Court is still in existence and has never been sought to be set aside.

The only question which really arises for determination in this case is whether the conclusions of the lower Courts to the effect that the appellant's action in getting the respondent arrested was without reasonable and probable cause and malicious can be supported in law. Before dealing with this matter I ought to deal with a preliminary objection which was raised by Mr. K. N. Lall appearing on behalf of the respondent. His objection was that the appeal was not properly valued because it was valued at Rs. 125 only whereas the decree actually prepared by the trial Court (which was affirmed by the Appellate Court) shows that the decree was passed for a sum of Rs. 135. I asked the parties to show me any finding of fact of either of the Courts below by which they have given reasons for awarding the plaintiff a sum larger than Rs. 125. I am unable to see such a finding in any of the two judgments. The memorandum of appeal was valued at Rs. 125 but the prayer which is attached in the end of the memorandum of appeal is to this effect: "It is prayed that the decree appealed from be set aside and the suit dismissed." It is clear therefore that the appellant is aggrieved not only from a portion of the decree but from the whole of the decree which has been passed and the objection of the respondent can only be

directed to the question of court-fees payable on the memorandum of appeal to this Court. But, this is not a matter which arises at all between the defendant and the Crown and in this case I do not think that any court-fee has escaped levying because the amount of court-fee will be the same whether the appeal is valued at Rs. 125 or at Rs. 135. I therefore overrule this objection.

It was then strenuously argued by Mr. K. N. Lall that the findings of the Courts below as to the absence of reasonable and probable cause and to the existence of malice are conclusions of fact with which this Court has no jurisdiction to interfere in a second appeal. It is enough in this connexion to refer to the case in 1 Pat L J 149¹ where some authorities are quoted at p. 152 in support of the view which I think is correct that this Court has jurisdiction in second appeal. To the same effect is the leading case in 4 Cal 583² which I refer because it will be of use in deciding the other points in controversy. As I have said before, the real question in this case is whether under the circumstances which have been established, namely that the decree still exists and has never been set aside and that the defence of the respondent that he had no notice of the suit having been found to be false, it can be held that the present suit is maintainable and should be decreed. The Division Bench of the Calcutta High Court decided in the case just referred to that in order to succeed in an action for malicious arrest the plaintiff has to show in the first instance that the original civil action out of which the alleged injury arose has been decided in his favour and secondly that the defendant maliciously and without reasonable and probable cause procured the respondent to be arrested and then he, of course, has to establish the injury and the damage as a result of his arrest. Now, in this case, as I have said above, the original civil action out of which this suit for damage has arisen has not been decided in his favour as the decree still remains against him. Again the decree as it stands was a decree jointly against all the defendants. The decree is silent as to whether it should be executed only against the property or assets of the plaintiff. The

1. Naik Pandey v. Bidya Pandey, (1916) 3 A I R Pat 174=34 I C 149=1 Pat L J 149.

2. Raj Chunder Roy v. Shama Soondari Debi, (1879) 4 Cal 583.

appellant sought to give evidence of a pleader whom he examined as his first witness in the defence in order to show that the pleader had advised him to apply for the issue of a warrant against the respondent on examining the terms of the decree. The pleader stated in his examination-in-chief to this effect but in cross-examination he denied that he advised his client to get a warrant of arrest issued. I have no doubt whatsoever that in this case the evidence of the pleader ought to have been accepted because it appears to me that the pleader under the stress of cross-examination was averse to take responsibility on him, but nonetheless it is not a matter (being a question of fact and the weight to be attached to the credibility of a witness) in which I can interfere in second appeal.

I now refer to the service of notice on the plaintiff respondent through one Jadunandan. The learned Judge held that it was a remarkable thing that notice in the original suit as well as the notice under O. 21, R. 37, Civil P. C., both should be entrusted by the Nazir to Jadunandan, a civil court peon, against whom the plaintiff had filed certain complaint (Ex. 7.A) and with whom he is on bad terms. The learned Judge says that it is curious that this Jadunandan was entrusted by the Nazir to serve the summons on the plaintiff in the Small Cause Court suit; but he omitted to notice that notwithstanding the proved enmity the summons was actually served on the plaintiff in the Small Cause Court suit. If the learned Judge had kept that finding in view he would have seen that his subsequent reasoning that the Nazir had entrusted the warrant of arrest to this Jadunandan was no ground whatsoever for believing that this man Jadunandan was a party to a deliberate avoidance of the service on the respondent. Again I find nothing whatsoever on the record to show that it was at the instance of the appellant that the Nazir entrusted the process to Jadunandan. The Nazir was not examined as a witness. I therefore do not see any reason whatsoever for coming to the conclusion that the arrest of the respondent was effected in a surreptitious way. All that can be said is that the Court has not been able to come to the conclusion that the arrest was with notice to the plaintiff. But there is another circumstance upon which the learned Judge has relied and that is that the appellant ought

to have proceeded against the judgment-debtor Basiruddin and not against the respondent. The case in 4 Cal 583² is a complete answer to this contention. In that case a pardanashin lady was arrested in execution of a decree which her enemy had obtained against her and it was argued on her behalf, as the plaintiff in the action, that owing to the enmity existing between the parties the decree-holder with full knowledge that the lady was possessed of sufficient property instead of executing the decree against the property proceeded to arrest her, and so it was argued it should be held that he did so maliciously and without reasonable and probable cause. The learned Judges of the Calcutta High Court held that the possession of property by the judgment-debtor did not make it wrongful in the creditor to arrest his debtor in execution of a decree because under the Civil Procedure Code an option is given to the creditor of enforcing the decree either against the person or the property of the debtor, and the fact that the decree is an ex parte decree does not make any difference whatsoever. The learned Judges further held that it has been long ago, and over and over again, ruled that in suits like the present one where the plaintiff has to show an absence of probable cause, existence of malice alone is insufficient to entitle the plaintiff to a verdict, and they referred to a number of English cases on the point.

In my opinion the facts of this Calcutta case apply with equal vigour to the facts of the present case; here also the only thing which I find is that the appellant having obtained a perfectly good decree against the respondent executed it in a manner which he thought that the law allowed. He did not snatch a decree against the defendant-respondent because a notice was served upon him in the Small Cause Court action. He consulted his pleader and whether we accept the evidence of the pleader or not, it is obvious that the pleader must have known that the warrant was being asked to be issued for the arrest of the respondent. The appellant was entitled to proceed against any of his judgment-debtors. In these circumstances I do not find anything in law to justify the conclusion that the arrest of the respondent was malicious and without reasonable and probable cause.

I now refer to two or three authorities which have been cited by the learned

advocate for the respondent. He strongly relies upon the case in 48 Bom 691.³ It is a Full Bench case of the Bombay High Court. But, in that case, the learned Judges came to the conclusion that the decree, which was executed, directed that in default of payment of the decretal amount by the defendants the amount was to be levied by seizure and sale of the property of the deceased that would come to their hands as his heirs and legal representatives, and the learned Judges pointed out at page 695 that the plaintiff in the Small Cause Court suit fully knew that they were not entitled under that decree to apply for the arrest of the defendants and they ought to have known that the order of the executing Court merely enabled them to proceed with the execution of the decree, and as the decree only entitled them to execute it against the property of the deceased in the hands of the defendants, they must be taken to have been aware, when they applied for the arrest of defendant 1, that such conduct was not justified. Now the present case is wholly of a different character. Here the decree, as I have stated above, was entirely silent as to the manner of execution and therefore there is no evidence in law to support the conclusion that the appellant knew or ought to have known that his conduct in applying for the arrest of his judgment-debtor was not justified.

Reliance was then placed upon the decision of this Court in 10 Pat 503.⁴ In that case a decree was passed against an infant who at the date of the suit was represented by a guardian ad litem and when the decree was being executed against him on his attaining majority he took the objection as an adult that it should not be executed against him. If I may say so with respect, this objection had to be allowed because the decree was not against the adult but was against him as an infant through a guardian ad litem. In such circumstances, the decree itself indicated on the face of it that it was against the defendant represented by a guardian ad litem. Therefore it was correctly held that such a decree both in fact and law could not be executed by the arrest of the person who was an

infant defendant at the date of the decree. The two cases of this Court, namely 13 Pat 7⁵ and 10 Pat 305,⁶ lay down the proposition that it is open to the judgment-debtor against whom a decree has been passed along with the father in respect of the father's debt to take objection in the execution department that he should not be made personally liable for the decree but only liable to the extent of the assets which would come into his possession. It is no doubt that the principles of these authorities induced the learned Munsif in the execution case against the respondent to order his release. But these authorities are no justification for holding that if a decree-holder tries to execute his decree against his judgment-debtor where the decree is silent as to the mode of execution he must be held in law to have been actuated by unreasonable and improper cause in arresting his judgment-debtor. An unreported case of this Court (M. A. No. 88 of 1932) decided by Wort J. sitting with Fazl Ali J. dealt with a similar situation in the execution department and it was held that

it was obvious that if the decree is not ambiguous or equivocal it is impossible for this Court, as it was impossible for the Subordinate Judge, to go behind the decree and to ascertain by that means what the liability of defendant 2 was. In this case as I have indicated there were a number of defendants and amongst them the present respondent and some infants. The Subordinate Judge in his decree stated: 'The suit is decreed on contest against both sets of defendants, etc.' At the end of the decree there is this statement, 'the minor defendant will not be personally liable.' The decree could not be clearer if the learned Judge had said that the other defendants are personally liable. In my judgment, the learned Judge by differentiating the liability of the minor defendant from the others quite clearly showed that the defendants other than the minor defendant were liable personally.

Now without attempting to reconcile the decision of this last cited case with the earlier Patna decisions referred to by Mr. K. N. Lall it is sufficient for the purposes of this case to hold that it is open to a litigant or a lawyer to take the view that where the decree is silent he may reasonably attempt to execute it by proceeding against the person or the personal property of the judgment-debtor and if he does so

3. *Velji Bhimsey & Co. v. Bachoo Bhaidas*, (1925) 12 A I R Bom 118=87 I C 199=48 Bom 691=26 Bom L R 349.

4. *Jwala Prasad v. Bhuda Ram*, (1931) 18 A I R Pat 328=134 I C 420=10 Pat 503=12 P L T 707.

5. *Bissessor Ram v. Ramakant Dubey*, (1934) 21 A I R Pat 187=151 I C 379=13 Pat 7=15 P L T 571.

6. *Sukdeo Prasad Narayan Singh v. Madhusudan Prasad Narayan Singh*, (1931) 18 A I R Pat 177=132 I C 871=10 Pat 305=12 P L T 75.

however maliciously he cannot be said to be actuated by any unreasonable or improper conduct. I may usefully draw attention to the provisions of Sec. 95, Civil P. C., which is especially inserted in the Code in order to give legislative approval to the procedure that where in any suit in which an arrest or attachment has been effected or a temporary injunction granted before the suit is decided the defendant may apply to the Court, and the Court may award against the plaintiff by its order such amount not exceeding Rs. 1000 as a reasonable compensation to the defendant for the expense or injury caused to him. It will be noticed that there is no provision in the Code for a situation resulting from the execution of decrees against the person or property of the judgment-debtor for the obvious reason that the terms of the decree under execution itself must decide the rights of the parties. For these reasons the appeal is allowed and the judgment and the decree of the lower Appellate Court is set aside and the suit of the plaintiff is dismissed with costs throughout. Leave to appeal is refused.

B.D./R.K.

*Appeal allowed.***A. I. R. 1939 Patna 17**

WORT AG. C. J.

*Hari Ojha and others — Defendants—
Appellants.*

v.

*Ramjatan Ojha — Plaintiff —
Respondent.*

Appeals Nos. 861 and 862 of 1936, Decided on 5th September 1938, from decision of Sub-Judge, First Court, Chapra, D/- 15th June 1936.

Principal and Agent — Suit by principal for accounts of rent collected — Agent found guilty of negligence—As a result some rent becoming time-barred — Landlord held entitled to decree for the rent not recovered.

A landlord who had engaged an agent for collecting rent from the tenants, filed a suit against the agent for accounts of rent of certain years. There was evidence on record to show that the agent had not properly collected rent due to the landlord nor had he taken proper and necessary steps to recover the rent and was thus guilty of negligence. As a result of the agent's negligence some of the rent had become time-barred :

Held that the landlord was entitled to a decree for the rent which owing to the agent's negligence had not been recovered. [P 17 C 2]

*S. N. Roy — for Appellants.**Ganesh Sharma — for Respondent.*

1939 P/3 & 4

Judgment. — These appeals are by the defendants. The claim against them was for an account. The plaintiff was a co-sharer landlord and his claim was with regard to the years 1337 to 1340. It would appear from the judgment that the Judge in the Court below, acting upon the Commissioner's report, has accepted the defendants' case as regards the years 1339 and 1340, that is to say he has accepted their statement of accounts and made them liable only for the sums actually shown to be collected by them. As regards the years 1337 and 1338 the case is otherwise, the Judge having given judgment for the plaintiff for the full amount on the footing that the defendants were guilty of negligence in not collecting the rents due to the plaintiff.

It is rather difficult to find a question of law in this case, but Mr. Roy contends that the subject-matter of this suit should be limited to the mere rendering of an account, and that the plaintiff should not be entitled to recover anything other than that shown by him to have been collected by the defendants, the agents. With that contention I cannot agree. It is based on the old rule that in certain circumstances the principal was entitled to ascertain the account in equity; by that was meant to ascertain the account in the Court of Chancery which had a different method of proceeding and in certain circumstances was more fit to take an account than a Court of law. Even in England since 1872 that distinction has disappeared and it certainly has no application to India. The question that really arose was whether the plaintiff having claimed an account was entitled to recover, in the events which happened on the footing that the defendants were guilty of negligence. I am not surprised that the Judge in the Court below has come to the conclusion at which he has arrived for the reason that the defendants throughout denied their agency. They denied their agency before the trial Court and they further denied their agency before the Commissioner, although the trial Judge came to the conclusion that they were in fact the agents of the plaintiff. It is their attitude in these matters which has led the learned Judge in the Court below to the conclusion at which he has arrived. Now the Judge rightly states that there was in fact neglect in collecting during the years 1337 and 1338, as the rents had not only not been collected but the actions for those rents

were barred by limitation. It is a highly technical point to suggest that the plaintiff could not recover his dues because rents were not collected by reason of negligence of the defendants, his agents. The Judge has been satisfied that the defendants made no effort to bring rent actions, to borrow the name of the plaintiff or to take any of the ordinary precautions which an agent would do in the circumstances; and although it is not contended to be so, but even if it were I should have great difficulty in coming to the conclusion that there was no evidence of negligence against the agents.

Taking all the circumstances into consideration I think it is impossible to hold that the learned Judge has in any way misdirected himself on a point of law by finding that the agents were liable for the years 1337 and 1338. Although merely these matters are not the proper basis for a judgment, it would appear that possibly if not probably the agents had in fact collected rents for which they had not accounted. That they had not accounted of course sufficiently appears from what I have already said. In those circumstances I find no ground for reversing the decision of the learned Judge in the Court below and the appeals therefore fail and must be dismissed with only one set of costs. This judgment will govern both Second Appeals Nos. 861 and 862 of 1936.

N.S./R.K.

*Appeals dismissed.***A. I. R. 1939 Patna 18**

WORT AG. C. J. AND MANOHAR LALL J.

Kamal Lal Gurda — Appellant.

v.

Chandrika Charan Ray and others — Respondents.

Appeal No. 238 of 1937, Decided on 4th August 1938, from order of Dist. Judge, Gaya, D/- 14th June 1937.

Provincial Insolvency Act (1920), S. 28 (4)—Insolvent acquiring property under will — It is available for distribution among his creditors — Mere fact that order of adjudication which was passed under old Act, was passed on single petition presented by three debtors, namely insolvent, his father and his brother, makes no difference.

Where an insolvent acquires certain property under a will, such property is available for distribution among his creditors and the mere fact that order of adjudication, which was passed in 1919 under the old Act, was passed on a single application presented by the insolvent, his father and his brother, makes no difference. Not having been

appealed from, the order of adjudication stands, and so long as it stands, the property under the will is available to the creditors. The order of adjudication cannot be said to be one without jurisdiction. At most that can be said is that it was wrong in law. [P 18 C 2]

Kedar Nath Varma — *for Appellant.*Raj Kishore Prasad — *for Respondents.*

Facts.—Ramlal and his sons Lachumanlal and Kamallal applied to be adjudged insolvents by a single petition in the year 1919 and accordingly were adjudged insolvents by order dated 25th July 1919, i. e. the insolvency proceedings were under the old Act. The creditors' application dated 24th February 1936, for proceeding against the properties recently acquired by Kamallal the appellant in this appeal, under a will and for vesting order under S. 28 (4), Provincial Insolvency Act, was therefore resisted on the ground that the order of adjudication which was passed on a joint application by the three debtors was void without jurisdiction, reliance being placed upon 24 C W N 461.¹

Wort Ag. C. J. — The creditors in this insolvency sought to make available for distribution amongst them property acquired by the insolvent under a will. It was contended by the insolvent that, as it was the personal property of the insolvent, it was not liable for debts for which he had been adjudicated, namely the debts of his father. That is tantamount to an argument that he should not have been adjudicated an insolvent, and indeed that is his argument in substance. But whether he should have been adjudicated or not is a matter which could have been taken on appeal at the time of his adjudication which I understand was about 1919. Not having appealed, the order of adjudication stands and it is not seriously disputed that, if the order of adjudication stands, the property under the will is available to the creditors. It is impossible to argue that the order of adjudication was without jurisdiction; the most that could be said was that it was wrong in law — a matter with which this Court has nothing to do in this appeal. The order of the learned Judge in the Court below was right; it must be affirmed and the appeal must be dismissed with costs.

Manohar Lall J. — I agree.

R.M./R.K.

Appeal dismissed.

¹1. Kali Charan Saha v. Hari Mohan Basak, (1920) 7 A I R Cal 964=58 I C 531=31 O L J 206=24 C W N 461.

A. I. R. 1939 Patna 19

WORT Ag. C. J. AND MANOHAR LALL J.

*Mt. Sumitra Kuer —**Defendant — Appellant.*

v.

*Bhagwat Narain Singh —**Plaintiff — Respondent.*

Appeal No. 899 of 1937, Decided on 17th August 1938, from appellate decree of Sub-Judge, Hazaribagh, D/- 28th June 1937.

(a) Chota Nagpur Encumbered Estates Act (6 of 1876), S. 12-A—Sales in execution come under S. 12-A.

Sales in execution come within the provisions contained in S. 12-A, Chota Nagpur Encumbered Estates Act. [P 19 C 1,2]

(b) *Res Judicata*—Applicability — Principle applies to execution proceedings.

The principle of *res judicata* applies to execution proceedings. Where a particular question is raised in the execution proceedings although not decided, the matter becomes *res judicata*: 6 All 269 (P C) and A I R 1938 Pat 427, *Rel. on.* [P 19 C 2]

(c) *Res Judicata* — Plea of — Court cannot decide whether matter is *res judicata* without having earlier judgment or some decision as regards that matter.

A Court cannot decide whether a matter is *res judicata* or not without having the earlier judgment in the case or (as in second appeal) without having some decision as regards that matter by the last Court. [P 20 C 1]

(d) Second Appeal—Question of law—Party appealing from appellate order wishing questions of law to be decided—It is necessary that facts necessary for those decisions should also be raised and decided.

If parties in appeals from appellate orders wish questions of law to be decided, it is necessary that the facts necessary for those decisions should also be raised and decided. Where that is not done, it would not be in the ends of justice for the High Court to decide those questions. [P 20 C 1]

Sarjoo Prasad — *for Appellant.*

Advocate-General — *for Respondent.*

Wort Ag. C. J.—This is an appeal by the defendant arising out of an action by the plaintiff for possession of property which he contends was sold contrary to the provisions of S. 12-A of Act 6 of 1876 which is generally known as the Encumbered Estates Act. I need not refer to the provisions of that Section as the point which is raised in this appeal does not necessarily arise by reason of the construction of that Section, and all that is necessary to state is that in 10 Pat 582¹ this Court has held that the sales in execution come within the

provisions contained in the Section to which I have referred. An argument was raised by Mr. Sarjoo Prasad under S. 177, Chota Nagpur Tenancy Act, but he frankly conceded that having regard to the correct interpretation of that Section it has no application to this case. Another point that appears to have been raised was that the property which was sold according to the defendant was not the interest of the plaintiff but some other interest. All that need be said with regard to that matter is that when the property was released from the Court of Wards it was released to the plaintiff among other persons and therefore the plaintiff was a holder within the meaning of the Encumbered Estates Act. The substantial question that was argued was whether the sale of which the plaintiff complained had resulted in a proceeding under S. 47, Civil P. C., and that decision therein is *res judicata* as regards the point in dispute in this case. Their Lordships of the Judicial Committee of the Privy Council in 11 I A 37² decided that the principle of *res judicata* applied to execution proceedings. In 1938 P W N 400,³ in a judgment of this Court to which I was a party, it was held that the question having been raised in execution, although not decided the matter became *res judicata*. Now, applying the principle of the decision of their Lordships of the Judicial Committee of the Privy Council, the question would arise whether in the general rule of *res judicata* in contra-distinction to the rule laid down in S. 11, Civil P. C., the principle of what is usually described as constructive *res judicata* applies. But it is unnecessary, in my judgment, to decide those questions for this very ample reason. In the grounds of appeal the appellant raised the question of *res judicata* but with regard to the question to which I have referred and which was said to arise under Sec. 177, Chota Nagpur Tenancy Act. Nowhere in the record of this case, either in the trial Court or the Appellate Court or in this Court, was the question of *res judicata* mooted as regards the execution proceedings to which I have referred. What was decided under S. 47 it is impossible to say. Mr. Sarjoo Prasad contends that it is unnecessary to

1. Thakur Khitanarain Sahi v. Surju Seth, (1931) 18 A I R Pat 864=192 I C 868=10 Pat 582=12 P L T 508.

2. Ram Kirpal v. Mt. Rup Kuari, (1884) 6 All 269=11 I A 37=4 Sar 489 (P C).

3. Mahadeo Prasad Bhagat v. Bhagwat Narain Singh, (1938) 25 A I R Pat 427=1938 P W N 400.

have the proceedings before the Court or to decide any question of fact with regard to this matter because the application of the principle arises from the fact that the execution actually took place when the property was actually sold. That is an argument with which, I am afraid, I cannot agree. It may well be (I do not say it is the fact) that the Judge in the S. 47 proceedings either refused to decide the point or might have decided the point in favour of the plaintiff for all we know. It is sufficient to say that we are entirely ignorant of the judgment under that Section. It is impossible to contend that a Court can decide whether a matter is *res judicata* without having the earlier judgment in the case or (as in a second appeal) without having some decision as regards that matter by the last Court. One very significant fact appears, to which I have already referred, that although the question of *res judicata* was raised by the defendant-appellant no mention of the application of the principle to the execution proceedings was suggested throughout these proceedings. It would not be in the ends of justice (to use the expression of Mr. Sarjoo Prasad) for us to decide that point in the circumstances of the case; in fact we might be in great danger of doing an injustice and not justice. If parties in appeals from appellate orders wish questions of law to be decided, it is necessary that the facts necessary for those decisions should be also raised and decided. As I have said, that is not the fact in this case. In those circumstances the appeal fails and must be dismissed with costs.

Manohar Lall J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1939 Patna 20

WORT AG. C. J.

Commissioners of Darbhanga Municipality — Defendant — Appellant.

v.

Shiva Prasad — Plaintiff — Respondent.

Appeal No. 837 of 1936, Decided on 31st August 1938, from appellate decree of Addl. Sub-Judge, Darbhanga, D/- 24th June 1936.

Bihar and Orissa Municipal Act (7 of 1922), S. 82 — Onus to prove that meeting was not held is on assessee — Municipal Officers called upon by assessee to produce papers giving explanation as to why they were not forthcoming — Judge coming to conclusion that meeting was not held — Imposition of tax held irregular.

It must be assumed that what ought to have been done, that is the holding of the meeting, was in fact done and hence the onus is on the assessee to show that the meeting was not held.

[P 21 C 1]

An assessee called upon the Municipal Officers to produce papers. The Municipal Officers gave an explanation why the records relating to the meeting were not forthcoming. The Judge thereupon came to the conclusion that the meeting was in fact not held :

Held that in these circumstances the imposition of the tax was irregular. It did not however prevent the Municipality from holding a meeting and imposing the tax in a proper and regular manner.

[P 21 C 1]

R. Misra — *for Appellant.*

B. N. Mitter and Bhabananda Mukharji
— *for Respondent.*

Judgment.—It must not be thought that I am laying down any principle of law in this case because that is not so, and it is with a considerable reluctance that I come to the conclusion at which I have arrived. I am quite certain that had I tried the case in the first instance I should not have come to the same conclusion on the question of fact as that at which the learned Judge in the Court below has arrived, and if it were possible I would reverse his decision on the point on which he has substantially decided the case. He has held here that no meeting was held and that the Sections of the Municipal Act were not complied with. Any assessment of tax would of course naturally be *ultra vires*. Tax can be imposed only by following the provisions of the Municipal Act. I am equally convinced that if the provisions of the Act relating to formalities had been complied with, this Court would have no jurisdiction to interfere with the decision of the Commissioner which is final. If I were satisfied that the Judge had come to the conclusion that the meeting was not held because the municipal authorities did not prove that the meeting had been held, in other words, if the Judge had decided the case on the assumption that the onus of proof was on the Municipality, I should not have the slightest hesitation in setting aside the decision. But in this case the Municipal Officers were called and they gave explanation why the records relating to the meeting were not forthcoming which made the Judge come to the conclusion that the meeting in fact was not held. It would not be accurate to say that the judgment was based on the assumption that the onus of proof was on the Municipality. If I could see anything in the judgment to suggest that, I repeat I would

gladly set aside the same, because it must be assumed that what ought to have been done was in fact done: the onus is on the plaintiff to show that it was not done. Here the plaintiff certainly took precautions by calling upon the Municipality before the case was heard to produce papers, and the explanation for non-production not appealing to the learned Judge he definitely said that the meeting was not held. In those circumstances of course imposition of tax in this particular case was irregular. It does not however prevent the Municipality from holding a meeting and imposing the tax in a proper and regular manner. These being the circumstances, the appeal fails and must be dismissed with costs.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1939 Patna 21**

WORT AG. C. J. AND MANOHAR LALL J.

Mahtha Raghubir Prasad — Defendant
— Appellant.

v.

Ramnath Singh and others, Plaintiffs
and others, Defendants —

Respondents.

Appeal No. 229 of 1937, Decided on 15th August 1938, from appellate decree of Addl. District Judge, Gaya, D/- 5th September 1936.

Civil P. C. (1908), O. 21, Rr. 58, 62 and 63 — Sale of mortgaged property in execution of decree—Application of mortgagee under O. 21, R. 58 dismissed—Action on mortgage by mortgagee more than one year after dismissal of application under O. 21, R. 58 is barred as against purchaser.

It may be unnecessary for a purchaser to make an application under O. 21, R. 58, but it is clear that O. 21, R. 62, contemplates the possibility of such an application being made. If an application is made and it is unsuccessful, as regards those parties, O. 21, R. 62 applies and if a suit is brought beyond the period of one year, it must necessarily fail on the ground of the effluxion of time.

[P 22 C 1]

Where a property which is the subject-matter of mortgage is sold in execution of a decree and the application of the mortgagee under O. 21, R. 58 is dismissed, an action on the mortgage by the mortgagee brought more than one year after the dismissal of an application under O. 21, R. 58 is out of time as regards the purchaser though not so as against the mortgagor: *A I R 1937 Pat 63, Expl.*

[P 21 C 2]

B. K. Prasad and N. K. Prasad II —
for Appellant.

S. N. Roy and A. N. Lal —
for Respondents.

Wort Ag. C. J.—The appellant in this appeal is defendant 5 who was the purchaser of the property, the subject-matter of the mortgage, and it is immaterial for the purposes of this case to state whether the purchase was the result of the execution of a rent decree or a money decree for this reason. The plaintiff who is the respondent and the mortgagee made an application under O. 21, R. 58. The result of that was that there was a certain application to the High Court and the High Court ordered that application to be heard on its merits with the result that it was ultimately dismissed, whether for default or not is again immaterial. The fact remains that the application by the mortgagee was dismissed. Then this action on the mortgage was brought more than one year after the disposal of the application under O. 21, R. 58.

Now it is, of course, abundantly clear that so far as regards the mortgagor the plea is unavailable. But it is contended by defendant 5, who is the purchaser of the property, as I have already stated, that as regards himself the action is out of time. Mr. Roy on behalf of the respondent relies upon the Full Bench decision of this Court in 16 Pat 54.¹ There are certain observations in the course of the judgment of the late Chief Justice to the effect that O. 21, R. 58, had no application to the facts of a case similar to the present. But I decline to hold that the decision of the Full Bench was that under no circumstances did O. 21, R. 58, apply to the case of the relationship of the mortgagee and the purchaser, either of the equity of redemption or of the security. The real decision of the Full Bench is contained in the penultimate paragraph of the judgment in which the learned Chief Justice is reported to have said that the decision in 1 Pat 159² was rightly decided, and then reference is made to *Biswantha's case*.² It will be seen that the opposite party in the application there was a usufructuary mortgagee which in my judgment makes a considerable and a substantial difference. If the contention of Mr. Roy is correct then O. 21, R. 62 becomes a nullity. O. 21, R. 62 runs as follows:

Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some

1. *Sunder Prasad Singh v. Deodhari Singh*, (1937) 24 A I R Pat 63=166 I C 463=16 Pat 54=17 P L T 812 (F B).

2. *Biswanath Patra v. Lingraj Patra*, (1922) 9 A I R Pat 408=70 I C 306=1 Pat 159.

persons not in possession (words of great importance) and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

It may be unnecessary for a purchaser to make an application under O. 21, R. 58, but it is clear that O. 21, R. 62, contemplates the possibility of such an application being made. If an application is made and it is unsuccessful, it seems to me that as regards those parties O. 21, R. 62 applies and if a suit is brought beyond the period of one year, it must necessarily fail on the ground of the effluxion of time.

The decision of the learned Judge as regards the merits on the mortgage itself cannot be disturbed, but so far as defendant 5 is concerned, the appeal succeeds and defendant 5 is dismissed from the action with costs throughout.

Manohar Lall J.—As I understand the decision of the Full Bench it only decides that the decision of this Court in 1 Pat 159² was correct. That case expressly referred, like the case in the Full Bench, to a usufructuary mortgagee. Further in the Full Bench case (as will be seen at p. 58 of 16 Pat) the rights of the mortgagee were not in jeopardy as is clear from the following sentence :

In this case the mortgagee was merely claiming in respect of his mortgage rights which were not threatened and the judgment-creditor could merely claim in respect of the right to put up for sale the equity of redemption: that is to say they were not fighting about the same property at all.

But in the present case I find from the judgment of the lower Appellate Court at page 10, line 18, that it was distinctly decided that the mortgage bond dated 25th September 1929 had no concern whatsoever with the execution case, that is to say plots Nos. 29 and 96 of Khata No. 13 of the mortgage bond in suit were outside the controversy and therefore could be sold by defendant 5. I therefore do not consider that the authority in 16 Pat 54¹ helps the respondent at all. I agree that the appeal should be allowed and the rights acquired by defendant 5 by virtue of his purchases will not be affected by the mortgage decree.

D.S./R.K.

*Appeal allowed.***A. I. R. 1939 Patna 22**

WORT AG. C. J.

Jugal Kishore and others — Decree-holders — Appellants.

v.

Pahlad Rai and others — Judgment-debtors—Respondents.

Appeal No. 107 of 1938, Decided on 19th August 1938, from appellate order of the Dist. Judge, Muzaffarpur, D/- 22nd February 1938.

Civil P. C. (1908), S. 51, Proviso, sub-cl. (b), (as amended by Act 21 of 1936) — "Sufficient means to pay debt" — Onus is on decree-holder.

The onus of proof is on the decree-holder to establish that the judgment-debtor had sufficient means to pay the debt within the meaning of sub-cl. (b) of the Proviso to S. 51. [P 22 C 2]

Sambhu Barmeshwar Prasad and Harians Kumar — *for Appellants.*

Wort Ag. C. J. — On the judgment of the District Judge it is clear that the question of onus of proof was not a mere academic question, as the Judge starts by stating that the onus was on the decree-holders, and towards the end of his judgment states that the decree-holders have failed to establish that the judgment-debtor had sufficient means to pay the debt within the meaning of sub-cl. (b) of the Proviso to S. 51, Civil P. C. Like so many of these statutory provisions, the matter is not free of difficulty, but it does seem to me on the whole to be clear from the wording of sub-cl. (b) itself that the Legislature intended the decree-holder to prove that the judgment-debtor had means. It is true that the first part of the Section calls upon the judgment-debtor to show cause why he should not be committed to prison, but the sub-clause which I have to construe provides that "the judgment-debtor has or has not had, since the date of the decree, means to pay the amount of the decree"; the Judge, in other words, has to be satisfied of that fact. The clause is in the affirmative but the argument addressed to me suggests that the judgment-debtor should be called upon to prove the negative. I think that is an impossible construction. I would hold therefore that the Judge in the Court below correctly placed the onus upon the decree-holders. The appeal is dismissed without costs.

R.M./R.K.

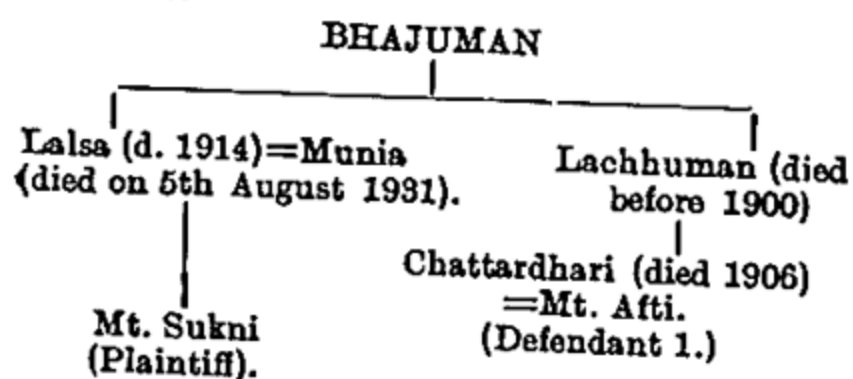
Appeal dismissed.

A. I. R. 1939 Patna 23

FAZL ALI AND CHATTERJI JJ.

Mt. Afti — Defendant — Appellant.

v.

*Mt. Sukni, Plaintiff and others —
Defendants — Respondents.*Appeal No. 138 of 1936, Decided on 23rd
August 1938, from original decree of Sub-
Judge, Chapra, D/- 27th February 1936.**Hindu Law—Partition—Proof of—Names of
two widows entered in Record of Rights as
having equal shares — Entries held sufficient
proof of separation.**Where the entries in the Record of Rights showed
that the names of two widows of two branches
were recorded in respect of certain properties with
a note that they had equal shares :*Held* that it was sufficient proof of the separa-
tion of the two branches of the family as the
entries showed that the two widows were equally
interested in the properties. [P 23 C 2]Mahabir Prasad and Jaleshwar Prasad
— *for Appellant.*S. K. Mitter — *for Respondents.***Chatterji J.** — This is an appeal by
defendant 1 in a suit brought by the plain-
tiff for possession of the disputed properties
on declaration of her title thereto. To
appreciate the controversy between the
parties the following genealogical table is
relevant.

The plaintiff's case is that the family was joint and that on the death of Lalsa, who was the last surviving coparcener, the disputed properties which belonged to the family devolved on his widow Mt. Munia and on the latter's death on the plaintiff. The defence of defendant 1 is that the plaintiff is not the daughter of Lalsa, that Lalsa and Chattardhari were separate and that Lalsa's wife Munia being an idiot, Lalsa made a gift of his half share to defendant 1. So she is in possession of the entire properties in her own right, half as heir to her husband and half by virtue of the gift. Defendants 2 and 3 are zarpeshgidars of a portion of the disputed properties under a deed executed by defendant 1. The learned Subordinate Judge has held that the plain-

tiff is the daughter of Lalsa and that Lalsa, Lachhuman and Chattardhari were all joint, and Lalsa being the last surviving coparcener was the owner of the entire family properties. He has disbelieved the defence story regarding the gift by Lalsa. He has accordingly decreed the entire claim of the plaintiff.

There are two points raised in this appeal, first, that the plaintiff is not the daughter of Lalsa, and second, that in any view she is not entitled to more than eight annas interest because the family was separate. On the first point the learned Subordinate Judge has, upon a careful consideration of the evidence which is entirely oral, come to the finding that the plaintiff is the daughter of Lalsa. There was very little to be said on behalf of the appellant on this point and without going into details it is enough to state that the learned Subordinate Judge's finding on this point is correct.

The real question is whether the two branches of the family were separate. The most important evidence on the point is a registered mortgage bond (Ex. B) dated 12th June 1907 executed by Lalsa and Mt. Afti jointly in favour of one Deocharan Singh. This document unmistakably shows that Chattardhari, husband of Afti, must have been separate from Lalsa, otherwise it is inconceivable that Lalsa would join Afti in executing a mortgage thereby admitting her title as his co-sharer in the mortgaged properties. The learned Subordinate Judge considers that this document strongly supports the plaintiff's allegation that the family was joint. This is entirely wrong. The explanation put forward on behalf of the respondent is that the mortgagee might for his own safety have insisted on Afti joining in executing the mortgage. It is difficult to accept this explanation. Then there are various entries in the Record of Rights (Exs. 5 and L) which show that Mt. Munia (Lalsa's widow) and Mt. Afti were recorded in respect of certain properties with a note that they had equal shares. This is entirely inconsistent with the theory that the family was joint. Mr. S. K. Mitra, the learned counsel on behalf of the respondent, has referred to certain rulings to support his contention that the mere fact that a widow's name is recorded in revenue papers is no evidence of separation in the family. I am afraid those rulings cannot be of any assistance

to us in considering the effect of the particular entries in the Record of Rights before us. Upon those entries there can hardly be any room for doubt that the two widows Munia and Afti were equally interested in the properties. Thus the documentary evidence in my opinion is quite convincing to establish the case of separation. Mr. S. K. Mitra has referred to the statements of witnesses examined on behalf of the defendants and pointed out certain discrepancies in their evidence. The main discrepancies are that whereas some witnesses say that the lands were not divided but the produce was divided, others say that the lands were divided, each plot being divided half and half. If the case had rested on the oral evidence alone, the matter would have been quite different, but, as I have already mentioned, there is documentary evidence of a decisive character to prove the separation. I therefore find that the two branches were separate and Lalsa had eight annas and Chatterdhari eight annas in the family properties. Accordingly, the plaintiff can have only eight annas share in the disputed properties. In the result I would allow the appeal in part and decree the suit only in respect of eight annas share in the disputed properties. The plaintiff will get possession over the same subject to the zarpeshgi rights of defendants 2 and 3 as directed by the learned Subordinate Judge. Success being equally divided, parties would bear their own costs throughout.

Fazl Ali J.—I agree.

N.S./R.K. *Appeal allowed in part.*

A. I. R. 1939 Patna 24

JAMES J.

Sonu Kurmi and another — Petitioners.

v.

Emperor.

Criminal Revn. No. 392 of 1938, Decided on 5th August 1938, from order of Sess. Judge, Gaya, D/- 23rd June 1938.

(a) Criminal P. C. (1898), S. 257, Proviso—Opportunity given to accused to cross-examine witnesses for prosecution after charge not availed of—Magistrate is justified in declining to resummon witnesses for cross-examination.

Where an opportunity is given to the accused to cross-examine the witnesses for prosecution after the charge is framed, but advantage is not taken of it, the Magistrate trying the case is justified under the Proviso to S. 257 in declining to recall the witnesses for cross-examination. [P 25 C 1]

(b) Criminal Trial — Appeal — Appellate Judge fixing day for hearing pleader for appellant and after hearing him dismissing appeal summarily — Judgment complete one, dealing with evidence in detail and with points raised by appellant — No grievance can be made of fact that no notice to Crown is issued.

Where on an appeal being presented before a Sessions Judge, he appoints a day for hearing the pleader, and after hearing him, dismisses the appeal summarily, but his judgment is a complete one dealing with the evidence in detail, and with the points raised on behalf of the appellant, no grievance can be made of the fact that he did not issue notice to the Crown, considering it unnecessary to call upon the Public Prosecutor to reply to the arguments adduced on behalf of the appellant. [P 25 C 1]

Dyhan Chandra — *for Petitioners.*

Govt. Advocate — *for the Crown.*

Order. — The petitioners have been convicted of attempted burglary in the town of Gaya. At the time of the occurrence in respect of which the petitioners have been convicted, they were under trial for another burglary for which they were convicted but were subsequently acquitted in appeal. In the present case the charge was framed on 12th April, when the hearing was adjourned till 5th May for cross-examination of the prosecution witnesses. On 5th May the trying Magistrate was ill and the trial was adjourned till the 25th. The petitioners who had been convicted had by this time been acquitted by the Sessions Court on appeal and had in this case been released on bail. On the 25th, when the prosecution witnesses attended Court for cross-examination for the second time, the petitioners prayed for an adjournment on the ground that they were not ready then to cross-examine the witnesses. The Magistrate declined to grant an adjournment and the pleaders who were appearing on behalf of the petitioners declined to cross-examine the witnesses. The witnesses were accordingly discharged. On the following day a petition was presented praying that the prosecution witnesses might be recalled for cross-examination under S. 257, Criminal P. C. The Magistrate pointed out that an opportunity had already been given for examination of these witnesses after charge and he declined to re-summon them. In appeal before the Sessions Judge the point was taken that cross-examination of the prosecution witnesses had not been permitted; but the learned Sessions Judge pointed out that an opportunity had been given of which the appellants had not availed themselves.

It is argued before me that when there had been no cross-examination after charge, the learned Magistrate ought to have issued process under S. 257 to recall the witnesses; but it is provided by S. 257 that when the accused had the opportunity to cross-examine a witness after the charge is framed, the attendance of such witness shall not be compelled under this Section unless the Magistrate is satisfied that it is necessary for the purposes of justice. I consider that after the opportunity had been given on the 25th and advantage had not been taken of it, the learned Magistrate was justified in acting under the Proviso in declining to recall these witnesses for cross-examination. When the appeal was presented before the Sessions Judge, he appointed a day for hearing the pleader and after hearing him dismissed the appeal summarily. It is argued that he ought not to have done this; but the judgment of the learned Sessions Judge is a complete one dealing with the evidence in detail and with the points raised on behalf of the appellants; and no grievance can be made of the fact that he did not issue notice to the Crown, considering it unnecessary to call upon the Public Prosecutor to reply to the arguments adduced on behalf of the appellants. I cannot interfere in this case and the application must be dismissed. The petitioners must surrender to their bail and serve out the unexpired portion of their sentences.

R.M./R.K. *Application dismissed.*

A. I. R. 1939 Patna 25

DHAVLE AND AGARWALA JJ.

Baiju Lal Pathak — Appellant.

v.

Smt. Maina Dai and others —

Respondents.

Appeal No. 137 of 1934, Decided on 2nd August 1938, from decision of Sub-Judge, Gaya, D/- 31st August 1938.

(a) Civil P. C. (1908), O. 32, R. 15—Allegation that defendant is of unsound mind or weak intellect—Procedure to be followed stated.

An allegation that defendant is of unsound mind or weak intellect and incapable of managing his affairs is placed on the same footing as an allegation of minority and requires similar treatment. Hence where there is an allegation that defendant is of unsound mind or weak intellect the Court should try that issue like any material issue in the case by placing the defendant under a (provisional) guardian ad litem or curator; and the

course to be followed subsequently would depend on what is established at the inquiry into the mental condition of the party: 16 *Mad* 344, *Rel. on.* [P 26 C 1, 2]

(b) Hindu Law—Joint family property.

Property acquired from an aunt by a member would not prima facie be the property of the joint family at all. [P 27 C 1]

S. M. Mullick, N. K. Prasad II and Sarjoo Prasad — *for Appellant.*

Sir Sultan Ahmad, Mahabir Prasad, K. N. Varma and K. Dayal — *for Respondents.*

Dhavle J.—This appeal arises out of a suit brought by Srimati Maina Dai as one of the three sisters of Babu Lachhuman Lal Pathak (who died in February 1932) for recovery of her one-third share in the properties left by her brother. Some of the properties claimed by her stood in the names of defendants 4 to 9, but the suit failed in respect of them, and we are not concerned with them in this appeal. Baiju Lal Pathak, defendant 3, was a first cousin of Lachhuman Lal, and he resisted the plaintiff's claim on the ground that he was joint with Lachhuman Lal and was entitled to the properties and had actually taken them by right of survivorship. This plea was overruled by the lower Court, and Baiju Lal appeals.

It appears that shortly before the institution of the suit there was a proceeding under S. 144, Criminal P. C., between Srimati Maina Dai and Baiju Lal, in which the latter succeeded. Before the first date fixed in the suit a written statement was filed on behalf of Baiju Lal admitting the plaintiff's claim. The case came on for hearing about a year afterwards; and when 7 or 8 witnesses had been examined for the plaintiff, a petition was filed by the mother of the appellant, alleging that he was of unsound mind and asking that she may be allowed to act as his curator in the case. The learned Subordinate Judge directed the mother to have defendant 3 examined by the Civil Surgeon and said that her application would be considered after taking into account the evidence of the Civil Surgeon. The Civil Surgeon apparently examined defendant 3 the next morning, but wanted to examine him again before giving an opinion about the mental condition of defendant 3. The learned Subordinate Judge did not consider it desirable, in view of the stage that the case had reached, to give further time to the mother of

defendant 3 to produce evidence regarding the mental condition of defendant 3 or to appoint her as curator without any evidence. He therefore ordered that "defendant 3 may, if he likes, appear in the case and give proper evidence." Shortly afterwards a petition was filed stating that his previous written statement had been filed "under undue influence of the plaintiff and her husband," and that he was a man of weak intellect. Upon this allegation the learned Subordinate Judge thought fit to postpone for a day the cross-examination that was going on, in order to investigate the circumstances in which the written statement had been filed.

The curious result was that though the learned Subordinate Judge, on the evidence that was produced before him, came to the conclusion that the written statement admitting the claim of the plaintiff had been filed under undue influence and misrepresentation from the plaintiff and her husband and was therefore not binding on him, he still left himself without any opportunity of properly going into the question of the mental condition of defendant 3. Defendant 3 was actually examined as a witness in the case, and the learned Subordinate Judge observes that he replied to all questions in a proper manner like a sane man. It was however only by his judgment in the case that he rejected the application of the mother for the appointment of a curator for defendant 3 "as the evidence in the record does not warrant the appointment of any curator for defendant 3".

And the learned Judge went on to find that defendant 3 has failed to prove that he is incapable of managing his affairs, or that the appointment of a curator is necessary.

Now, on the face of it, the procedure adopted by the learned Subordinate Judge was irregular. There was an allegation before him that defendant 3 was of unsound mind or weak intellect and incapable of managing his affairs. That allegation, which by O. 32, Rule 15, Civil P. C., is placed on the same footing as an allegation of minority and requires similar treatment, the learned Subordinate Judge was not in a position to reject forthwith. On the contrary he says that as this matter arose in the midst of the hearing of the case, the decision about the allegation of defendant 3 that he is of unsound mind was not made then, and defendant 3 was allowed to give evidence in support of the written statement filed by his mother.

The mental weakness was thus not directly put in issue at all, and it was only because there was on record a written statement which defendant 3 challenged as due to undue influence and misrepresentation that some evidence was apparently given regarding his actions; and it is on this evidence that the learned Subordinate Judge ultimately comes to the conclusion that defendant 3 had failed to prove that he was incapable of managing his affairs. This overlooks the consideration that if the defendant were in fact suffering from mental infirmity, he would be incapable of proving anything unless a guardian ad litem was first appointed for him; he would not otherwise be effectively joined as a party defendant. As the learned Subordinate Judge was not in a position to reject the allegation of weakness of mind, he should have tried that issue like any material issue in the case by placing defendant 3 under a (provisional) guardian ad litem or curator; and the course to be followed subsequently would have depended on what was established at the inquiry into the mental condition of the party: *compare* 16 Mad 344.¹ The fact that an abnormal written statement admitting the claim of the plaintiff was filed—abnormal because not long before defendant 3 had actually succeeded against the plaintiff in the proceedings under Sec. 144, Criminal P. C.—was itself sufficient to suggest doubts about whether the man was in his right mind. The learned Subordinate Judge somehow put these doubts away and came to the conclusion on no direct evidence that he refers to, that the written statement was due to undue influence and misrepresentation from the plaintiff and her husband, and it is a man in this condition that is called upon to prove his case after adopting a written statement that was subsequently filed by his mother. No finding arrived at in these circumstances against defendant 3 could be held to be binding on him.

The procedure adopted by the learned Subordinate Judge has moreover had the unfortunate result of affecting the trial on the merits. Time was applied for, but not given, though it is obvious that defendant 3, even if he had been in a normal condition of mind, could not be reasonably expected to be ready with any evidence at that stage, for he had originally admitted the claim of

1. Kasi Doss v. Kassim Sait, (1893) 16 Mad 344.

the plaintiff, and it would only be after the mother's written statement was adopted for him by the Court that issues could be framed as between him and the plaintiff, and before this was done, no question of evidence would arise so far as he was concerned. Attempts were moreover made on his behalf in his then condition to put in papers to prove his case, and the papers seem to have been rejected on the ground that they had not been filed in time. The substantial issue as between plaintiff and defendant 3 was whether or not Lachhuman Lal and defendant 3 were joint or separate. Admittedly a deed of partition had been executed in December 1914, but the case that defendant 3 attempted at that stage to establish was that that partition deed was only a paper transaction and that he and his cousin still remained joint. The learned Subordinate Judge negatived this plea, and in doing so relied among other things on the fact that defendant 3 had sold his residential house to one Kesho Lal in the lifetime of Lachhuman Lal.

It has been urged before us that this sale, which is not questioned, was in respect of a house acquired by defendant 3 from an aunt under a registered document. Property so acquired by the defendant would not *prima facie* be the property of the joint family at all, and Mr. Sushil Madhab Mullick, who appears for the appellant, has complained that defendant 3 did not have a proper opportunity of proving that the house was so acquired by defendant 3. It is impossible to hold that the complaint is without substance. This is but one instance of how the procedure followed by the learned Subordinate Judge has actually affected the case on the merits.

The decree of the lower Court must therefore be set aside. Defendant 3 has died during the pendency of the appeal; it would otherwise have been necessary to remand the case to the lower Court, with a direction that the question of his mental condition be properly gone into first and the case afterwards tried on proper issues framed in accordance with the law. Defendant 3 has been replaced on the record by a sister's son, who is anxious, and not unnaturally to assert the rights of Baiju Lal and defend the case properly. The question of the mental condition of Baiju Lal cannot now be further investigated, and in the circumstances, the parties before us have agreed (in order not to throw away labour already

gone through so far as can be helped) that the case be remanded to the lower Court with the following directions: That the defendant-appellant will be allowed to amend the written statement filed by the mother of Baiju Lal (deceased defendant 3) or file an independent written statement of his own. On the issues then arising, the defendant-appellant will be further allowed to adduce evidence, both oral and documentary, and ask for the cross-examination of such of plaintiffs' witnesses as he may consider necessary. The plaintiff, on the other hand, will have the right to cross-examine the defendant's witnesses and give such further evidence, oral and documentary, in proof of her claim as she thinks fit. I would therefore allow this appeal, set aside the decree of the lower Court as against the appellant, and remand the case to that Court for further trial. The lower Court will deal with the case on the lines indicated, and will deal with it as expeditiously as may be, and not later than the end of the year in any case. The costs of the hearing in this Court will abide the event. As Appeal No. 126 of 1934, arising out of the same case, has been kept pending at the instance of the plaintiff-appellant, the learned Subordinate Judge is requested to intimate to this Court as soon as he disposes of the case on remand. This will enable the High Court office to place Appeal No. 126 of 1934 before the Bench without delay.

Agarwala J.—I agree.

D.S./R.K.

Case remanded.

A. I. R. 1939 Patna 27

JAMES J.

Gaurishanker — Applicant.

v.

Bachha Singh — Opposite Party.

Criminal Ref. No. 25 of 1938, D/- 24th August 1938, made by Sess. Judge, Gaya.

Penal Code (1860), S. 504—Insult should be delivered to person insulted with intention that he may be provoked to commit offence.

For the offence under S. 504 it is necessary that the insult should be delivered to the person insulted with the intention that he may be there and then provoked to commit an offence. There is no offence when there has been no publication of that kind.

[P 28 C 1]

Janak Kishore, Dhyan Chandra, N. K. Prasad and Raj Kishore Prasad —

for Applicant.

R. K. Sinha — *Opposite Party.*

Order. — When the Prime Minister visited Gaya on 12th December 1937, a photograph was taken of the party assembled at the Bar Library. One of the persons in the group, which was a large one, was a Municipal Commissioner named Bachha Singh. It is said that another Commissioner, who apparently preferred that Bachha Singh's face should not appear in the photograph where he himself appeared, persuaded the photographer to remove Bachha Singh's face from a negative and some prints were prepared in which there was a black spot where Bachha Singh should have been. The photographer has been fined Rs. 30 under S. 504, I. P. C., and the Sessions Judge of Gaya has forwarded the record of the case under S. 438, Criminal P. C., recommending that the finding and sentence should be set aside. There is no evidence of publication to Bachha Singh, that is to say, there is no evidence to show that the photographer brandished the photograph before Bachha Singh or that he transmitted it to Bachha Singh. An agent of Bachha Singh purchased a copy from the photographer which he afterwards showed to Bachha Singh; but that is a different matter. For the offence under S. 504, it is necessary that the insult should be delivered to the person insulted with the intention that he may be there and then provoked to commit an offence; but there has been no publication of that kind here.

The reference of the learned Sessions Judge is therefore accepted. The finding and sentence are set aside and the fine, if paid, will be refunded.

D.S./R.K.

Reference accepted.

A. I. R. 1939 Patna 28

JAMES J.

Ragho Singh — Petitioner.

v.

Rambirich Singh and others —

Opposite Party.

Criminal Revn. No. 390 of 1938, Decided on 26th August 1938, from order of Senior Deputy Magistrate, Patna, D/- 26th May 1938.

Criminal Trial — Revision — Powers of High Court — Single mistake by lower Court of misreading evidence would not justify High Court in setting aside acquittal.

A single mistake on the part of the lower Appellate Court of misreading the evidence of a witness, would not justify the use of the extraordinary power which the High Court has in revision of setting aside an order of acquittal. [P 29 C 1]

Ganesh Sharma and S. Mustafi —

for Petitioner.

C. P. Sinha — *for Opposite Party.*

Order.—The petitioner complained that certain persons by erecting a bund across a stream had caused a diminution of the supply of water for the purposes of irrigation of Masarh village. The persons accused were placed on their trial and they were, in due course, convicted of the offence punishable under Sec. 430, I. P. C., while certain of the accused were also convicted under Secs. 143 and 144. The Record of Rights had described a right in the appellants' village to erect such a bund, but some years before there had been a proceeding under Sec. 147, Criminal P. C., in which the Sub-divisional Magistrate had found that the right to erect this bund described in the Record of Rights had not been exercised during the year before which proceedings were taken; and therefore he made an order against the men of the village of the accused forbidding them to erect such a bund until they should get an order from the Civil Court. The trying Magistrate came to the conclusion that whatever might have been the state of affairs at the time of the final publication of the Record of Rights, the right to erect the bund had not been exercised since the time of the proceedings under Sec. 147. On appeal, the Deputy Magistrate exercising powers under S. 407, Criminal P. C., set aside the conviction and acquitted the accused. One of the prosecution witnesses, a village chaukidar, had said in cross-examination that the people of Mandach erected a bund which the learned Appellate Magistrate thought was a description of the bund in dispute. It appears that this was a mistake committed by the Appellate Court. The learned Magistrate examined the Record of Rights and applied the presumption under Sec. 103-B, Ben. Ten. Act, finding further that it was proved by evidence that the right to erect the bund actually had been exercised within recent years. The learned Magistrate pointed out that the order in the case under Sec. 147, merely directed Ramkhelawan Singh and certain other definite persons not to construct the bund at the disputed place; but

that the order was not binding on anybody except the parties and that the finding did not amount to *res judicata* between anybody except the actual parties to the dispute.

The petitioner prays that this acquittal should be set aside in revision, relying mainly upon the fact that the Magistrate who was exercising appellate powers misread the evidence of the *chaukidar*. It is to be regretted that he did not read the evidence of the *chaukidar* more carefully; but I do not consider that a single mistake of this kind would justify the use of extraordinary power which the High Court has in revision of setting aside an order of acquittal. So far as the learned Magistrate is dealing with the entry in the Record of Rights and the effect of the order under Sec. 147, his judgment is not open to criticism. The learned advocate suggests that the lower Appellate Court committed a mistake also in remarking that the loss suffered by the complainant's village in consequence of the erection of the bund had not been proved; but here the learned Magistrate did not apparently mean that no witness had come forward making general statements of loss of crop, but merely that the loss of crop has not been proved to his satisfaction. I find myself unable to interfere with the order of acquittal in this case and the application is dismissed.

R.M./R.K. *Application dismissed.*

A. I. R. 1939 Patna 29

DEHAVLE AND AGARWALA JJ.

S. Naziruddin Ashraf — Appellant.

v.

Kharagnarain and another —

Respondents.

Appeal No. 97 of 1935, Decided on 12th August 1938, from original decree of Sub. Judge, Monghyr, D/- 30th April 1935.

Mahomedan Law—Guardian—De facto guardian cannot impose obligations on minor—Elder brother acting for himself and as de facto guardian of his minor brother, executing money bond for his father's debts—Minor is not liable.

Under Mahomedan law, a de facto guardian may incur responsibilities but he can impose no obligations on the infant. Hence where an elder brother purporting to act for himself and as de facto guardian of his minor brother executes a money bond in respect of both their shares of the liability for their father's debts, the creditor in a suit on the bond is not entitled to a joint decree as minor is not liable : *A I R 1918 P C 11, Rel. on.*

[P 80 C 1]

Gholam Muhammad and Ramanugrah N. Singh — *for Appellant.*

B. C. Mitra, Muhammad Hasan Jan and J. M. Ghosh — *for Respondents.*

Agarwala J. — Miajan, the father of defendants 1 and 2, died in 1930 leaving a widow, four daughters and two sons defendants 1 and 2. Prior to his death he had borrowed money from the plaintiff-respondent on five promissory notes. By a deed of partition dated 3rd January 1932, his heirs partitioned his properties amongst themselves according to the shares to which they were entitled under the Mahomedan law, and in respect of the amount due to the plaintiff on the hand notes each heir undertook liability for an amount proportionate to his or her interest in the estate of the deceased. The share of each of the sons was $3\frac{1}{2}$ annas, of the daughters $1\frac{3}{4}$ annas and of the widow 2 annas. Defendant 2 was at the time a minor. By the partition deed the minor's property was placed under the management of his elder brother, defendant 1. On 24th January 1932, defendant 1 executed a bond in favour of the plaintiff in respect of both their shares of the liability for their father's debt to the plaintiff-respondent. In executing the bond defendant 1 purported to do so for himself and as guardian of his brother, defendant 2. The bond was not in fact registered, and therefore did not operate as a mortgage bond but merely as a money bond, and it is on that basis that the plaintiff instituted the present suit against the two sons of Miajan. Defendant 1 admitted his liability for half the amount due under the bond but defendant 2, who attained his majority in August 1933, denied that defendant 1 had been his guardian or that he had power to bind him by purporting to execute the bond as his guardian. The Court below decreed the plaintiff's suit as to half of the claim against each of the two defendants. From that decision defendant 2 has preferred this appeal and the plaintiff has filed a cross-objection claiming that he is entitled to a joint decree against both the defendants.

It is contended on behalf of the appellant (defendant 2) that defendant 1 was merely a de facto guardian and that as such he had no authority to bind the appellant. The facts of the present case are peculiar in this respect that the appellant is undoubtedly liable to the plaintiffs for a part of his

father's debt not exceeding the amount of the property which he inherited from his father. There is no suggestion in this case that the appellant's share of his father's property is less than the amount for which the decree makes him liable. In so far as the bond in suit dealt with the appellant's liability for half the amount of the bond, it did not increase the amount for which the appellant was liable under the Mahomedan law. In very similar circumstances in 160 I C 268,¹ Beasley C. J. held that the minor was liable on a hand note renewed by his de facto guardian. But the limited nature of the powers of a de facto guardian of a Mahomedan minor was pointed out by their Lordships of the Privy Council in 45 Cal 878.² It is true that in that case their Lordships were dealing with a transfer of immovable property belonging to a minor but they also examined in some detail the position of a de facto guardian and pointed out that while such a person may incur responsibilities, he can impose no obligations on the infant. Certain exceptions, in the case of a minor who has no de jure guardian, were referred to but are not relevant to the present case. Defendant 1 therefore must be held to have had no power to bind defendant 2 by the bond. The plaintiff's remedy against the latter was not by suit on the bond but as he has chosen to sue on the bond his suit must fail as against defendant 2. It follows that the plaintiff is not entitled to a joint decree against the two defendants. The bond was executed by defendant 1 alone and as he had no power to execute it on behalf of defendant 2, he alone is liable on it. The decree of the Court below must therefore be modified in this respect that the plaintiff will have a decree against defendant 1 alone for Rs. 5082 as principal and Rs. 1287 as interest up to the institution of the suit and interest at 6 per cent. per annum on these amounts until realization.

The plaintiff will pay the costs of defendant 2 throughout. Defendant 1 will pay the costs of the plaintiff throughout.

Dhayle J.—I agree.

D.S./R.K.

Decree modified.

1. Venkatarayudu v. Khasim Saheb, (1935) 22 A I R Mad 1041=160 I C 268.

2. Imambandi v. Mutsaddi, (1918) 5 A I R P C 11=47 I C 513=45 Cal 878=45 I A 73 (P C).

A. I. R. 1939 Patna 30

VARMA J.

Ramavtar Prasad Verma—Petitioner.

v.

Satdeo Lal and others—Opposite Party.

Civil Revn. No. 266 of 1938, Decided on 25th July 1938, from order of Sub-Judge, Saran, Chapra, D/- 25th May 1938.

(a) Practice—Consolidation of suits—Question whether two suits should be consolidated or not depends upon whether in the long run it would be expeditious and advantageous to all concerned to have them tried together.

In deciding whether two suits should be consolidated or not, the whole question is whether or not in the long run, it will be expeditious and advantageous to all concerned to have the two suits tried together as analogous cases. [P 31 C 2]

Where the parties are almost all of them the descendants of a common ancestor and the decision of the two suits rests mainly on the question as to whether or not there was a partition in the family, as alleged by one or the other of the contesting parties, it would be convenient to consolidate the two suits and have them tried together. [P 31 C 1, 2]

(b) Civil P. C. (1908), Ss. 151, 115 — Trial Court refusing to consolidate the suits although they warrant consolidation — High Court can interfere in revision.

Where it appears that there is sufficient unity or similarity in the matter in issue in two suits to warrant their consolidation and yet the trial Court has refused to consolidate them, it is a fit case in which the High Court can interfere in its revisional jurisdiction : A I R 1933 Pat 61, Rel. on.

[P 32 C 1]

H. P. Sinha and K. P. Verma —

for Petitioner.

T. N. Sahai, A. P. Upadhya, B. B. Sahay

and A. B. N. Sinha —

for Opposite Party.

Order.—This is an application in revision on behalf of the plaintiff in Title Suit No. 17 of 1938 pending in the Court of the Subordinate Judge at Chapra. There was another suit, Title Suit No. 55 of 1937, which had been filed against the present petitioner along with others by the present opposite party Nos. 1 and 2, and which was pending in the Court of the Munsif, Second Court, at Chapra. The petitioner filed an application before the District Judge of Saran praying for a transfer of the suit pending in the Court of the Munsif to the Court of the Subordinate Judge where the suit filed by him was pending so as to have the two suits tried together inasmuch as he urged that the essential points for determination were the same in the two suits. The learned District Judge, by an order dated

25th April 1938, allowed the transfer as prayed for, and also rejected a rejoinder filed afterwards by the opposite party Nos. 1 and 2 on 26th April 1938. The two suits are now accordingly pending in the same Court of the Subordinate Judge. Thereafter it appears that on 2nd May 1938, the plaintiffs who are the present opposite party Nos. 1 and 2, of Suit No. 55 which has been transferred, filed a petition before the Subordinate Judge under S. 10, Civil P. C., for a stay of proceedings in the subsequent suit (Title Suit No. 17) filed by the present petitioner. The learned Subordinate Judge refused to stay proceedings and directed the parties to proceed with the trial of the former suit No. 55 in which the petitioner was impleaded as a defendant, and while making this order he has overruled the prayer of the petitioner for consolidating or treating the two suits as analogous cases. The plaintiff-petitioner has come up in revision against that part of the order of the learned Subordinate Judge which rejects the prayer for consolidating the two suits. Mr. Rai Tribhuvan Nath Sahay has raised the question of the jurisdiction of this Court in interfering with an order like the one complained of in this application in revision. Before dealing with the point, I propose to look into the reasons given by the learned Subordinate Judge for refusing to consolidate the suits. He says as follows :

As to the question of consolidating the trial of the two suits, apart from the application or objection of any party in that behalf, the Court had an inherent power to consolidate if it should tend to the convenience of the Court and the parties. I doubt that so far as the main question of jointness or separation between the three branches of the sons of Mahesh Lal is concerned, the evidence in both the suits will be the same. But as the former suit is ripe for hearing while the latter may take some time yet to get ready and while the defendants in the latter suit are some of them different also, I should think that it would be advisable to proceed with the hearing of the former suit that has been received on transfer.

So, of the three considerations given by the learned Subordinate Judge, it appears that the important question of jointness or separation is common to both the suits. As a matter of fact, in the plaint of Title Suit No. 17 allegations made in Title Suit No. 55 have been repeatedly challenged. The next reason given by the learned Judge is that Title Suit No. 17 will take some more time to be ready for trial ; but the whole question is whether or not in the long run it will be expeditious and advantageous

to all concerned to have the two suits tried as analogous cases. So far as the third consideration given by the learned Subordinate Judge is concerned, I have gone through the plaints of both the suits and examined the respective genealogies given therein by the contesting parties. It is clear that the parties are almost all of them descendants of a common ancestor ; and the decision of the two suits rests mainly on the determination of the question as to whether or not there was a partition in the family as alleged by one or the other of the contesting parties. From the scrutiny, I also find that of the 17 defendants impleaded in Title Suit No. 17, only defendant 17, Babu Uma Nath Prasad, son of Babu Juthan Lal does not appear to have been impleaded in the former Suit No. 55 whilst defendants 4 and 5 were represented by their father Babu Satdeo Lal, one of the plaintiffs of that suit, defendant 7 being the wife of defendant 9 of that suit, and defendant 14 being represented by his father Babu Pancham Lal who is defendant 2 of that suit. It cannot therefore be said that the parties to the two suits are altogether different ; and since the determination of the suits rests mainly on a common question, it must be convenient to have them tried as analogous cases.

Mr. Rai Tribhuvan Nath Sahay while questioning the power of this Court to interfere in revision has said that no prejudice would be caused to the other side if the cases are tried separately, and that if the issues are similar, one of the suits would be postponed under S. 10, Civil P. C. It may be mentioned here that the opposite party Nos. 1 and 2, for whom Mr. Rai Tribhuvan Nath Sahay appears, did as a matter of fact apply for a stay of proceedings in Suit No. 17, and the learned Subordinate Judge has refused to grant the prayer holding that the conditions laid down in S. 10 had not been fulfilled. The learned advocate has referred to a number of decisions on the point whether this Court can interfere in its revisional jurisdiction in a case like this, but it is not necessary to refer to them. I respectfully agree with the view taken by James J. in 13 P L T 726,¹ where his Lordship set aside the order of the Court below consolidating suits. On a consideration of the facts and

1. *H. Hamid v. M. Abdul Ghanl*, (1933) 20 A I R Pat 61=141 I O 473=13 P L T 726.

circumstances of the case the learned Judge observed as follows :

It would appear that the Subordinate Judge has acted with material irregularity in the exercise of his jurisdiction by ordering consolidation against the will of practically all the parties, in two cases which have so little in common. It would be indeed most improper to force upon the District Board and the Special Officer, in conducting their litigation association with a partner such as Abdul Ghani, with whom they do not desire to be associated ; and I do not consider that such an order can be regarded as a proper exercise of the inherent power to consolidate suits.

It is clear that Suit No. 17 is a sequel to the former Suit No. 55 and from a casual reading of the plaints in the two suits it appears that there is sufficient unity or similarity in the matters in issue in the two suits to warrant their consolidation. In my opinion, this is a fit case in which I should interfere with the order complained of in the revisional jurisdiction of this Court. I would therefore allow the application with costs ; hearing-fee two gold mohurs.

R.M./R.K.

Application allowed.

A. I. R. 1939 Patna 32

JAMES J.

Registrar Co-operative Societies, Bihar
— Appellant.

v.

Ramkishun Mandar and others —
Respondents.

Appeal No. 607 of 1936, Decided on 11th August 1938, from appellate decree of Sub-Judge, Second Court, Monghyr, D/- 21st April 1936.

(a) Civil P. C. (1908), S. 80, O. 1, R. 3—Certificate debtor incurring liability to Co-operative Society — Amount of liability determined by award of Registrar, Co-operative Societies — Certificate issued and in execution thereof property advertised for sale—Claim by plaintiff to attached property summarily dismissed by certificate officer — Suit by plaintiff to set aside such decision — Plaintiff joining Registrar Co-operative Societies as party to suit — No proof of service of notice under S. 80, Civil P. C. on Registrar—Held that Registrar was not proper party to suit — In any case, service of notice under S. 80, Civil P. C. not having been proved he could not remain on record.

A suit was instituted to set aside the summary decision of a certificate officer in a case of claim to attached property which had been made by the plaintiff. The certificate-debtor had incurred liabilities to a Co-operative Society which was in liquidation and the amount of liability had been determined by an award of the Registrar of the Co-operative Societies. A certificate was then issued,

in execution of which the suit property was advertised for sale. The plaintiff joined as one of the parties to the suit the Registrar, Co-operative Societies. There was no proof of service of notice under S. 80, Civil P. C., on the Registrar :

Held that the Registrar was not a proper party to the litigation. He ought not to have been joined by the plaintiff and he should have been struck off by the trial Court as soon as the plaint was received. That in any case the Registrar could not remain on record as party because there was no proof of service of notice under S. 80, Civil P. C.: *A I R 1927 P C 176, Rel. on.* [P 33 C 1]

(b) Civil P. C. (1908), S. 80 — Provisions of S. 80 must be strictly observed.

The provisions of S. 80 are imperative and must be strictly observed: *A I R 1927 P C 176, Rel. on.* [P 33 C 1]

B. P. Sinha — *for Appellant.*

S. N. Bose — *for Respondents.*

Judgment. — This appeal arises out of a suit which was instituted to set aside the summary decision of the certificate officer in a case of claim to attached property which had been made by the plaintiff. The attached property was a house which belonged to the certificate debtor. This man had incurred liabilities to a Co-operative Society which was in liquidation and the amount of his liability had been determined by an award of the Registrar of Co-operative Societies. A certificate was then issued in execution of which this house was advertised for sale. The plaintiff joined as parties to the suit, the Registrar of Co-operative Societies and the auction-purchasers. The Registrar objected that the suit against him was not maintainable, and that notice under S. 80, Civil P. C., had not been served on him as required by law. He also objected that the plaintiff's purchase was a sham transaction. The Courts below found that the Registrar was a proper party to this litigation and that notice had been adequately served on him and they also found that the purchase by the plaintiff had not been shown to be a sham transaction. The suit was decreed, and the appeal was dismissed. In each instance the Registrar was required to pay the plaintiff's costs. This appeal is preferred by the Registrar of Co-operative Societies, who objects to so much of the decree as has made him liable to pay the plaintiff's costs on the ground that he was not a proper party and that notice on him was not served as required by law.

The learned Government Pleader arguing the appeal has also pointed out that the trial Court omitted to notice that after the dismissal of the objection by the certificate

officer, the burden lay on the plaintiff to prove that the transaction by which he acquired title to the house was a real and genuine transaction but, if the Registrar is not a proper party to these proceedings, he can hardly ask at the same time that he should be struck off as a defendant and that the suit should be remanded for further hearing. In fact, as Mr. Bose points out on behalf of the plaintiff-respondent, the finding of the learned Subordinate Judge, though he speaks rather ambiguously here and there, is based more on appreciation of the plaintiff's evidence than on the absence of evidence on the side of the defendants.

The Registrar who made the award was not a proper party in this litigation. He ought not to have been joined by the plaintiff, and he should have been struck out by the Munsif as soon as the plaint was received. In any event, the Registrar could not properly remain on the record as a party, because there was no proof of service of notice under S. 80, Civil P. C., and he had specifically taken the objection that notice had not been served. Some paper which purported to be a notice was sent by post addressed to the Registrar of Co-operative Societies through the Secretary of the Central Co-operative Bank of Monghyr. The notice was delivered to the Secretary at Monghyr on 3rd April 1934. There is no evidence of any kind to indicate that the Secretary conveyed the notice to the Registrar, and there is no admission that the Registrar ever received it. If this was to be proved as a valid notice, it would have to be proved that the Secretary, accepting the office of agent of the plaintiff, delivered this letter to the Registrar or to his office in Patna within two days of his having received it at Monghyr. Mr. Bose suggests that we ought to presume that all this was done by the Secretary; but, it was not part of the Secretary's duty to carry letters of this kind to the Registrar and it must be held that service had not been proved. The learned Subordinate Judge has remarked that a notice under S. 80 is sufficient if it substantially fulfils its objects in informing the party concerned generally of the nature of the suit intended to be filed, citing two decisions of the Bombay High Court which were disapproved by the Privy Council in 51 Bom 725.¹ It may be remarked that it

has not been proved in this case that Registrar was informed of the nature of the suit within two months of its institution; and it certainly cannot be held that the provisions of S. 80, Civil P. C., were observed. That being so, since the provisions of S. 80 are imperative and must be strictly observed, the suit against the Registrar ought to have been dismissed on that ground alone, as was done by the Privy Council in the case which has been mentioned.

The appeal is accordingly allowed with costs. The decrees under appeal are set aside so far as they affect the Registrar of Co-operative Societies; and the suit is dismissed as against the Registrar with costs throughout. The decree as against the other defendants is not affected by this order.

R.M./R.K.

Appeal allowed.

A. I. R. 1939 Patna 33

WORT AG. C. J. AND
MANOHAR LALL J.

Parmeshwari Singh and others —
Appellants.

v.

Ranjit Singh and others—Respondents.

Appeal No. 5 of 1938, Decided on 16th August 1938, from appellate order of Dist. Judge, Bhagalpur, D/- 12th August 1937.

Limitation Act (1908), S. 7—Decree passed on 28th January 1932 in favour of four persons, grandfather who was karta of joint Hindu family, his two sons, and grandson who was minor—Execution taken out on 26th September 1935—Decree-holders relying on S. 7—Minor represented by his grandfather as next friend—Next friend, i.e. grandfather, held could not give discharge without concurrence of minor under O. 32, R. 6, Civil P.C.; limitation did not run against persons other than minor and execution held not barred—Application for execution by decree-holder other than minor was competent.

Order 32, Rule 6, Civil P. C., is mandatory in the sense that no compromise on behalf of a minor can be entered into without the leave of the Court. The inhibition with regard to a discharge without the consent of Court under O. 32, Rule 6 which applies to a person in one capacity would apply also in his other capacity, in other words when once a person is appointed a guardian ad litem or appears as a next friend, O. 32, R. 6 equally applies and there being an inhibition the test laid down by S. 7, Limitation Act, applies. [P 34 C 2]

A decree having been obtained on 28th January 1932 in favour of four persons, the grandfather, who was the karta of a joint Hindu family, his two sons and a grandson who was a minor, the first execution was taken out on 26th September 1935. The decree-holders relied on Sec. 7, Limitation Act, to save the bar of limitation. It appeared

1. Bhagchand Dagadusa v. Secretary of State, (1927) 14 A I R P O 176 = 104 I O 257 = 51 Bom 725 = 54 I A 338 (P O).

that the minor was represented by a next friend, probably his grandfather :

Held that as the next friend, i.e. the grandfather, could not give a discharge without the concurrence of the minor, limitation did not run against the persons other than the minor under S. 7 and the application was not barred by limitation. The application by the decree-holders other than the minor was competent : *A I R 1925 Mad 78 ; 36 Mad 295 (PC) and 1 Cal 226 (PC), Rel. on.* [P 34 C 2]

Bindhyeshwari Prasad—*for Appellants.*

Barhamdeo Narain — *for Respondents.*

Wort Ag. C. J.—This appeal is by the judgment-debtor against the order of the District Judge allowing the appeal against the decision of the Subordinate Judge in an execution case. The only point was whether the application for execution is barred by limitation. The first execution was taken out on 26th September 1935, and the decree having been obtained on 28th January 1932, in favour of four persons, the grandfather who was the karta of the family, his sons and a grandson who was a minor, it is clear that the application would be barred by limitation unless some provision of the Limitation Act could be called to the aid of the decree-holders. The decree-holders rely upon Sec. 7 of that Act. S. 7 provides that where one of several persons who are jointly entitled to make an application or to institute a suit is under a disability, the question whether that disability enures to the benefit of the other decree-holders or applicants depends upon applying the test whether the persons who are not under a disability could give a discharge without the concurrence of the person under such disability. I do not think there can be any doubt in this case that the grandson (the minor) appeared by his nearest friend, whoever that may have been, probably his grandfather. There are certain references in the record which lead us to suppose that to be the case.

At one stage of the argument, it was thought necessary to send for the record of the case for the purpose of determining whether a guardian had been appointed by Court but at that moment there was some misapprehension and it is now clearly seen that no such application is necessary having regard to the fact that the minor was amongst the applicants and not a defendant or respondent to the application. We must therefore act on the assumption that the minor, as I have said, appeared by his next friend whether he appeared by the next

friend (the minor being the applicant) or whether he appeared by his guardian ad litem (being defendant to the suit or respondent to the application in execution), O. 32, R. 6, equally applied which is mandatory and is mandatory in the sense that no compromise can be entered into without the leave of the Court. Therefore we have to apply the test of S. 7 on the assumption, in this case that the grandfather could not give a discharge on behalf of the minor.

The proposition, I think, clearly appears from the decision of certain cases which are referred to by the Chief Justice in 47 Mad 920.¹ Dealing with this question, the learned Chief Justice pointed out that there was a number of decisions on this point culminating in the decision of the Madras Court in *Ganesha Row v. Tulja Ram Row*.² That case as it appeared to the learned Judges of the Madras Court was this. The party there being a defendant or respondent and being a minor was represented by a guardian ad litem and the question arose as to whether a discharge could be given. There was an inhibition with regard to a discharge without the consent of the Court under O. 32, R. 6 so far as regards the father or the managing member was concerned in his capacity as guardian ad litem. But the learned Judges came to the conclusion that there was no such inhibition with regard to that person as managing member of the joint Hindu family and therefore as a representative of the minor member. The case came before their Lordships of the Privy Council,³ and the effect of the decision it clearly appears, was that the inhibition as regards one capacity would apply also to a person in his other capacity: in other words when once a person is appointed a guardian ad litem or, (as in this case) appears as a next friend, O. 32, R. 6, equally applies and there being an inhibition, the test laid down by Sec. 7, Limitation Act, applies. Applying that test, we conclude that the next friend could not give a discharge and therefore limitation did not run as against the other persons, that is to say, persons other than the minor.

Then it was contended that if limitation did not run and the minor was entitled to

1. *Latchmana Chetty v. Subbiah Chetty*, (1925) 12 A I R Mad 78=82 I C 785=47 Mad 920=47 M L J 389.
2. (1909) 21 M L J 1093=3 I C 928.
3. *Ganesha Row v. Tulja Ram Row*, (1913) 36 Mad 295=19 I C 515=40 I A 132=25 M L J 150 (P C).

bring his application for execution after the disability had disappeared, the application for execution was premature. The answer to that case seems to me to be clearly provided by the case in 3 I A 7.⁴ In my judgment, therefore, the decision of the learned Judge in the Court below was right. The appeal must therefore be dismissed with costs.

Manohar Lall J.—I entirely agree.

R.M./R.K.

Appeal dismissed.

4. *Phoolbus Koonwur v. Jogeshur Sahoy*, (1875)
1 Cal 226=3 I A 7=25 WR 285=3 Sar 573=
3 Suther 236 (P C).

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MOHAMAD NOOR AND ROWLAND JJ.

Emperor

v.

Sadasibo Majhi and others — Accused.

Death Ref. No. 4 of 1938 (Orissa) and Criminal Appeal No. 21 of 1938, Decided on 29th August 1938, made by Agency Sess. Judge, Koraput, D/- 30th June 1938.

(a) Criminal Trial — Practice — Charge once framed should not be dropped before trial ends — Charges framed under more offences — Judge dropping some of them must record reasons — Withdrawal of some charges before conviction based on others is premature.

Once a charge is framed, it should not be dropped until the conclusion of the trial, unless on the face of it, it is wholly inappropriate or the trial is open to attack on the ground of misjoinder or multifariousness of charges. [P 36 C 1]

When an accused is charged for offences under more than one Section and the Judge does not take up the trial of some of the charges, nor does he cancel them, he must record some order in respect of the charges not taken and should not leave them in air; it is not competent for him to quash the commitment though he can stay the trial of some charges and allow them to be withdrawn on conviction being had on other charges. But, it is premature to withdraw some charges before conviction is based on other charges: *A I R 1929 Pat 275, Rel. on.* [P 36 C 1]

(b) Criminal Trial—Confession of co-accused corroborated by other evidence is sufficient to support conviction.

No doubt, Sec. 80, Evidence Act, requires that the confession should be one affecting its maker but it does not go so far as to require that confession should claim for its maker the leading part in the crime. [P 37 C 1]

It is a rule of prudence, if not of law, that against a co-accused, confession is sufficient to support a conviction, if it is substantially corroborated by good evidence from other sources; but, it is not necessary that such corroborative evidence should

by itself be sufficient to support the conviction: *Case law discussed.* [P 37 C 2; P 38 C 1, 2]

(c) Criminal Trial—Identification of property not discredited by absence of test identification — Court is to act on evidence of witnesses as to identification.

Identification of property cannot be discredited only on the ground that test identifications were not held. There is no magic about test identification. The evidence on which the Court has to act is the identification by the witnesses at the trial and the question is whether the witnesses are to be believed or not. [P 38 C 2]

(d) Criminal Trial—Confession of co-accused and evidence of approver distinguished (*Per Mohamad Noor J.*)

Confession of a co-accused cannot be placed on the same footing as the evidence of an accomplice. The evidence of an accomplice is, as a matter of law, sufficient for a conviction. The Courts are by law allowed but not compelled to presume him unworthy of credence unless he is corroborated. If, in spite of warning, a jury believes him without corroboration, the High Court cannot interfere. The confession of an accused can only be considered against his co-accused. Even this would not have been permissible but for S. 30, Evidence Act. The Act itself gives it a position inferior to the evidence of an approver. There must be some evidence which when weighed after considering the confessions of the co-accused should bring the charge home to the accused: *A I R 1929 Pat 212 and A I R 1938 Pat 108, Dissent.; A I R 1927 Pat 257, Rel. on.* [P 39 C 1; P 40 C 1]

Public Prosecutor — *for the Crown.*

M. Azizulla — *for Accused.*

Rowland J. — The Agency Sessions Judge of Koraput has made this reference for confirmation of the sentences of death passed on Sadasibo Majhi and on Jalla Dhonorjoy Domb under Sec. 302, I. P. C., for the murder of Sunamani Dondasena, a widow aged about 60, resident in village Jodapalli, a hamlet of Dungiaputthi. The murder is said to have taken place on the night of 8th November 1937, in the course of a dacoity committed by the two prisoners above-named and Orjuno, Challan, Akutia Gudia and Gusang Soma at the house of Sunamani Bewa. It was the prosecution case that this old woman was of substantial means and that in the dacoity considerable sums in cash as well as numerous gold ornaments including properties of the lady herself and articles deposited with her by way of pledge or pawn were stolen by the dacoits and that some of the stolen properties were recovered from the possession of the five persons I have named and also from Chanda Loichan and Kepai Ghasi who are said to have received such articles from the dacoits knowing them to be stolen property.

On these facts the Stationary Sub-Magistrate of Jaypur committed for trial at the Court of Session these seven persons, namely Sadasibo Majhi (accused 1), Orjuno Challan (accused 2), Akutia Gudia (accused 3), Jalla Dhanurjoy Domb (accused 4), Gusang Soma (accused 5), Chanda Loichan (accused 6) and Kepai Ghasi (accused 7). Against the first five he framed charges under Ss. 449, 396 and 302, I. P. C. Against the sixth and seventh the charge framed was under S. 414. The fourth accused was also charged under S. 75, I. P. C., as being liable to enhanced punishment by reason of previous convictions. When the case came before the Sessions Judge, he framed a new charge under Ss. 302 and 34, I. P. C., and proceeded to try accused 1 to 5 on this charge. He excluded from the trial the charge against accused 6 and 7 reserving their case for a separate trial. As regards the charges under Ss. 449 and 396 against accused 1 to 5, he appears neither to have cancelled these charges nor to have taken up the trial of them. The Sessions Judge ought to have recorded some order in respect of these charges and should not have left them in the air. He has given no reason for not trying them; and he was not competent (under S. 215) to quash the commitment, though he could (under Sec. 240) stay the trial of some charges or allow them to be withdrawn on conviction being had on the murder charge: in that case the consequences set forth in Sec. 240 would follow in the event of the conviction being set aside. If his intention was to withdraw the charges, I would consider it, in the words of Fazl Ali J. in 8 Pat 289¹ "premature" to do so "before there was time to judge what value could be properly attached to the confession and which part of it was liable to be rejected and which part of it had been sufficiently corroborated." "The rule of caution" (it was there said)

is that it is better to have too many charges than too few and once a charge has been framed, it should not be dropped until the conclusion of the trial unless on the face of it, it is wholly inappropriate or the trial is open to attack on the ground of misjoinder or multifariousness of charges.

The facts and the history of the investigation are stated in the judgment of the Sessions Judge and it is unnecessary to repeat them at length. The deceased was last seen alive in her own village Joda-

palli on 8th November, and her body was found about a hundred yards from her house at a stream called Kusumjodi the next morning. Death was due to strangulation with dislocation of vertabæ of the neck. There were cut marks on her left ear from which a gold ornament appeared to have been torn. No fruitful clue was obtained till about the beginning of December when the police got some information which led them to make searches. Properties were recovered from the possession of each of the five accused. I shall deal later with the recoveries and evidence of identification of some of the properties. Four of the accused, that is to say all except accused 1, made confessions before a Magistrate and substantially the convictions rested on the confessions coupled with recovery of stolen and suspicious properties. In addition, there is some evidence of movements and suspicious acts of the accused persons. The first accused and the second, who is his brother-in-law, are residents of Jayantagiri, about twenty miles from the home of the deceased. Accused 3 is of the same village. Accused 4 is of village Mewa, twelve miles from Jayantagiri, and accused 5 is of Sindhiput, six miles from Mewa. According to the confession it was accused 1 who organized and led the gang. He sent accused 3 to call accused 4 and accused 1 and 4 planned to murder Sunamani and take her money and ornaments. It was accused 4 who called accused 5 and brought him in.

The description of the murder is given in the several confessions in substantial agreement, the principal difference being that according to accused 2, 3 and 5 these persons were posted outside to keep guard against any interruption while accused 1 and 4 entered the house, overpowered and killed the woman, whereas accused 4 says that while he and accused 1 took the principal parts in gagging the woman's mouth and twisting her neck, the other three accused (2, 3 and 5) also assisted in overpowering her by catching her legs and hands. According to the confessions each of the confessing accused got Rs. 60 cash and some ornaments. All the confessions were retracted before the committing Magistrate and at the trial, and the accused persons who made them, have said that they gave those statements under pressure brought by the police. There is no evidence of any such pressure having been brought.

1. Kunja Subudhi v. Emperor, (1929) 16 A I R Pat 275=1929 Cr C 62 = 116 I C 770 = 30 Cr L J 675=8 Pat 289=10 P L T 549.

The Magistrate recording the confessions questioned the accused with commendable care and I have no doubt that the confessions were entirely voluntary. One of the accused, namely Gusang No. 5, told the Magistrate that there had been some attempt at tutoring him to change his story so as not to implicate accused 1, but he did not yield to the suggestion.

It has been argued that the confessions are self exculpatory, that is to say they did not implicate the makers in the same way as the other persons mentioned in them and therefore should not be considered as against the other accused, particularly accused 1. No doubt Sec. 30, Evidence Act, requires that the confession should be one affecting its maker and this has been always, since as far back as in 2 All 444,² understood to mean that the confession must incriminate its maker or it is of no value against a co-accused but each of the confessions in the present case fully implicates its maker in the guilt of dacoity with murder and of participation by assistance at the actual murder, so that principle does not avail the defence here; the law does not go so far as to require that the confession should claim for its maker the leading part in the crime. Then, it is said that a conviction cannot be based on confessions unless there is other circumstantial evidence sufficient to support the conviction independently of the confessions. There is an obiter dictum to this effect in 54 Mad 75,³ where Reilly J. observed that

The confession cannot take the place of evidence against the co-accused, nor can it be added to supplement evidence otherwise insufficient.

Now undoubtedly the rule is that the confession of a co-accused uncorroborated by any other evidence is not alone sufficient to support conviction. There is some difference of opinion as to whether this is a rule of law, that is to say a conviction based on confession of co-accused alone would be bad in law, or whether it is a rule of practice which has all the reverence of law. The former view is taken by the Judges composing a Full Bench of the Calcutta High Court which decided the leading case in 4 Cal 483⁴ and followed by Jenkins C. J. in

2. *Empress of India v. Ganraj*, (1878) 2 All 444.
3. *Periaswami Moopan v. Emperor*, (1931) 18 A I R Mad 177=1931 Cr C 281=129 I C 645=82 Cr L J 448=54 Mad 75=59 M L J 471.
4. *Empress v. Ashootosh Chuckerbutty*, (1879) 4 Cal 483=8 C L R 270 (F B).

38 Cal 559.⁵ The latter was taken in the Allahabad High Court in 29 All 434⁶ and in the Bombay High Court in 38 Bom 156⁷ where Macleod J. said that:

Confession in Sec. 30 cannot be restricted to an unretracted confession, as once a confession is proved, it may be taken into consideration. Nor do I think,

he said, that words can be read into the Section when there is nothing in the Section to fetter the discretion of the Court, or that there is anything in the Section itself which prevents a Court from convicting after taking the confession into consideration. But, I do think that the High Courts in India have, as they are entitled to do, laid down rules of practice which deserve all the reverence of law so that they ought to be observed by Judges when exercising their discretion under Section 30.

In this High Court the Calcutta view was accepted in 8 P L T 566,⁸ but not in 8 Pat 262⁹ or in 16 Pat 612.¹⁰ The question which of those views should prevail is in the present case academic, for, on the one hand the whole of the facts are open to us as a Court of fact, and on the other hand, none of the accused is sought to be convicted on an uncorroborated confession. The question may require consideration in a case in which it directly arises. But the point with which we are concerned here, is whether the above rule is to be extended to the length of laying down that when a conviction is sought to be based on the confession of a co-accused together with corroborative evidence, there is a rule that such corroborative evidence cannot be used unless it is sufficient, if believed, itself to support a conviction. This was the opinion of Jackson J. in 4 Cal 483⁴ above referred to. He said:

An accused person other than he who has confessed cannot lawfully be convicted upon such confession alone, nor in my opinion ought he to be convicted on the ground of such confession corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction.

5. *Emperor v. Lalit Mohan*, (1911) 38 Cal 559 = 10 I C 582 = 15 C W N 593 = 12 Cr L J 286 (S B).
6. *Emperor v. Kehri*, (1907) 29 All 434=4 A L J 310=1907 A W N 140=5 Cr L J 860.
7. *Emperor v. Gangappa Kardepa*, (1914) 1 A I R Bom 805 = 21 I C 673 = 38 Bom 156 = 15 Bom L R 975=14 Cr L J 625.
8. *Devendra Bhattacharya v. Emperor*, (1927) 14 A I R Pat 257=101 I C 881 = 28 Cr L J 497 = 8 P L T 566.
9. *Sheo Narain Singh v. Emperor*, (1929) 16 A I R Pat 212=117 I C 43=8 Pat 262= 30 Cr L J 716=10 P L T 228.
10. *Emperor v. Mangru Kisan*, (1938) 25 A I R Pat 108=173 I C 507 = 39 Cr L J 325 = 16 Pat 612=19 P L T 104.

This extension of the doctrine was not accepted by the majority of the Full Bench. Garth C. J. said:

How far any corroborative evidence would be sufficient, coupled with confession, to convict a prisoner, must depend on the circumstances of each particular case.

In S P L T 566⁸ Scroop J. quotes both 4 Cal 483⁴ and 38 Cal 559⁵ as laying down that corroboration by circumstantial evidence is not sufficient unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction. With great respect, the majority of the Judges who decided 4 Cal 483⁴ laid down no such proposition, and it was advanced as a rule of prudence, and not of law, even by the minority as is clear from the words I have quoted from the judgment of Jackson J. with whom McDonell J. concurred, and I find nothing in the judgment of Jenkins C. J. in the later case to support this extension of the doctrine. Jenkins C. J. said:

The Court can only treat a confession as leading assurance to other evidence against a co-accused. Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused alone would be bad in law.

I do not think the learned Chief Justice meant to lay down any doctrine as to the amount of corroboration required. The remarks of Scroop J. seem to me to be obiter dicta and the supposed rule to be not well founded. Its implication is that the Court must assess the effect of the corroborative evidence independently as a condition precedent to considering the confession and applying its mind to determine the cumulative effect of the confession and corroborative evidence taken together. This is a mental gymnastic which I find it difficult to believe that the law requires a Court to practise. The definition of proof in S. 3, Evidence Act, makes the real test to be whether after considering the matters before it the Court believes a fact to exist or considers its existence so probable that a prudent man ought to act upon the supposition that it exists. The criterion is whether the matters before the Court taken as a whole carry conviction. I can find no warrant in the statute for requiring a Court to speculate as to what its findings would be if the materials had been something different, as a preliminary to making up its mind what it thinks of the case on the materials as they stand. Not that I wish in any way to minimize the importance which

experience teaches should be attached to independent corroboration of a confession not only in its general outlines but also as against each individual accused affected by it. I would accept, as a rule, at least of prudence if not of law, the statement in 15 P L T 711¹¹ that against a co-accused a confession "can carry no weight unless it is substantially corroborated by good evidence from other sources." The judgment of the learned Sessions Judge does not show separately the extent to which the case against each individual accused is corroborated by the finds of property; and this aspect of the case needs further examination. (After considering the corroborative evidence against accused 1 by considering the evidence as to identification of property, etc. his Lordship proceeded.) In argument it was sought to discredit the identifications of property on the ground that test identifications were not held. Personally I see no magic about test identifications. The evidence on which the Court has to act is the identification by witnesses at the trial and the question is, are the witnesses to be believed or not? I have no doubt as to the identification of material objects 11, 12 and 13 as articles stolen in the dacoity, and I am of opinion that as against this accused there was sufficient corroboration, that the case is true and that he is guilty of the offence. (His Lordship then considered evidence against the other accused and continued.) The explanation of the accused as regards the finding of articles has been in each case on the same lines, that is to say, none of them have claimed to be the owner of any of these properties but all have said that the articles were in some way foisted by the police. Of this there is no evidence and the testimony of the witnesses who speak of the recovery of the articles in the manner alleged by the prosecution has not in any way been shaken.

The Sessions Judge has referred to some other corroborative evidence as regards movements of accused. (His Lordship considered this aspect of the evidence and then concluded.) The result of this examination of the evidence is that the case is established fully against all the accused and I would affirm all the convictions. According to the confessions of accused 3 and accused 5, the murder of deceased as well as robbery was

11. *Barnabas Christian v. Emperor*, (1934) 21 A I R Pat 586=1934 Cr C 1243=152 I C 275 =36 Cr L J 12=15 P L T 711.

in contemplation from the outset, and I believe this to be true. At any rate, there is no room for doubt that the robbery and murder were done in one transaction. The sentence of death imposed on accused 1 and accused 4 is fully merited by them and I would accept the reference and confirm it and dismiss the appeals of all the accused. We have been handicapped in our study of the evidence of this case by the illegible writing of the Sessions Judge. Parts of the record could not be correctly transcribed into the brief and there were words which we, referring to the original, could not read. I hope that the Sessions Judge will endeavour in future to prepare a legible record.

Mohamad Noor J. — I agree that the reference be accepted and the appeal be dismissed. I would however like to make a few remarks of my own on the value of the confession of an accused affecting another accused who is being jointly tried with him for the same offence. The view taken in 16 Pat 612,¹⁰ which followed 8 Pat 262,⁹ seems to be that though as a matter of law a confession of a co-accused is sufficient for the conviction of an accused, as a rule of prudence, one must seek corroboration of the confession before conviction. With all respect to the learned Judges who decided the two cases, this view places the confessions of a co-accused on the same footing as the evidence of an accomplice, but I venture to think it is not. The evidence of an accomplice is, as a matter of law, sufficient for a conviction. He is a competent witness and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice: S. 133, Evidence Act. The Courts are by law allowed but not compelled to presume him unworthy of credence unless he is corroborated. If in spite of warning, a jury believes him without corroboration, the High Court cannot interfere. If the framers of the Evidence Act intended to attach to the confession of an accused against a co-accused the same value as the evidence of an approver, they would have said so. The confession of an accused can only be considered against his co-accused. Even this would not have been permissible but for S. 30, Evidence Act. The Act itself gives it a position inferior to the evidence of an approver.

In practice however in a large number of cases it is immaterial whether the rule of seeking corroboration be taken a rule of

practice which has all the reverence of law or whether it be treated as a rule of law. But difficulty is likely to arise in cases tried by jury in which there is nothing against an accused except the confession of his co-accused whether retracted or not. The question may then arise whether the Judge ought to direct the jury to return a verdict of not guilty on the ground that there is no evidence against the accused, or in case the Judge does not give this direction and the jury on this material alone convicts the accused, whether the conviction can be interfered with by the High Court on the ground that it is based upon no legal evidence whatsoever. Garth C. J. in 4 Cal 483⁴ observed as follows:

A confession by prisoner A, which involves the guilt of prisoner B, is of itself, unsupported by other testimony, evidence of the weakest possible kind against B. It is simply the statement of a third person, not made upon oath or affirmation, and I am of opinion, that no Court ought to convict prisoner B upon such evidence. I consider moreover that if a prisoner were convicted upon such evidence, whether by a jury or otherwise, and were to appeal to this Court, the conviction ought to be set aside; and further, that any Sessions Judge trying such a case before a jury ought to direct them to acquit the prisoner. How far any corroborative evidence would be sufficient, coupled with the confession, to convict a prisoner, must depend upon the circumstances of each particular case.

It is clear from this observation that the question whether there can be a conviction on the confession of a co-accused was treated as one of law and not of prudence. In 38 Cal 559⁵ Jenkins C. J. went much further and observed as follows:

Reliance has been principally placed on those (confessions) of the accused Soilen Das and Susil Biswas; and these the prosecution would use not only against the person making them but also against the rest of the accused. The warrant for this is to be found in S. 30, Evidence Act, which provides that, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons, is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. The language of the Section is guarded, and the history of this Act leaves me in no doubt that this Section was designedly framed in these terms. While "admissions," a word which embraces confessions, are by S. 21 relevant, and may be proved as against the person making them, all that S. 30 provides is, that the Court may take them into consideration, as against other persons. This distinction of language is significant, and it appears to me that its true effect is, that the Court can only treat a confession as lending assurance to other evidence against a co-accused. Thus to illustrate my meaning, in the view I take, a conviction on the confession of a

co-accused alone would be bad in law. This reading of the Section appears to me to gain confirmation from the language of S. 5.

This view was adopted in this Court in 8 P L T 566,⁸ where Das J. (Scroope J. concurring) held that under S. 30, Evidence Act, the Court may take into consideration a confession made by an accused person against the co-accused, but the Court can only treat a confession as lending assurance to other evidence against a co-accused and a conviction based on the confession of a co-accused alone would be bad in law. I am inclined to agree with the views set forth in the two Calcutta cases and that of Das J. in the Patna case above referred to. The case in 8 P L T 566,⁸ which was an earlier decision, was not brought to the notice of the learned Judges who decided the two cases reported in 8 Pat 262⁹ and 16 Pat 612.¹⁰ If a question arises as to whether a conviction based upon an uncorroborated confession of a co-accused is bad in law, a question which did not arise in the two cases, the matter may require re-consideration. I am not prepared to go to the length of saying that there must be, apart from the confession of a co-accused, independent evidence by itself sufficient for conviction as has been stated as an obiter dicta in a Madras case. This will be making S. 30, Evidence Act, practically useless. But I think that the broad proposition that a conviction can legally be had on an uncorroborated confession of a co-accused is somewhat too wide. In my opinion, the correct law seems to be that there must be some evidence which when weighed after considering the confessions of the co-accused should bring the charge home to the accused.

The question however is of academic interest in this case, as there is not only ample corroboration to the confession of the four prisoners, accused 2 to 5, but there is independent circumstantial evidence against every accused. So far as accused 2 to 5 are concerned, they can safely be convicted on their own confessions supported as they are by the discovery of the material objects. So far as accused 1 is concerned, the material against him is ample. There can be no doubt that the deceased was murdered on the night in question. She was seen alive in the evening. The condition of the dead body with lobes of ears cut off and the condition in which the house was found, leaves no room for doubt that robbery was com-

mitted along with murder. Then some properties of deceased which have been sufficiently identified were practically produced by accused 1 and he must be taken to have been in possession of them. One may therefore safely presume under S. 114, Evidence Act, (the illustrations are not exhaustive) that accused 1 was either involved in the murder and robbery or, at any rate, he received the stolen property knowing it to be the proceeds of the robbery. Having come so far, the little aid taken from the confessions proves the guilt of accused 1 beyond any doubt.

N.S./R.K.

Reference accepted;

Appeal dismissed.

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JAMES J.

Bhagirath Singh and others —

Petitioners.

v.

Munga Lal and another —

Opposite Party.

Civil Revn. No. 124 of 1938, Decided on 19th October 1938, from order of Small Cause Court Judge, Gaya, D/- 7th December 1937.

Limitation Act (1908), Sec. 22—Members of joint family carrying family business describing themselves in plaint by names adding word "firm" — Deletion of word "firm" by amendment after limitation held did not bar suit.

Plaintiffs who were a joint family of a Hindu father and a son and who alone did the business in their joint name, described themselves in the plaint by their two names with the addition of the word "firm." Upon objection as to registration of the firm being taken, plaintiffs amended the plaint by deleting the word "firm." But this amendment was made after limitation had expired :

Held that the suit was not barred under S. 22 as the deletion of the word "firm" was no addition of parties within the meaning of S. 22, the original description of the plaintiffs as partners being mere misdescription : *A I R 1931 Bom 590, Rel. on.*

[P 41 C 1].

Lal Narain Singh and G. P. Singh —
for Petitioners.

A. N. Lal — for Opposite Party.

Order.—This is an application for revision of the order of the Small Cause Court Judge at Gaya decreeing a suit which was based on a handnote. The plaintiffs were a Hindu father and son who do business in their joint names and they described themselves in their plaint by their two names with the addition of the word "firm". It

appears from the evidence that these two persons alone are doing business and they are presumably a joint family, so that strictly speaking the provisions of Sec. 5, Partnership Act, would make their description as a firm incorrect. The objection was taken that this firm was not registered, whereupon the plaint was amended by the deletion of the word "firm" in the description of the plaintiffs. Objection is now taken on behalf of the defendants that this amendment was made after limitation had expired, so that the provisions of Sec. 22, Limitation Act, would seem to bar the plaintiff's suit. Their description originally as members of a joint family would not bar an alternative or substituted claim from them as partners: 135 I C 423;¹ and in this case the original description of the two plaintiffs as partners is a mere misdescription, and it is no addition of parties within the meaning of S. 22, Limitation Act, when the word "firm" is deleted and they sue as members of a Hindu family. It appears that although they might in a sense be described as a firm without any offence against the English language, they are not a firm in the sense in which the word is used as a word of art in the Partnership Act. In the second place it is pointed out by the learned counsel for the petitioners that the learned Small Cause Court Judge erred in declining to compel the plaintiffs to furnish particulars before the defendants entered upon their defence.

The plaint alleged that the loan had been advanced to the defendants' family for valid family necessity. The defendants applied for particulars of the facts constituting the necessity, but the plaintiffs' pleader objected that this would be furnishing details of evidence which he was not required to do; and the learned Small Cause Court Judge permitted this objection to prevail and the defendants filed their written statement without having the required particulars from the plaintiffs. The learned Small Cause Court Judge was in error on this point; he ought to have compelled the plaintiffs to furnish particulars or to have struck out so much of the claim as rested upon the proof of valid family necessity. However, this was not done and the parties proceeded to trial. At the hearing of the case if the defendants had objected that

owing to the absence of particulars they were taken by surprise by the evidence of the plaintiffs, they would have been entitled to ask for time in which to produce the evidence to rebut that which had been given on behalf of the plaintiffs; but, they made no such application. Learned counsel for the petitioners suggests that they could make no application at that stage, because the Small Cause Court Judge had already accepted the plaintiffs' plea that the particulars for which they were applying were not on matters of fact but on details of evidence; but an application for adjournment ought to have been made before a grievance could be made in a Court of revision of the fact that the defendants had been taken by surprise. I do not in the circumstances consider that the defendants are entitled to ask that the case should be remanded for the hearing of any further evidence on their behalf, because it is clear that if there actually were any further evidence which they would have tendered if they had known in time precisely what the particulars were, they would have objected at the trial itself.

Learned counsel further objects that the rate of interest allowed by the Small Cause Court Judge is high; and he suggests that it ought to be reduced in accordance with the provisions of Act 5 of 1938; but that Act does not extend to pending litigation the provisions of S. 9 of Act 3 of 1938. This application is dismissed with costs.

N.S./R.K. *Application dismissed.*

A. I. R. 1939 Patna 41

WORT AG. C. J. AND MANOHAR LALL J.

Banarsi Prasad and others —

Appellants.

v.

Mahabir Prasad Sahu and others —

Respondents.

Appeal No. 26 of 1938, Decided on 4th August 1938, from appellate order of Dist. Judge, Monghyr, D/- 30th November 1937.

(a) Costs — Suit on mortgage — Suit decreed with costs against subsequent purchaser — Decree is not personal decree.

A subsequent purchaser, there being no privity between him and the mortgagee, is not liable in the action on the personal covenant: 34 All 63, (P C), Rel. on. [P 42 C 2]

Where a mortgage suit is decreed with costs against the subsequent purchaser he is not liable for the amount of the mortgage money and as the

1. Bishamberdas v. Brijlal Arora, (1931) 18 A I R Bom 590=135 I C 423=33 Bom L R 1985.

Court makes no difference between the amount of the claim and the costs, the decree is not personal decree against the subsequent purchaser even for costs. [P 42 C 2]

(b) *Res Judicata*—One defendant objecting in a previous suit to his property being sold in execution—Objection overruled—Properties of other defendants not attached or put up for sale—Other defendants can raise objection in subsequent suit.

One of the defendants in a suit objected in a previous suit to his property being sold in execution of the decree for costs. The objection was overruled. There was nothing to show that the properties of the other defendants were attached and put up for sale :

Held that the decision in the previous suit did not preclude the other defendants from raising the objection in a subsequent suit. [P 42 C 2; P 43 C 1]

C. P. Sinha — *for Appellants* :

Siva Narayan Bose — *for Respondents*.

Wort Ag. C. J.—It is not disputed in this appeal that the appellant is liable personally for the costs of the Appellate Court a small sum amounting to somewhere between Rs. 50 and Rs. 60. The method by which it should be realized is a matter for the parties themselves and is no concern of this Court. As regards the costs of the first Court, it seems to me that the matter is perfectly clear.

Mr. Bose on behalf of the respondents contends that he has a right to recover the costs against defendants second party who are represented by the appellants in this Court. I do not think there can be any doubt that whether he is so entitled or not depends upon the construction to be placed upon the decree of the trial Court. Heald J. in 9 Rang 186¹ lays down certain rules which, the learned Judge was of the opinion, should be used by the Courts to guide them in the question of the construction of a decree. So far as the rules are concerned, (if I may say so with respect to the learned Judge), I agree, but the purpose for which they should be used seems to me to be an entirely different matter. Having regard to what the learned Judge says, it does seem that in making the order in the suit the Court, all things being equal, should consider the advisability of making a personal decree against the party in such a case as the present. But it depends, as I have already stated, entirely upon the circumstances of each case. The order of the Court in this case seems to me to be capable of

construction in one way only and that is that it is an ordinary mortgage decree. The order is in the following form :

That the suit be decreed with costs on contest against defendants 3 to 9 and ex parte against others.

When the order provides 'the suit be decreed with costs' it obviously means that 'the claim in the suit be decreed with costs'. In my judgment, the decree in the form which I have stated this to be is not a personal decree against the defendants second party (defendants 3 to 9). Now if there were any serious doubt about the matter, it may be decided in this way. The Court makes no difference between the amount of the claim and the costs. It has been decided in numerous cases. I only propose to quote one, being the case in 39 I A 7² that the subsequent purchaser, there being no privity between him and the mortgagee, is not liable in the action on the personal covenant. Now having regard to that proposition, it could not be said in this case that the Judge was intending that the subsequent purchaser (the appellant before us) should be liable for the amount of the mortgage moneys, and not differentiating between the amount of mortgage moneys and the costs, it is equally clear that he did not intend a personal decree against defendants second party for costs. In my judgment the decision of the learned Judge on this question is erroneous.

The learned Judges in the Courts below appear also to have had held against the appellant on the footing that the matter was *res judicata*. There were no sufficient materials (so it appears) before the Courts to enable them to come to that decision; there are certainly no sufficient materials before this Court. One of defendants 3 to 9 objected to her property being sold in execution of the decree for costs. The objection was overruled. So far as that defendant is concerned, of course, it is impossible for her now to put forward the contention advanced by the appellant before us. But it is far from saying that the other defendants are precluded from raising the objection. There is nothing to show that the properties of the other defendants were attached and put up for sale and unless some relief in that form as asked for by the decree-holder against the defendants before us at the moment, it could not be said that the

1. Maung Po Mya v. M. A. S. Firm, (1931) 18 A I R Rang 153=133 I C 225=9 Rang 186.

2. Jamna Das v. Ram Autar Pande, (1912) 34 All 63=13 I C 304=39 I A 7=9 A L J 37 (P C).

decision in Ram Kuari's case was res judicata.

For those reasons, in my opinion, the decision of the learned Judge in the Court below was wrong and it must be set aside and the appeal allowed with costs of this Court subject, of course, to the liability which I have already stated to exist in the defendants for the payment of the costs of the Court of Appeal. For the purposes of costs the appeal will be valued at Rs. 200.

Manohar Lall J.—I agree.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Patna 43

WORT AG. C. J. AND MANOHAR
LALL J.

Tikait Srinibas Hukum Singh Deo —
Appellant.

v.

Lal Narain Singh and others —
Respondents.

Appeals Nos. 972 and 973 of 1936, Decided on 9th August 1938, from appellate decrees of Judicial Commissioner, Chota Nagpur, D/- 13th July 1936.

Landlord and Tenant—Relationship—Rights depend on construction of patta governing relationship—But, where Record of Rights is not rebutted by patta, relationship held governed by Record of Rights.

Where the relationship of the parties is governed by a patta their rights depend upon the proper construction of that patta and not the Record of Rights. [P 43 C 2]

But, where a tenant who executed in favour of the grantor a patta describing his interest to be life estate only, afterwards assigned a portion of his tenancy land to a sub-tenant who paid rent directly to the original grantor and whose interest was entered in the Record of Rights as being permanent interest :

Held that the grantor by accepting rent directly from the sub-tenant created a new tenancy and as the entries in the Record of Rights were in no way rebutted by the patta, the relationship between the sub-tenant and the original grantor was governed by the Record of Rights and not the terms of the patta. [P 44 C 1]

B. P. Sinha — for Appellant.

K. K. Banarji — for Respondents.

Wort Ag. C. J. — This is the plaintiff's appeal in an action to resume an estate which has been held by the Judges in the Courts below to be permanent mukarrari. Mr. Sinha who appears on behalf of the plaintiff-appellant contends that the question whether it is a permanent or a life

estate is to be determined on the proper construction to be placed on the patta of 1882. The original grantee, it appears, had taken possession of certain parti lands for the purpose of bringing them under cultivation and then in 1882 this grant was made by the Raja to that person, the grant including not only the lands thus reclaimed but the whole of the village being of a very considerable area. The subsequent history of the matter was this, that the original grantee assigned his interest in the greater part of the village to the ancestor of defendant 1, but retained for himself 124 acres which was the land he had reclaimed. Then there was a subsequent transfer of a part of those 124 acres, that is to say about 110 acres, to defendant 5. The history of the relationship of those assignees is different. As regards defendant 5 who is the assignee of 110 acres he paid no rent to the original landlord. It cannot be said therefore that there was any new contract or lease with the original grantor. His rights therefore are governed by the patta of 1882 and I do not think there was any serious dispute that on the proper construction of that grant the estate which was given to the original grantee was a life estate only. So far as that part of the case is concerned, that is to say as regards 110 acres, the decisions of the learned Judges in the Courts below were erroneous. Their decisions were based on the evidence in the case, particularly the Record of Rights. But when once it is determined that the relationship between the parties was governed by the original patta of 1882 the matter is a very simple one and the solution is the one which I have just stated.

So far as the greater part of the village is concerned, and which was assigned to the ancestor of defendant 1, the matter is entirely different. The original patta was in the early part of 1882 and the assignment to the ancestor of defendant 1 was in August 1882, whereupon the original grantor accepted defendant 1's ancestor as a tenant and accepted rent. He was not bound to do so, but by doing so he created a new tenancy or a lease. On the facts and circumstances of the case, as I have already indicated, the learned Judges in the Court below have come to the conclusion that the interest there was a permanent interest. It is true that in the rent receipt the word mukarrari was used which does not necessarily imply anything more than a life

estate; but there were facts and circumstances which were taken into consideration amongst which was the Record of Rights. The khewat was prepared in 1908 and the final publication some years later. In both of them the interest which the ancestor of defendant 1 or defendant 1 was stated to have possessed was a permanent interest and not a life estate only. The learned Judge therefore was right in coming to the conclusion that so far as defendant 1 or his ancestor was concerned, the estate which he possessed was, as I have said, a life estate. The Record of Rights being in no way rebutted by the document of 1882 it stands to reason that the relationship between the original grantor and defendant 1 is not governed thereby.

For these circumstances the appeal so far as it concerns 110 acres, i. e. the interest of defendant 5 is allowed and the suit decreed in favour of the plaintiff, but dismissed as regards the balance. I should have observed that the considerations which apply to 110 acres necessarily apply to the balance being 14 acres and therefore the plaintiff's suit should be decreed for 124 acres. To make the matter clear, the Appeal No. 973 is allowed with costs throughout and the Appeal No. 972 is dismissed with costs.

Manohar Lall J. — I agree.

N.S./R.K. *Order accordingly.*

A. I. R. 1939 Patna 44

ROWLAND J.

Mahabir Singh and others—Appellants.
v.

Sri Ramsumran Anantnidhi and others
— Respondents.

Appeal No. 45 of 1937, Decided on 3rd November 1938, from appellate decree of Sub-Judge, Second Court, Monghyr, D/- 28th September 1936.

Bengal Tenancy Act (8 of 1885), S. 104-J — Record of Rights — Entry regarding rent is conclusive.

Though the presumption of correctness attaching generally to entries in the Record of Rights can be rebutted by evidence, the entry with regard to rent is on a different footing. It is conclusive, even if the other entries have been rebutted and proved incorrect: *A I R 1924 Cal 341 and 13 C W N 210, Rel. on.* [P 45 C 1]

L. K. Jha add Balaram Kumar Sinha —
for Appellants.

S. K. Mitra — *for Respondents.*

Judgment. — The plaintiff-respondents are co-sharer proprietors having 3 annas 6 gandas interest in Tauzi No. 1321 which is diara land of which they and their co-sharers have taken temporary settlement. The periods of settlement, it seems, are of about 10 years. The suit refers to a holding which in the finally published Survey Record of Rights prepared under Ch. 10, Ben. Ten. Act, and finally published on 20th January 1925 is shown as a cash rent paying holding. The tenants whose names were entered in that record subsequently found their title assailed by the defendants first party, who after certain proceedings under S. 145, obtained a decree declaring their title and awarding them possession of the holding in 1925. In that suit they based their own title on a hukumnama granted to them by the landlord in 1918 in which there was a stipulation for payment of batai rent. Now the plaintiffs sue the successful claimants of the holding for the rent of the years 1339 to 1342. A portion of the claim having been dismissed as barred by limitation a decree has been passed in respect of years 1341 and 1342 only. The defendants pleaded that the rent of the holding was that entered in the settlement rent roll and that the plaintiff was not entitled to produce rent; but the Courts below have held that in face of the hukumnama which was propounded in the title suit as the basis of the title of these defendants it did not lie in their mouth now to allege that the rent was not a produce rent. It was said that when the presumption of correctness of the Record of Rights had been rebutted in so far as it purported to show the Ramchandrapur raiyats as tenants of the holding the whole should be treated as cancelled and disproved and the rent payable would be that agreed between the tenant and the landlord. Accordingly a decree was passed for bhaoli rent.

The question in this appeal is whether the defendants are entitled to retain the holding on payment of the cash rent entered in the Record of Rights. The Courts below have not correctly appreciated the difference between survey and settlement proceedings in a permanently settled area and similar proceedings in a temporarily settled estate in connexion with which a settlement of land revenue is being made. In the former proceedings there is a presumption of correctness attaching to the Record of Rights under S. 103-B which is rebuttable

by evidence in respect of any and every portion of the entry. But in the latter case it is not simply a matter of recording existing rents. The first duty of the revenue officer under S. 104 is to settle fair and equitable rents for tenants of every class. Such fair rents may be or may not be the same as rents agreed on between the landlord and the tenant but if they differ there is no doubt whatever which of the two is to prevail. All rents settled under Ss. 104-A to 104-G are by virtue of Section 104-J to be deemed to have been correctly settled and to be fair and equitable rents within the meaning of this Act. The effect of this is that whereas the presumption of correctness attaching generally to entries in the Record of Rights can be rebutted by evidence, the entry with regard to rent is on a different footing. It is conclusive. There is consistent and ample authority that in a settlement under Part 2 the entry as to rent still remains conclusive even if the other entries have been rebutted and proved incorrect. A number of cases in which the law has been examined and explained are summarized in 27 C W N 982.¹ This line of authority goes right back to 13 C W N 210² in which the distinction between rebuttable and conclusive entries is clearly brought out.

It has been argued for the respondents that the settlement of 1925 fixed the rent as between the plaintiffs and the Ramchandrapur raiyats and on the assumption that it is analogous to a decree as between these persons it will not be binding as between the plaintiffs and a third party, namely the present defendants. The answer to this is that the rent was fixed in respect of a tenancy as between the landlord and the raiyat for the time being representing the tenancy. The tenancy was at that time represented by the Ramchandrapur raiyats and is now represented by the present defendants who have displaced them. That is sufficient for the disposal of the appeal. But I may in passing refer to the undertaking of the plaintiffs given in their kabuliyat, Ex. O, at the time of taking temporary settlement of this mahal, not to demand or realize rents in excess of the rents entered in the settlement rent roll. In the result,

the plaintiffs are found entitled not to bhaoli rent but to cash rent at the rate entered in the Record of Rights for the years 1341-42. The plaintiffs will get a modified decree accordingly. They will get their proportionate costs of the first Court and the parties will bear their own costs of the lower Appellate Court and this Court.

N.S./R.K.

Decree modified.

A. I. R. 1939 Patna 45

WORT AG. C. J. AND MANOHAR LALL J.

Mt. Satwanti Kuer and another —
Appellants.

v.

Ambica Prasad Singh and others —
Respondents.

Appeal No. 191 of 1937, Decided on 24th August 1938, from appellate decree of Dist. Judge, Gaya, D/- 7th January 1937.

Hindu Law — Religious endowment—Specification of purpose, dedication of property and divestiture by donor necessary — Divestiture how proved.

In cases of religious endowment under Hindu law what is necessary is that the purpose should be clearly specified and that the property intended for the endowment should be set apart as dedicated to that purpose. It is necessary that the donor should divest himself of the property. Whether he has done so is to be determined by his subsequent acts and conduct. The evidence of divestiture may be contemporaneous and in such a case the subsequent acts and conduct of the donor are irrelevant and cannot re-invest him. [P 46 C 1]

Rai Guru Saran Prasad and Rajkishore Prasad — *for Appellants.*

Dr. D. N. Mitter and S. N. Ray —
for Respondents.

Wort Ag. C. J.—This is an appeal by the plaintiff arising out of an action under O. 21, R. 63, the plaintiff being a claimant and having failed in a claim case under O. 21, R. 58. The real question which had to be decided by the learned Judge in the Court below was whether the transaction, which was a supposed dedication in favour of two deities which had taken place in 1924, was a real or a fictitious transaction, the facts being that an oral dedication took place in July of the year I have mentioned, the waqf deed being executed in 1925. We are saved from a consideration of a somewhat difficult question which arose under S. 53, T. P. Act, by reason of the finding of the learned Judge in the Court below. He says in the first instance that he is "unable

¹ Priya Nath Basu v. Tara Chand Moral, (1924) 11 A I R Cal 341=80 I O 1034=27 C W N 982.

² Ambica Charan v. Joy Chandra, (1909) 13 C W N 210=4 I O 470.

to differ from the Subordinate Judge regarding the factum of the alleged dedication." I am using the words of the Judge himself. Then at the end of his judgment he comes to a very clear finding that this dedication was not a real transaction, that there was no "real intention on the part of the Musammat (i. e., the plaintiff) to divest herself of the property, hence there was no dedication enforceable by law"; in other words, no dedication which would support the claim on behalf of the deity. I should have stated that the plaintiffs in this action and therefore the appellants are the deities as represented by the Musammat.

It is contended by the learned advocate appearing for the appellant, who had some considerable difficulty in discovering a point of law in this case, that the finding of the Judge which I first mentioned was a finding that the dedication had in fact taken place and that that was an end of the matter and that the Judge had no right to consider the questions which he referred to in coming to the subsequent finding which I have also mentioned. I propose to refer to one case which was pointed out by my learned brother during the course of the argument and content myself with a reference to that decision. Lord Thankerton while delivering the judgment of the Privy Council in 42 C W N 930¹ referred to a statement of the High Court to the following effect:

What is necessary is that the purpose (i. e., with regard to a Hindu endowment) be clearly specified and that the property intended for the endowment should be set apart as dedicated to that purpose. It is necessary that the donor should divest himself of the property. Whether he has done so is to be determined by his subsequent acts and conduct.

His Lordship then proceeds to say:

Their Lordships agree with this statement, except that the evidence of divestiture may be contemporaneous, as in this case, and, in such a case, the subsequent acts and conduct of the donor are irrelevant and cannot re-invest him.

Here in the case before us there was no question of the evidence of divesting the Musammat of the property at the date of the dedication. Apart from the actual alleged dedication, it was therefore necessary for the learned Judge to investigate the surrounding circumstances for the purpose of deciding whether the transaction was a

real one or not. On the findings of the Judge in the Court below, the decision cannot be disturbed, the appeal therefore fails and must be dismissed with costs.

Manohar Lall J.—I agree.

N.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 46

JAMES J.

Jadu Ram — Petitioner.

v.

Emperor.

Criminal Revn. No. 533 of 1938, D/- 14th October 1938, against order of Sess. Judge, Gaya, D/- 27th June 1938.

Factories Act (1934), Section 77 — Rules framed under S. 77, R. 72 (1)—Employee in factory falling in pit containing hot water and dying as result of scalding—Pit into which accident occurred, fenced on three sides, fourth being kept open for approach — Pit did not ordinarily contain very hot water or other injurious substance—Manager of factory held could not be convicted for not observing Rule 72 (1).

The rules framed under the Factories Act do not require that a place, like a pit containing hot water, for silting wood in a rice factory, which is used for the purposes of the factory, to be fenced in such a manner as to be completely unapproachable. It is sufficient if it is fenced in such a way that nobody would cross that way and fall into the pit by accident. [P 47 C 1]

Where the pit, which contained hot water and into which an employee in the factory fell and was fatally scalded was fenced on three sides but the fourth side was left open for approach and did not ordinarily contain very hot or other injurious substance:

Held that the manager was not liable to be convicted for not observing Rule 72 (1) of the Rules framed under the Factories Act and for failing to fence the pit, because firstly the pit was fenced and secondly it was not a pit which ordinarily contained any hot or injurious substance. [P 47 O 1]

Sarjoo Prasad and Radha K. Sahay —
for Petitioner.

Asst. Govt. Advocate — *for the Crown.*

Order. — On 22nd June Akbar Mian working in a rice mill in Gaya fell into a pit which contained hot water with the result that he was severely scalded and died the next day. After the accident, the manager of the mill was prosecuted for having failed to fence the pit and he has been fined two hundred rupees for not observing R. 72 (1) (a) of the Rules under the Factories Act. Mr. Sarjoo Prasad on behalf of the manager argues that the pit should be regarded as having been securely fenced; and in the second place that it was

1. *Sunder Singh-Mallah Singh v. Managing Committee, Sunder Singh-Mallah Singh*, (1938) 25 A I R P C 73=172 I C 993=32 S L R 350=I L R (1938) Lah 63=42 C W N 930=65 I A 106 (P C).

not a pit which would be governed by the provisions of R. 72 (1) of the rules under the Act. The pit, which on the occasion of the fatal accident contained very hot water, ordinarily contained water which was warm but not very hot used for the purpose of silting wood which was used in the factory. It was fenced on three sides, but the fourth side was left open for the purposes of approach; and I consider the argument of Mr. Sarjoo Prasad to be reasonable, that the rules do not require a place of this kind which is used for the purposes of the factory to be fenced in such a manner as to be completely unapproachable. It was fenced in such way that nobody would cross that way and fall into the pit by accident; and if the Chief Inspector of Factories considered that further fencing was required, he should have issued an order on the manager under S. 26, Factories Act. It further appears from the evidence of the Inspector himself contained in his report on the enquiry which followed the accident that the water in the pit is never very hot and though it might be something more than lukewarm it does not appear that this pit could be described as a pit ordinarily containing hot or injurious substances, so that it was not such a pit as was affected by the provisions of Rule 72.

It is pointed out that the plan which is on the record of the case indicates that Akbar Mian could not have fallen into this pit in the course of his homeward journey because it was fenced on three sides, so that it would be necessarily avoided by any ordinary passenger; and there appears to be no foundation for the opinion expressed by the Magistrate that it was lack of a fence which caused this loss of life. The map appears to indicate that Akbar Mian climbed over the fence in order to reach the pit which he could presumably have easily done, or that he went deliberately out of his way in order to approach it from the southern side where there is an opening. In any view of the matter, it does not appear that the manager was liable to conviction for failing to fence the pit, because in the first place the pit was fenced, and in the second place it was not a pit which ordinarily contained any hot or injurious substance. The finding and order of the trial Court are set aside and the petitioner is acquitted. The fine, if paid, will be refunded.

R.M./R.K.

Order set aside.

A. I. R. 1939 Patna 47

WORT Ag. C. J.

Jadunath Mitra — Plaintiff —

Appellant.

v.

Isar Jha and others — Defendants —

Respondents.

Appeal No. 762 of 1936, Decided on 31st August 1938, from decision of Sub-Judge, Bhagalpur, D/- 9th May 1936.

(a) Civil P. C. (1908), S. 2 (11)—Legal representative—Possession whether necessary.

The fact that the legal representative has not taken possession of the property does not assist another person who is not in possession of the property of the deceased but claims to be his legal representative. If he is the legal representative, it is his duty to take possession of the estate, and it is no answer to the proposition that the legal representative has not taken possession of the property. [P 48 C 1]

(b) Mortgage — Mortgagor is estopped from denying his possession of property.

A mortgagor is estopped from asserting that he is not in possession of the property mortgaged : *A I R 1922 P C 382, Rel. on ; A I R 1923 Pat 203, Ref.* [P 48 C 1]

(c) Evidence Act (1872), S. 68—Scope.

The provisions of S. 68 are mandatory and apply equally whether a document is produced in original or secondary evidence of such document is given. [P 48 C 2]

(d) Evidence Act (1872), S. 68, Proviso — Words "Indian Registration Act, 1908" interpreted.

The words "Indian Registration Act, 1908" used in Proviso of S. 68 are not confined to the provisions of that particular Registration Act but are intended to be extended to any previous Registration Act. [P 48 C 2]

S. C. Mazumdar — *for Appellant.*

K. N. Lall — *for Respondents.*

Judgment.—This appeal is by the plaintiff in a mortgage action. Both the Courts below have gone into a number of questions including the validity of the mortgage itself. They have held that it was the property of the deity and therefore inalienable as I understand their judgments. The Judge in the Appellate Court expresses himself in these words :

I see no reason to differ from the finding of the learned Munsif that the property mortgaged is debuttar property.

The learned Judge has also held that as there was no proof of attestation the action was bound to fail. A further point is argued before me that the defendants are not the legal representatives of the deceased mortgagor. I propose to deal with that point first. Both the Courts below have found as a fact that the defendants are the nearest agnates and heirs. S. 2 (11), Civil P. C. describes "legal representative" as

a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased.

There is no question of intermeddling with the estate and it does not assist the defendants by contending that they have not got possession, their case being that the deity was in possession; the defendant merely performed the puja and therefore on the construction of S. 2 (11) he is not the legal representative. The fact that the legal representative has not taken possession of the property does not assist the defendant. If he is the legal representative, it is his duty to take possession of the estate, and it is no answer to the proposition that the legal representative has not taken possession of the property. That question is wrapped up in this case with the other points whether this is a debuttar property. Their Lordships of the Judicial Committee of the Privy Council in 27 C W N 607¹ have emphasized what is really an elementary proposition in a mortgage action, namely that a mortgagor is estopped from asserting that he is not in possession of the property mortgaged. One is very diffident to make statement relating to what are elementary and fundamental principles of law, but it seems to be necessary in some cases. 4 P L T 457² a decision of this Court, is another case. I quote the proposition laid down by the then Chief Justice :

If it should hereafter turn out either that the Hindu public or anybody else is interested as proprietor of the mortgaged property or has a paramount title adverse to that of the mortgagor, the decision in this suit will not be binding upon such a person.

The next question is that the Judges in the Courts below have quite clearly decided that there was no legal necessity. Now, that issue goes with the one with which I have just dealt. It is only in this case that it is admitted that the execution is on behalf of a person other than the person who actually executed the deed : in other words, if for example the deed was executed by the karta on behalf of the joint family or by the shebait on behalf of the idol, the question of legal necessity would arise. If once that fact is allowed to be established, the issue which the Judge in the Court below has decided against the plaintiff will be conclusive in this action. But as I have already stated the defendant was not entitled

to say in this case that it was not the property of the shebait and he certainly did not say that the deed was on behalf of the deity. It is only if he is allowed to say that and if he can establish that the mortgage was executed on behalf of the deity that the question of legal necessity would arise. That argument is therefore overruled. One other question is whether the learned Judge in the Court below was right in holding that the mortgage document had not been proved. The original was not produced and secondary evidence was given, but that would make no difference to the application of S. 68, Evidence Act, which is mandatory. That Section provides :

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called.

The Proviso is that this proof of attestation is not necessary in case of any document which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.

There is no denial by the person who executed the document : indeed that person is dead and no such evidence could be given. It is a denial by the legal representative of that person. Now, the contention on behalf of the respondents is that when the words "Indian Registration Act, 1908" were used, it confined the application of the provisions of that particular Registration Act and not any previous Registration Act. Therefore, if the document was registered, as this was, under the Registration Act which was in force prior to 1908, the Proviso would not apply. In my judgment that is an impossible contention. The clear policy of the law in this regard, is that there is a special sanctity (if I may use the expression) attaching to registration. When the amendment was passed about ten or twelve years ago, the legislation mentioned the only Registration Act which was in existence. It is true, they might have said 'or under no previous Registration Act.' The intention of the Section, in my judgment, is perfectly clear and I overrule that point. I would, in the result, allow the appeal and set aside the judgments of the Courts below. The plaintiff would be entitled to a mortgage decree with costs throughout. Leave to appeal is refused.

N.S./R.K.

Appeal allowed.

1. Bholanath Sen v. Balaram Das, (1922) 9 A I R P C 382=70 I C 932=27 C W N 607 (P O).

2. Brij Ratan Das v. Raghunandan Gir, (1923) 10 A I R Pat 203=71 I C 944=4 P L T 457.

A. I. R. 1939 Patna 49

ROWLAND AND MANOHAR LALL JJ.

Muhammad Yunus and others —
Appellants.

v.

Champamani Bibi and others —
Respondents.

Appeal No. 127 of 1936, Decided on 21st September 1938, from original decree of Sub-Judge, Shahabad, D/- 13th May 1935.

(a) Assignment — Assignment of interest of plaintiff pending litigation—Assignee not applying to be substituted as plaintiff — Suit will proceed at instance of original plaintiff—Decision will be binding on the assignee also — As against plaintiff, defendant cannot raise objection as regards defect of parties when interest of plaintiff in litigation was fully represented.

The rule is that in the event of transfer or assignment of an interest by a plaintiff or decree-holder, the assignee has the right to apply to the Court to be added or substituted as a plaintiff. If this is not done, the suit will proceed at the instance of the original plaintiff and any decision arrived at whether favourable or unfavourable will be effective for or against the interest of the assignee. That is on all fours with the rules about transfer pendente lite as affecting the interest of defendant in property in suit; but as against the plaintiff, it is not for the defendant to raise any objection as regards defect of parties when the interest of the decree-holder in the litigation was throughout fully represented. [P 50 C 2]

(b) Mortgage—Suit on—Failure to bring on record some persons having equity of redemption does not cause dismissal of whole suit—Though decree passed in suit will be ineffective against them, amount of mortgage debt payable for redemption will not be affected by their absence from record.

Whereas the general rule is that all persons having the equity of redemption ought to be brought on the record, the failure to bring any one of them on the record does not necessitate the dismissal of the suit if the Court in his absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it, and notwithstanding that any decree passed in this suit will be ineffective against persons who have not been brought on record and their representatives, the amount of the mortgage debt to be entered in the decree as payable for the redemption of the mortgaged properties will not be affected by the absence of those persons from the record: *A I R 1931 Pat 164 and A I R 1919 Bom 135, Rel. on; A I R 1918 Mad 1030 (FB), Ref.* [P 51 C 1, 2; P 52 C 1]

(c) Transfer of Property Act (1882 as amended in 1929), Section 60—Amendment is merely declaratory.

The intention of the Legislature in making the amendment of S. 60 in 1929 was not to alter but to declare the law. [P 51 C 2]

(d) Government of India Act (1935), Ss. 100 and 107 and Sch. 7 — Bihar Money-Lenders Act is regarding matter in Provincial Legislation 1939 P/7 & 8

tive List and must prevail in province even though repugnant to previous All India Act.

The scheme of Sections 100 and 107 and Sch. 7, Government of India Act, is that when a Provincial Legislature makes laws regarding matter in the Provincial Legislative List those laws will prevail notwithstanding that they may be repugnant to a previous All India Act. The subject "money lenders and money lending" is on the Provincial Legislative List. Prima facie therefore the Bihar Moneylenders Act must prevail within the Province. [P 53 C 2]

(e) Bihar Money Lenders Act (3 of 1938), Sec. 11—Sec. 11 does not affect decree already passed.

It is a recognized principle that where one construction of an enactment will be in accordance with the existing enactments and another construction will be repugnant to them, the Court will, where possible, adopt that reading which avoids repugnancy. On this principle S. 11 should be construed in the narrower sense as not intended to affect a decree already passed and hence Court cannot go behind the preliminary decree which was passed in 1928 and the requirement of the Civil Procedure Code that a final decree should be prepared in accordance with it. [P 54 C 1]

(f) Stamp Act (1899), S. 26—Applicability—Stamp Act does not limit right of parties to value chose-in-action at any amount they think fit.

Section 26 only applies where the amount or value of the subject-matter of any instrument chargeable with ad valorem duty cannot be ascertained at the date of its execution. There is nothing in the Stamp Act to limit the right of the parties to value a chose-in-action at any amount they may think fit or to penalise them for doing so. [P 54 C 1, 2]

M. Yusuf, A. K. Mitra, I. B. Saran and
Amir Ali Khan Warisi —

for Appellants.

Dr. D. N. Mitter and S. N. Bose —

for Respondents.

Rowland J. — This is an appeal from the decision of the Subordinate Judge of Shahabad directing the preparation of a final decree in a mortgage suit. The mortgage bond is dated 16th December 1905 and was for repayment of a principal sum of Rs. 600 with interest thereon at two per cent. per month with half yearly rests. It was secured on two revenue paying properties and one house. A payment of Rs. 75 on account of interest was made on 26th December 1906 and thereafter nothing further having been paid, the mortgagee brought the suit on 28th November 1916. Attachment before judgment was effected on 9th December 1916 as against a sum of Rs. 1859-14-6 lying in the Court at Sasaram as a deposit to the credit of defendant 1. the Subordinate Judge, Mr. Jadunandan Prasad, passed a preliminary decree for sale

on 31st May 1918 which was followed by a final decree on 7th February 1920. The decree-holder withdrew on 2nd July 1920 the sum of Rs. 1859-14-6 which had been attached before judgment. Thereafter one of the mortgaged properties namely the house was sold on 8th December 1920 and the decree-holder was the purchaser himself at a price of Rs. 204-8-3. Subsequently he sold it on 21st November 1922 for a sum of Rs. 500 to one Hakim Abdul Hamid. Thereafter one of the defendants, Jagarnath Singh, defendant 32 against whom the decree had been made *ex parte* applied under O. 9, R. 13 alleging that the summons had not been served upon him. On his application the entire decree was set aside on 17th December 1923 and the suit restored for hearing. It was heard and the whole suit was dismissed on 19th December 1924 by Mr. Abdus Shakur, Subordinate Judge.

From this dismissal an appeal was preferred to this Court and was No. 51 of 1925. The appeal was decreed and preliminary decree was passed on 17th May 1928. Pending the hearing of the appeal, however, three of the defendants had died, that is to say, on 14th February 1926, Mangroo Ray, defendant 19; on 1st February 1927, Narain Prasad, defendant 6 and in October 1927, Ram Nath Singh, defendant 26. The death of these defendants was not reported to the Court and no substitution of their heirs was made. After the passing of the High Court's decree, that is to say, on 3rd July 1928, the death occurred of another defendant, namely Kalika Prasad, defendant 3. One more transaction may be mentioned and that is a transfer by the decree-holder on 14th February 1926 of her entire rights to her daughter Champamani Bibi and son-in-law, Bhan Kumar. The application for a final decree was made on 18th March 1930 before the Subordinate Judge in the names of the original plaintiff decree-holder and the two transferees. The objections which have been taken in the main, arise out of alleged defect of parties. There are however other objections affecting the amount as due to be entered in the final decree. Before the Subordinate Judge it had been contended that the applicants for a final decree were not entitled to maintain the suit. The Subordinate Judge has dealt with this contention which seems to have no foundation in anything that I can find

in the Code of Civil Procedure. The rule is that in the event of transfer or assignment of an interest by a plaintiff or decree-holder, the assignee has the right to apply to the Court to be added or substituted as a plaintiff. If this is not done, the suit will proceed at the instance of the original plaintiff and any decision arrived at whether favourable or unfavourable will be effective for or against the interest of the assignee. That is on all fours with the rules about transfer *pendente lite* as affecting the interest of defendant in property in suit; but as against the plaintiffs, it is not for the defendant to raise any objection when the interest of the mortgagee in the litigation was throughout fully represented. In April 1932 Lalmani Bibi, the mother of Champamani Bibi died and Champamani Bibi was substituted for her as her heir. The interest of the mortgagee was therefore completely represented throughout. We were pressed much more seriously by Mr. Yusuf in respect of the second objection which refers to the death of defendants 6, 19 and 26 during the pendency of the appeal in this Court. No steps were taken to substitute their heirs and it necessarily follows that the appeal against them in this Court had abated by operation of law before the date on which the appeal was heard and decided. Therefore so far as these defendants are concerned, no decree could be passed against them and any decree that has been passed cannot affect their interest or the interest of their legal representatives.

Now it is argued that as the result of the death of these defendants the entire appeal abated and no decree in the suit could be passed at all because it is said a mortgage is one and indivisible and in order to obtain a mortgage decree there must be present on the record not only all the persons interested in the mortgage but all the persons having an interest in the equity of redemption. If one or more of these are missing, it is said, the suit is not properly constituted and no decree can be passed at all. The Subordinate Judge in dealing with this had held that though no final decree could be passed as against defendants 6, 19 and 26 or could affect their interest, nevertheless this would not prevent a final decree being passed in the suit with the reservation that it would affect only the interests of defendants other than those mentioned. This is in accordance with the decision of

this High Court in 10 Pat 341¹ where the principle laid down in previous decisions was accepted that whereas the general rule is that all persons having the equity of redemption ought to be brought on the record, the failure to bring any one of them on the record does not necessitate the dismissal of the suit if the Court in his absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. The argument was on similar lines with regard to Kalika Prasad defendant 3 who died on 3rd July 1928 after the disposal of the appeal in this Court. What happened in his case was that no steps were taken until the decree-holders moved the Subordinate Judge on 18th March 1930 to prepare a final decree. At that stage the death of this defendant was reported and a prayer was made to substitute his heirs and to continue the proceedings against them in his place. The Subordinate Judge held that the proceedings for a final decree being proceedings in the suit, the suit must be held to be still pending and to have abated as against this defendant; that it was too late to have the abatement set aside and accordingly the substitution was refused and proceedings continued as against the other defendants on the record. We have not here to consider the correctness of the Subordinate Judge's view of the law as no cross appeal has been presented against the decision so far as the substitution matter is concerned. Assuming the procedure followed by the Subordinate Judge to be correct, the position in respect of defendant 3 is now analogous to the position in respect of defendants 6, 19 and 26 above referred to.

It was next argued that assuming that the suit could proceed to a final decree against those defendants who remained on the record and were represented, nevertheless the Court could only pass a decree for something less than the amount due on the mortgage and reduced proportionately to the share in the mortgaged property of those defendants who were no longer on the record. It was also pointed out that there are at present no materials on which the Court can determine what is the share of those defendants in the mortgage security and what proportion it bears to the whole of the mortgage security. Therefore the

argument was that the Court being unable to ascertain for what limited amount it will be able to pass a decree should pass no decree at all but should dismiss the entire suit. For the respondents, it was argued that the mortgage being indivisible, every part of the mortgaged property is liable for the whole of the mortgage debt. This is a well-established principle; but an exception is introduced by S. 60, T. P. Act, which recognizes the right of a person entitled to a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage if the mortgagee or mortgagees has or have acquired the share of a mortgagor. The appellant claims that the benefit of this exception will accrue to the remaining mortgagors and persons interested in the mortgage security not only on acquisition by the mortgagee of a part of the mortgage security but on the release whether by act of the creditor or in any other way of a portion of the mortgage security. The exception was extended in circumstances of this nature in a number of decided cases in the Calcutta High Court; but the High Courts in India were by no means unanimous as to the effect of S. 60 as it stood before the amendment made in 1929. In Allahabad, Madras and Bombay different views prevailed. I may refer for instance to the Full Bench decision of the Madras High Court in 40 Mad 968.²

It was apparently to settle the conflict between these different views that the amendment of the Section was made in 1929, the word 'only' being inserted after 'except'. As I understand it the intention of the Legislature in making this amendment was not to alter but to declare the law. It is perhaps significant that S. 63 of the Amending Act names certain Sections in respect of which the amendments made in 1929 are not to have retrospective effect; but the Section by which the amendment was made in S. 60 of the original Act is not one of those Sections. This fact is in favour of the view that the amendment of this Section was intended to declare what the law was and was to be regarded as having always been. If I am right in this view then notwithstanding that any decree passed in this suit will be ineffective against

1. *Mt. Waleyatunnissa Begum v. Mt. Ohalaki*, (1931) 18 A I R Pat 164 = 182 I O 100 = 10 Pat 841 = 12 P L T 28.

2. *Perumal Pillai v. Raman Chettiar*, (1918) 5 A I R Mad 1080 = 42 I O 852 = 40 Mad 968 = 83 M L J 211 (F B).

defendants 3, 6, 19 and 26 and their representatives the amount of the mortgage debt to be entered in the decree as payable for the redemption of the mortgaged properties will not be affected by the absence of those defendants from the record. It is suggested that the decision above cited, 10 Pat 341,¹ follows the Calcutta decisions in the view that the mortgage debt is to be proportionately reduced; but in that case that question was not directly in controversy. Had it been so and had we been disposed to take a different view it might have been necessary to refer the question to a larger Bench; but I find that yet another defendant died during the pendency of these proceedings and the consequences of his death were considered by Das and Allanson JJ. in the course of their judgment dated 17th May 1928. That decision is *inter partes* and must operate as res judicata for the purpose of this litigation both on matters of fact there decided and on the view of law there taken. Das J. accepted the view in 43 Bom 575³ and held that there was no question of abatement of the entire suit and also proceeded to pass decree for the entire mortgage debt without any reduction in consequence of the absence of one of the defendants. We must therefore follow that precedent and this objection to the decree must fail.

The next point was with regard to the allowance to which the defendants are entitled in respect of realizations made since the institution of the mortgage suit. There are two items to be considered. One is the sale of the house on 8th December 1920. This was put up to auction on foot of the mortgage decree which had been passed by the Subordinate Judge on 31st May 1918 preliminary and 7th February 1920 final decree. The defendants in the present proceeding contended that an allowance should be made of the full value of the house and they led some evidence as to its cost of construction according to which it should have been valued at Rs. 3597. The witness who was called to prove the estimate of the cost of construction did not impress the Subordinate Judge favourably. Moreover, if we were to assume that the house had cost so much to construct, it would still remain a matter of uncertainty

how much allowance ought to be made for depreciation before arriving at its value. On the other hand it appears in evidence that the house was within two years from its purchase by the plaintiff sold for Rupees 500. That amount may safely be taken as the value of the house. The respondents before us did not resist the claim of the defendant that allowance should be made for the value of the house by entering satisfaction of the claim as Rs. 500 instead of Rs. 204-8-6; and the allowance will be made accordingly. In this connexion the appellants revived the argument that the mortgagee by his purchase of this house acquired a part of the mortgaged property thereby giving the defendants a right to proportional reduction of the mortgage debt to be decreed. But the purchase of the house was not by private contract or in execution of a third party's money decree in which case such a contention must succeed. It was a purchase on the plaintiff's own decree in respect of this very debt. Therefore it can have effect only as a part satisfaction of the claim and to the extent that I have indicated.

The other item is a sum of Rs. 1859-14-6 which was in deposit, was attached before judgment on 9th December 1916 and was paid out to the decree-holder on 2nd July 1920. The Subordinate Judge has allowed credit for this as payment made towards the mortgage debt on 2nd July 1920 the day when it was drawn out. The appellant contends that credit should be given so as to stop interest running to this extent with effect from the date on which attachment before judgment was effected so that the money was not available for the purposes of the debtor. We cannot regard this sum as one which ought to be deemed to have been paid to the plaintiff in 1916 when it was not at that time in his power to receive the money; nor can we regard it as having been taken beyond the reach of the debtor at that date, because it was open to him to give sufficient security to the Court to obtain permission himself to draw the money. But the money was available for payment to the decree-holder at any time after the passing of the final decree on 7th February 1920. If he waited longer that was entirely at his choice. We think therefore that credit should be allowed for this amount as for a payment made on 7th February 1920 instead of 2nd July 1920. With these modifications the calculation of

3. Sabduralli v. Sadashiv Supdu, (1919) 6 A I R Bom 135=51 I O 223=43 Bom 575=21 Bom L R 369.

the amount for which the property is to be sold appears to us to be correct.

We have now to deal with one more contention of the appellants that calculation of the amount is to be made on an entirely different basis in consequence of the passing of Bihar Act 3 of 1938, the Bihar Money Lenders Act and Bihar Act 5, the Bihar Money Lenders (Amendment and Application to Pending Suits and Proceedings) Act, 1938. Reference is made to S. 11 of the Act in which it is enacted that notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realized as interest through Court or otherwise, is greater than the amount of the loan advanced, or, if the loan is based on a document, the amount of loan mentioned in the document on which the suit is based. It is said that this Section precludes the Court from passing a decree for more than Rs. 600 by way of interest. (The Amending Act declared that this and the three following Sections would apply to appeals as well as suits and to litigations instituted before as well as after the commencement of the Act.) An objection is taken for the respondents that Sec. 11 does not mean this and that if it does, it is repugnant to the provisions of certain enactments of the Indian Legislature and is to the extent of that repugnancy void.

To appreciate these contentions I must refer to the Government of India Act, 1935, Ss. 100 and 107 and Sch. 7. In Schedule 7 there are three lists. The first is called the Federal List and with regard to the subjects of that List it is not competent to the Provincial Legislature to pass any laws. There is also a Provincial Legislative List of matters with respect to which the Provincial Legislature has and the Central Legislature has not power to make laws for a province. There is thirdly a concurrent Legislative List of matters with respect to which a Federal Legislature and also a Provincial Legislature has power to make laws. Money-lenders and money-lending are referred to in Item 27 of the Provincial List in Sch. 7; but Civil Procedure Code, Item 4, Contracts Item 10, jurisdiction and powers of all Courts with respect to any of the matters in this List Item 15, are in

the concurrent Legislative List. Now the scheme of the Act appears to be that when a Provincial Legislature makes laws regarding any matter in the Provincial Legislative List, those laws will prevail notwithstanding that they may be repugnant to a previous All India Act. For instance, the Usury Laws Repeal Act, India Act 28 of 1855, states in the clearest terms that the amount of interest shall be adjudged or decreed at the rate agreed on by the parties. But the Bihar Money Lenders Act in the Section I have quoted imposes a limit on the interest that may be decreed, notwithstanding anything to the contrary in the contract or in any other law. The apparent repugnancy is not necessarily fatal to the validity of the Provincial Act if the subject is one on the Provincial Legislative List; and "money-lenders and money-lending" is on that List. *Prima facie*, therefore, the Bihar Money Lenders Act must prevail within the Province, subject to what I have next to say.

Section 107 (1), Government of India Act, enacts that when a Provincial Legislature passes a law regarding a matter on the concurrent Legislative List then if it is repugnant to an Act of the Indian Legislature dealing with the matter, then the existing India law is to prevail and the provincial law shall to the extent of the repugnancy be void unless the procedure indicated in the succeeding sub-sections has been followed. That procedure is to reserve the provincial law for the consideration of the Governor-General or for the signification of His Majesty's pleasure. When that has been done and the law has received the assent of the Governor-General or of His Majesty, then the provincial law shall in that province prevail. Now it has been argued before us that the expression in Sec. 11 "no Court shall pass a decree" is intended to control the powers of the Courts not only with respect to preliminary but also with respect to final decrees and that notwithstanding that a preliminary decree may have been passed, it is not open to the Court to pass a final decree or on appeal to affirm a final decree which would award interest beyond the limits laid down in S. 11. I feel some difficulty in reading S. 11 in this very wide sense.

It seems more reasonable to assume that it refers to the passing of a fresh decree and not merely to the carrying out of a

decree already passed. If we were to read the Section in the wide sense contended for, it would seem repugnant to S. 97, Civil P. C., as well as to several of the Rules in O. 34 of the Code. It is a recognized principle that where one construction of an enactment will be in accordance with the existing enactments and another construction will be repugnant to them, the Courts will, where possible, adopt that reading which avoids repugnancy. On that principle I think S. 11 should be construed in the narrower sense as not intended to affect a decree already passed and therefore it seems that we cannot go behind the preliminary decree that was passed in this Court in 1928 and the requirement of the Code that a final decree should be prepared in accordance with it. It may be observed in this connexion that this is not a money suit to recover debt from a debtor but a mortgage suit and the decree that is to be passed is not a decree requiring judgment-debtors to pay any certain amount but a decree for sale of the property unless the persons interested in the property make sufficient payment to redeem it. On this view the defendants can get no advantage from the Bihar Money-Lenders Act, 1938. It is unnecessary to decide whether if this had been a money suit there would have been repugnancy between S. 11, Bihar Money-Lenders Act and the Civil Procedure Code or any other India Act against which S. 11 would not prevail.

In the course of the hearing, it was argued before us that the present respondents were the subject of a personal disqualification from realizing the entire decretal amount. Reliance in this connection was placed on Sec. 26, Stamp Act, but I find nothing in that Act to assist the appellants. The Section only applies where the amount or value of the subject-matter of any instrument chargeable with ad valorem duty cannot be ascertained at the date of its execution. Now the argument was that in the deed of gift by which Lalmani Bibi assigned her interest to the other plaintiffs this bond in suit was mentioned and its value was estimated at Rs. 10,000 and the argument is that this precludes the plaintiff as assignee from claiming more than Rupees 10,000. This is not a case in which S. 26 applies at all. The parties to an assignment of a debt are also under no compulsion to value it at the entire amount due. It may well be that in consequence of a risk of

non-realization the value of a debt is considerably less than its face value. There is nothing in the Stamp Act to limit the right of the parties to value a chose in action at any amount they may think fit or to penalise them for doing so. I should add, that appellants' advocate could not tell us what was the value of the stamp on the deed of gift or show us that a stamp of higher value would have been needed had a higher valuation been placed on this debt.

Another objection is taken that no decree can be passed against the property of the appellants because those properties are not mentioned in the preliminary decree. This matter has a history. The mortgage security entered in the mortgage bond was a three annas share of the entire mahal Amawan asli mai dakhli, tauzi 2075, sadr jama Rs. 1113-6-6. In the plaint a number of villages are mentioned with specifications of the khewats as being portions of the mortgaged property. The preliminary decree as at first framed in the High Court contained a list of villages in accordance with the list in the plaint, but on an application by the defendants a direction was given that the description of the mortgaged properties in the decree should be amended to correspond with the description in the bond. This was done. The appellants contend that the effect of this was to exempt from sale the properties in the list which has been struck out of the decree. That is not so. The effect is that nothing has been decided as to what villages and shares out of those in the list in the plaint are comprised within the mortgage security of which a general description was given in the bond and repeated in the preliminary decree. That question can obviously not be decided in this appeal. It must remain to be determined by the executing Court. In the result, all the objections taken by the appellants fail except with regard to the valuation of the house and the date from which credit will be allowed in respect of the sum of Rs. 1859-14-6. Let a decree be prepared in accordance with the directions given above. It is to be noted that the decree is not executable against the mortgaged properties in the hands of defendants 3, 6, 19 and 26. If on any part of the mortgaged property being put up to sale it is claimed before the Subordinate Judge to be the property of one of those defendants, the Subordinate Judge will hear and decide the matter. The respondents are

entitled to their costs of this appeal to be realised from the mortgaged property.

Manohar Lall J. — I agree.

D.S./R.K. *Order accordingly.*

*** * A. I. R. 1939 Patna 55**

FULL BENCH

WORT, DHAVLE AND

MANOHAR LALL JJ.

Sadanand Jha — Defendant —
Appellant.

v.

Aman Khan, Plaintiff and others,
Defendants — Respondents.

Appeal No. 81 of 1937, Decided on 30th November 1938, from decision of District Judge, Darbhanga, D/- 30th June 1936.

(a) Government of India Act (1935) — Interpretation — Value of decisions of Privy Council on North America Act stated.

In all questions of ultra vires arising while interpreting constitutional law it is the wisest course not to widen the discussion by consideration not necessarily involved in the decision of the point in controversy. So, Courts should refrain from expressing an opinion on points which do not arise : (1883) 9 A C 117; (1882) 7 A C 96; (1902) A C 73 and (1937) A C 326, *Rel. on.* [P 56 C 2 P 57 C 1]

In interpreting the Government of India Act (1935), the decision of their Lordships of the Privy Council arising under the North America Act are of little assistance and it would be dangerous to rely on them. The Government of India Act is framed entirely on different lines and based upon wholly different policy. The two Acts are not in pari materia. There have been however principles enunciated which may be of general application and to the extent to which those principles may be described as principles or canons of construction, they may be useful in construing the Government of India Act : A I R 1932 P C 138 and A I R 1930 P C 59, *Rel. on.* [P 57 C 1]

* * (b) Bihar Money-lenders Act (3 of 1938), Sec. 11—Sec. 11 is repugnant to Sec. 2, Usury Laws Repeal Act and must to extent of that repugnancy be treated as void under S. 107 (1), Government of India Act.

Section 11, Bihar Money-lenders Act (3 of 1938) is repugnant to the earlier existing Indian law, that is to S. 2, Usury Laws Repeal Act (1855) and therefore under Sec. 107 (1), Government of India Act, S. 2, Usury Laws Repeal Act, ought to prevail over Sec. 11, Bihar Money-lenders Act, which must to the extent of the repugnancy be treated as void. [P 62 C 1]

P. R. Das and A. C. Ray —
for Appellant.

L. K. Jha — *for Respondents.*

Wort J. — This appeal which has been referred to a Full Bench arises out of an action on a mortgage. The only point raised

in the Courts below was with regard to the question of interest. The loan was for Rs. 400 and in the plaint a sum of Rupees 1980 was claimed credit having been given for Rupees 281. The trial Judge disallowed compound interest but allowed simple interest at the rate provided by the mortgage bond being Rupee 1-4-0 per mensem. The District Judge on appeal reversed the trial Court's judgment and allowed compound interest at the rate claimed. The appeal raises the question of the validity of S. 11, Bihar Money-lenders Act (Bihar Act 3 of 1938) which is expressly retrospective. It is contended by the appellant that the learned Judge in the Court below had jurisdiction to make a decree in favour of the plaintiff for a sum of interest no greater than the amount of the loan advanced by reason of the provisions of the Section to which I have referred. The Section provides :

Notwithstanding anything to the contrary in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender (in this Act the money-lender is defined as a person who advances a loan) in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which together with any amount already realised as interest through the Court or otherwise, is greater than the amount of the loan advanced or, if the loan is based on a document, the amount of loan mentioned in the document on which the suit is based.

On behalf of the respondents, Mr. Jha contends that the Federal Legislature being paramount with regard to subjects of which Contract (No. 27) is one, enumerated in List III of Sch. 7, Government of India Act (25 & 26, Geo. V, Ch. 42), and money lending being a branch of the law of Contract the Section is void as being repugnant to the "existing Indian law." The arguments proceeded in the first place on the footing that the legislation was ultra vires the Provincial Legislature. Although, that in one aspect may be a correct designation of the problem before us, it would appear that the question is more limited, as there can be no doubt that Parliament having conferred on the Provincial Legislature the power to legislate with regard to "trade and commerce within the Province, markets and fairs, money-lending and money-lenders" (Item 27), the legislation in question is within the competence of the Legislature. The question is the narrower one, whether the provisions of the Act with which we are concerned is repugnant to "existing

Indian law" as I have already stated. The case depends upon the proper construction to be placed upon Part 5 of the Government of India Act 1935 and the three lists given in Sch. 7 of the Act. More particularly are we concerned with Ss. 100 and 107 and two items in two lists. Sec. 99 of Part 5, Government of India Act, distributes generally legislative powers to the Federal Legislature "for the whole or any part of British India or for any Federated State," and to the Provincial Legislature for the Province. We are not concerned with the subject-matter of sub-section 2 of S. 99. Sec. 100 deals with the distribution of the legislative powers in detail. Sub-s. (1) of that Section provides that :

Notwithstanding anything in the two last succeeding sub-sections the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I.

The next succeeding sub-section confers powers on the Federal Legislature and the Provincial Legislatures with regard to the Concurrent Legislative List, List III, and sub-sec. 3 confers power on the Provincial Legislature to make laws for the Province, excluding the right of the Federal Legislature to legislate in respect of the matters enumerated in the Provincial Legislative List, List II. To be more specific, sub-s. 2 relating to the Concurrent Legislative List confers the power referred to "notwithstanding anything in the next succeeding sub-section" (that is, sub-s. 3 giving the Province power with respect to the Provincial Legislative List) and confers power on the Provincial Legislature with respect to the same List which power is "subject to sub-s. 1" granting exclusive power in respect of the Federal Legislative List to the Federal Legislature. And again, the power conferred upon the Provincial Legislature in respect of the Provincial Legislative List by sub-sec. 3 is subject to the power conferred in the two preceding sub-sections, (Federal and Concurrent Legislative Lists).

It was contended by Mr. P. R. Das on behalf of the appellant in his able argument, that the Section properly construed plainly meant that the legislative powers were distributed to the Federal Legislature and the Provincial Legislature and those powers were mutually exclusive, but whilst admitting that the subjects of legislation, as contained in the Lists could not be put into water-tight compartments, he contended that the Provincial Legislature when legis-

lating on a subject contained in the Provincial List or with regard to a subject the dominant character of which or the "pith and substance" of which [as to the application of these tests, *see* (1934) A C 337,¹ *see also* (1937) A C 863² at page 870] properly brought the legislation in question within a subject assigned to the Provincial Legislature, such legislation could not be considered beyond the powers of the Provincial Legislature and therefore could not be questioned. That may be true, but on a plain reading of the Section, it seems to me to be abundantly clear that Parliament intended in this Section that the Federal Legislature should be paramount with regard to all matters enumerated in the three Lists and it is that situation with which we have to deal. I am of the opinion that the argument does not correctly state the nature of the problem before us. It appears from this Section that the Federal Legislature was given exclusive power to legislate with regard to those subjects enumerated in List I of Schedule 7, and those powers are untrammelled by the powers given to the Provincial Legislature in respect to the subjects enumerated in the Provincial List and the Concurrent List. Again, upon the Federal Legislature is conferred the power to legislate with regard to certain subjects enumerated in the Concurrent List notwithstanding any power conferred upon the Provincial Legislature to legislate with regard to that List or with regard to the subjects enumerated in List II. But the same concurrent power given to the Provincial Legislature is cut down by the exclusive power granted to the Federal Legislature, and finally the exclusive power given to the Provincial Legislature to legislate in its own field under List II, is conditioned by the exclusive power granted to the Federal Legislature with regard to List I and the concurrent power under List III. In arriving at a conclusion with regard to the matter in hand I would bear in mind the principle, which has been so often reiterated by the Judicial Committee of the Privy Council in constitutional cases that we are not entitled to stray beyond the limits of the matter under discussion, nor to lay down any general rules of construction of the Act. Expressed in the language of their Lordships of the Privy

1. Attorney-General for Ontario v. Reciprocal Insurance, (1934) A C 337.

2. Gallagher v. Lynn, (1937) A C 863.

Council in (1883) 9 A C 117³ at page 128 :

In all these questions of ultra vires it is the wisest course not to widen the discussion by consideration not necessarily involved in the decision of the point in controversy:

See also (1882) 7 A C 96⁴ at p. 107 and (1902) A C 73⁵ at page 77. In this connexion I should like to add that, although a large number of their Lordships' decisions on constitutional problems arising under the British North America Act of 1867 have been freely quoted, they offer little or no assistance to us in the question before us and indeed it would be dangerous to apply those decisions to this case having regard to the fact that the Act under consideration in this case and the British North America Act differ so materially in structure, although the interpretation of the two Acts may give rise to similar constitutional problems. There have been however principles enunciated which may be of general application and to the extent to which those principles may be described as principles or canons of construction may be useful in determining the matter before us. If the matter under consideration fell to be determined under S. 100 and the respective Legislative Lists only, the problem which we have to solve would bear a striking resemblance to those arising in many of the Canadian cases. But, it will be seen that the case depends not only on that Section but upon the proper construction to be placed upon Sec. 107, Government of India Act, in conjunction with the Legislative Lists in Sch. 7, a Section the prototype of which is not found in the British North America Act, unless it be the Proviso to S. 91 which was dealt with by the Judicial Committee in (1896) A C 348⁶ at p. 359. But it will be seen that the scheme of the two Acts is different : whereas under the Proviso referred to, subjects enumerated in S. 91, British North America Act, 1867 shall not be deemed to come within the class of matters of a local and private nature comprised in the enumeration of the classes of subjects by the Act assigned to the Provincial Legislatures, under the Section of the Act now under

8. *Hodge v. Reg.* (1883) 9 A C 117=53 L J P C 1 =50 L T 301.

4. *Citizens Assurance Co., Canada v. Parsons*, (1882) 7 A C 96=51 L J P C 11=45 L T 721.

5. *Att.-Gen. of Manitoba v. Manitoba License Holders Association*, (1902) A C 73=71 L J P C 28 = 85 L T 591=50 W R 431=18 T L R 94.

6. *Att.-Gen. Ontario v. Att.-Gen. for the Dominion of Canada*, (1896) A C 348 = 65 L J P C 26=74 L T 533.

consideration Federal Legislation shall prevail in all subjects which the Legislature of the Federal Legislature is competent to enact. Had we been considering the power of the Federal Legislature on the one hand to legislate with regard to a particular subject in the presence of actual legislation by the Province on a subject which was alleged to be within the power of the Federal Legislature, whether as regards a subject specifically enumerated in the Federal or Concurrent Lists or as incidental thereto, questions such as arose in (1883) 9 A C 117³ and (1894) A C 189⁷ would have arisen in this case. We are not concerned with Ss. 101 to 106. Shortly stated, they give powers with regard to legislation in exceptional circumstances, not present in this case. We come therefore to S. 107. It is unnecessary to consider sub-s. 2 or sub-s. 3 of that Section as they relate to matters which are clearly not relevant to this case. Sub-section 1 provides :

If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then subject to the provisions of this Section, the Federal law, whether passed before or after the provincial law, or as the case may be, the existing Indian law shall prevail and the Provincial law, shall to the extent of the repugnancy, be void.

It will be seen that the last part of the sub-section makes the Federal legislation or the "existing Indian law" paramount, but the words "subject to the provisions of this Section" occur. These last words gave rise to some difficulty in the argument. But it seems to be quite clear that the expression necessarily refers to those provisions in sub-s. (2) under which on certain conditions a provincial law, although repugnant to an "existing Indian law" may yet have effect in the Province in which it was enacted, but the words can have no reference to the validity or otherwise of the Federal or Provincial legislation, as apart from references to that question, which are not relevant to the point before us; in the first part of the sub-section and the last sub-section, no mention is made in the Section to that matter. Broadly stated it would appear that, whilst S. 100 distributes legislative powers to the respective Legislatures, sub-s. (1) of S. 107 provides a

7. *Att.-Gen. Ontario v. Att.-Gen. for the Dominion of Canada*, (1894) A C 189=63 L J P C 59.

test with respect to the validity of legislation when conflict between the Federal and the Provincial Legislation arises—a possibility which is contemplated and is not unlikely having regard to the fact that concurrent legislative powers are conferred on the two Legislatures. It is said in this case that there is this conflict as the Provincial Legislature, in enacting S. 11 Bihar Money Lenders Act (although that legislation is *intra vires* coming as it does expressly under head 27 Money-lending and Money-lenders), has trenched upon the Concurrent List, in that Sec. 11, prohibiting a money-lender from recovering more than a certain amount of interest and in that sense having made a contract for the parties, has legislated in respect of a subject enumerated in the Concurrent Legislative List, Item 10, and therefore has brought itself within the mischief of sub-s. (1) of Sec. 107 Government of India Act. The appellant has sought to avoid this position by relying upon a number of Canadian decisions for the application of the maxim *generalalia specialibus non derogant*: see the case in (1920) A C 1029,⁸ contending that the general term in the Concurrent List “Contract” is to be cut down by the specific words in the Provincial List “Money-lending and Money-lenders”, or, as expressed by their Lordships of the Judicial Committee in the case referred to,

that the generality of the wording of . . . has to be interpreted as restricted by the specific language of . . . in accordance with the well-established principle that subjects in one aspect may come under one list and in another aspect, that is made dominant, be brought under the other :

See also (1912) A C 880.⁹ The argument amounts to this also that, when considering the validity of the legislation under consideration, in its relation to “existing Indian law” with regard to a subject enumerated in the Concurrent List, it must be held that the general subject “contract” having been cut down by the special subject “Money-lending”, the “existing Indian law” although dealing with interest does not deal with a subject in the Concurrent Legislative List. But, this principle cannot be held to apply, and it seems to me for several reasons, the main one of which is stated in the earlier part of my observa-

tions. Had we been considering on the one hand the power of the Federal Legislature *eo nomine* to legislate in the absence of actual legislation by that Legislature, and on the other hand legislation by the Provincial Legislature on a subject specifically enumerated in the Provincial List and in another aspect coming within a subject enumerated in the Federal List or the Concurrent List of which the subject-matter of the Provincial Legislature was said to be a branch or part, then it might have been held that the power conferred on the Provincial Legislature to legislate with regard to money-lending and money-lenders was an exception to the power of the Federal Legislature to legislate under the Concurrent Legislative List with regard to the wider and more general subject “Contract”. Undoubtedly money-lending, as I have said, is a branch of “Contract”; the subject money-lending and money-lenders may be considered the species and contract the genus. The principle relied upon by the appellant is a principle of construction ; it cannot affect matters of definition. It will be noticed that the first part of sub-s. (1), S. 107, refers to two different cases: first, if any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact,

secondly,

or to any provision of an existing Indian law with respect to one of matters enumerated in the Concurrent Legislative List.

The principle *generalalia specialibus non derogant* may be applied in testing the question under the first part whether the Federal Legislature is competent to enact legislation with regard to a subject e. g. the power to legislate in the field of contract, may be limited by the application of the principle by excluding from that subject the special subject money-lending. But, it cannot be applied for the purpose of deciding whether the “existing Indian law” relates to a subject in the Concurrent List. Either the subject-matter of the “existing Indian law” comes within a subject enumerated in the Concurrent Legislative List or it does not, e. g. money-lending or interest recoverable in a money-lending contract is a part of the subject ‘contract’. At this stage we were invited to consider a detailed comparison of the various subjects of legislation enumerated in the Lists with a view to support and to test the arguments advanced. As an instance, Item No. 28, List 1, was compared with one of the Items

8. *Paquet v. Corporation of Pilots of Quebec*, (1920) 7 A I R P C 204=(1920) A C 1029=89 L J P C 241.

9. *In re Marriage Legislation in Canada*, (1912) A C 880 = 81 L J P C 237=107 L T 330=28 T L R 580.

under consideration in this case, Contract : No. 10, List 3. The comparison was also used by Mr. Jha for contending that where Parliament intended a limit to be placed upon the Legislature as regards any particular subject it is so provided, for instance, Item No. 45, List 1 : No. 7, List 3. This does not altogether support Mr. Jha's case but I purposely refrain from any discussion of this argument as it clearly tends to widen the matter under discussion—a course condemned by the Judicial Committee of the Privy Council, and not being the point to be determined in this case, must necessarily be barren of results. If and when the many problems suggested by these comparisons arise, I have no doubt they will be solved by the competent authority. But here the position is clear. We are considering, it is argued, Provincial legislation in its relation to an "occupied field", occupied by the "existing Indian law" in respect to 'contract' in its wider and general aspects, it might be said that the Provincial legislation in respect to 'contract' in the particular aspect 'money-lending' was valid, as the power to legislate with regard to that particular matter had been specifically conferred upon that Legislature. What has been described as the "doctrine of the occupied field" has been expressed by Lord Tomlin in (1930) A C 111¹⁰ in the fourth rule there laid down and may be applied to the case before us *mutatis mutandis* :

There can be a domain in which Provincial and Dominion Legislations may overlap, in which case neither legislation will be ultra vires if the field is clear; but, if the field is not clear and the two legislations meet, the Dominion Legislation must prevail :

See (1907) A C 65,¹¹ also (1894) A C 189⁷ at p. 200. This doctrine may be applied to the case before us as I have stated, as the dominant power of the Central Legislature is a feature common to the Canadian and Indian constitutions, expressly so in the case of the Indian, by S. 107, Government of India Act. Here it is necessary to pause to examine what is meant by "existing Indian law" under the Government of India Act. Under S. 311 (2)

"existing Indian law" means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part 3 of this Act by

10. Att.-Gen. for Canada v. Att.-Gen. for British Columbia, (1930) A C 111=99 L J P C 20=142 L T 73=46 T L R 1.

11. Grand Trunk Ry. of Canada v. Attorney General of Canada, (1907) A C 65=76 L J P C 23=95 L T 631=23 T L R 40.

any Legislature, authority or person in any territories for the time being comprised in British India, being a Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation.

So we are met with this position that the laws (in this particular case, it is argued, provisions of the Civil Procedure Code, Contract Act, Usury Laws Repeal Act, 1855 and Usurious Loans Act, 1918) to which S. 11 is alleged to be repugnant have the same status as a law passed by the Federal Legislature under S. 11, List 3 of S. 100 and List 3 of the Concurrent Legislative List of Sch. 7. The validity of the "existing Indian law" cannot be called in question, and the problem therefore with which we are met is to consider whether the Provincial Legislature had power to legislate with regard to this particular matter (that is admitted) and whether the "existing Indian law" properly defined comes within the subject 'contract' in the Concurrent Legislative List; in other words, whether this particular field of legislation is already occupied : and, if that is answered in the affirmative, whether S. 11, Bihar Money Lenders Act, is repugnant thereto. It will be seen that the field of investigation is narrowed. We are therefore not met with the problems which existed in so many of the cases before the Privy Council under the British North America Act : the question does not arise whether for instance legislation of the Provincial Legislature was on a subject incidental to or ancillary to a specific subject with regard to which powers have been conferred, nor does the question strictly arise whether the legislation complained of comes within the powers of the Provincial Legislature.

Section 11, Bihar Money Lenders Act, prohibits the making a decree for interest, whatever the contract between the parties may be, for a sum beyond a certain amount. The Court complying with the provision of this Section therefore would impose upon the parties a new contract and I do not think there can be any doubt therefore that the Provincial Legislature in passing this legislation is dealing with the subject "contract under the special head money-lending and money-lenders;" that is not disputed. It is argued that the Legislature by a law passed by an authority indicated in the definition to which reference has been made, has also legislated with regard to the subject "contract" coming within the Concurrent Legislative List. In the first

place it is said that the Legislature has legislated under O. 34, Rr. 2 and 11, Civil Procedure Code. R. 2 provides :

In a suit for foreclosure if the plaintiff succeeds the Court shall pass a preliminary decree ordering that an account be taken of what was due to the plaintiff at the date of such a decree.

Rule 11 provides :

In any decree passed in a suit for foreclosure, sale or redemption where interest is legally recoverable the Court may order payment of interest to the mortgagee.

Sub-clause (a) (iii) of that Rule provides :

On the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee at the rate agreed between the parties or, failing such rate, at the same rate as is payable on the principal.

It is contended here that the Legislature provides that the Court is bound to make a decree at the contract rate. Sec. 37, Contract Act, is also relied upon. That Section provides :

The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law.

Dealing first with Sec. 37, Contract Act, I am clearly of the opinion that there is no obligation laid down by the Legislature in that Section to make a decree according to the terms of the contract and on no other terms. Sec. 37 itself provides for a possible dispensation to the parties to the contract :

Unless such performance is dispensed with or excused under the provisions of this Act or of any other law.

In those cases in which the facts come within the provisions of the Usurious Loans Act, 1918, the strict performance is excused. As regards O. 34 the respondents, also rely upon the case in 54 Cal 161¹² in which Lord Phillimore in delivering the judgment of the Privy Council said :

Till the period of redemption has expired, the matter remains in contract and interest has to be paid at the rate and with the rests specified in the contract of mortgage.

Reliance was also placed upon the case in 63 I A 114¹³ for the contention that as the law stood before the passing of Sec. 11, Bihar Money-Lenders Act, the contract made by the parties bound them as provided by O. 34. The short answer to that argument is that in the cases quoted one question alone which was being considered

was interest recoverable for the period before and after the decree and again from an examination of the latter case it will be seen to be an authority directly opposed to the argument advanced. It is contended by Mr. P. R. Das that this order creates no rights, lays down no principle of substantive law but is merely a branch of the adjective law, and for that reason no assistance can be gained from it by the respondent. Again it may be remembered that O. 34 found place at one time in the Transfer of Property Act—an additional reason for the correctness of the view advanced by the appellant: In other words, it was transferred from an Act dealing with substantive law and made a rule under an Act dealing with adjective law or law of procedure. But a much more serious question arises with regard to the other Act mentioned: the Usurious Loans Act, 1918. In this connexion it was first argued that the Section under consideration was repugnant to the Usury Laws Repeal Act, 1855, repealed the Usury laws then in existence and provided that :

In any suit in which interest is recoverable the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties, and if no rate is agreed upon, at such a rate as the Court shall deem reasonable. .

There are other provisions with which we have in this case no concern. Then came the Usurious Loans Act of 1918 by which to some extent the Usury laws existing before the passing of the Act of 1855 were reinstated. The Usurious Loans Act 1918 provides that in circumstances mentioned in S. 3 the Court has a discretion to make a decree other than at the rate of interest agreed upon between the parties: in other words, to reopen the transaction, the subjects of the litigation, and to that extent to make a new contract between the parties. The position is this, therefore, in a case in which the conditions mentioned in Sec. 3, Usurious Loans Act, 1918, do not exist, the Court is bound to make a decree at the rate "agreed upon between the parties" (Act 28 of 1855). If the case before us had been limited to a consideration of the repugnancy of S. 11, Bihar Money Lenders Act, to the Act of 1855, much could have been said for the appellant's argument that Parliament could not have intended that a conflict should exist, that it could not be assumed on any construction of the relevant provisions that what Parliament gave a Provincial Legislature by conferring powers

12. Jagannath Prosad v. Surajmal Jalal, (1927) 14 A I R P C 1=99 I C 686=54 Cal 161=54 I A 1 (P C).

13. Kusum Kumari v. Debi Prosad, (1936) 23 A I R P C 63=160 I C 285=15 Pat 210=63 I A 114 (P C).

to legislate in respect to money lending was expressly taken away by conferring power on the Federal Legislature to legislate as to contract, or by inference made invalid by placing a general subject contract in the Concurrent List. But the "existing Indian law" does include legislation on this specific subject in the sense that a law exists with regard to the recovery of interest in the Usurious Loans Act, 1918.

Now, by Sec. 11, Bihar Money Lenders Act, the Court is deprived of the discretion placed in its hands by the Usurious Loans Act, 1918, and at the same time, as regards those cases to which by their circumstances the Act of 1918 does not apply in terms, the Court is prohibited from obeying the mandatory provisions of the Act of 1855—"adjudge or decree an amount of interest according to that agreed upon by the parties." The answer to that put forward in the argument of Mr. P. R. Das is a principle laid down by a number of Indian authorities to which I shall now refer. It is contended on the analogy of these authorities that S. 11 of the Act, under consideration amounts to nothing more than a rule of limitation of suits and is therefore in conflict neither with the Usury Laws Repeal Act of 1855 nor with the Usurious Loans Act of 1918. It will be observed that if this argument is to be accepted it must be held that the two Acts referred to—the Acts of 1855 and 1918—are Acts giving substantive rights. The first case relied on is 1 Cal 92¹⁴ deciding that the Damdupat rule was not applicable to the mufussal and the Judges deciding that case said during the course of the judgment that:

In the Presidency town here no doubt it has been held that the rule of Hindu law in question has not been abrogated by Act 28 of 1855.

In 5 Cal 867¹⁵ Wilson J., sitting alone, observed on the authority of certain Bombay decisions, but without considering the authorities in detail, that he doubted whether the rule of Hindu law in question (i. e. Damdupat rule) has properly anything to do with the legality or illegality of any contract, "I think it is rather a rule of limitation." Chaudhuri J. sitting on the Original Side of the Court in 42 Cal 826¹⁶

14. Deen Doyal v. Kylas Chunder, (1875) 1 Cal 92 = 24 W R 106.

15. Ramconnoy Audicarry v. Johur Lall Dutt, (1880) 5 Cal 867 = 7 O L R 204.

16. Kunja Lal Banerji v. Narsamba Debi, (1916) 3 A I R Cal 542 = 31 I O 6 = 42 Cal 826 = 20 C W N 110.

held (referring however to a Madras decision to which detailed reference will be made later) that the Damdupat rule applied in cases of mortgage, observing that the Madras Court had overlooked Sec. 4, T. P. Act. On the other hand, in 5 Beng L R 500¹⁷ the Court held that Act 28 of 1855 repealed the Mahomedan laws against interest as between co-religionists but remarking that so far as Courts of justice were concerned the rule had been treated as obsolete. In Madras in 26 Mad 662¹⁸ it was held that under Ss. 86 and 88, T. P. Act, the mortgagee was entitled to interest at the contract rate, and whether the rule of Damdupat be treated as a special rule (being applicable to Hindus only) and the Transfer of Property Act as a general statutory provision or vice versa—the rule of Damdupat general, and Ss. 86 and 88, T. P. Act, as special—the same result obtained viz. the latter was to be taken as having abrogated the former. This latter case is against Mr. Das's contention. However he relies upon the earlier quoted cases by way of analogy. He contends that S. 11, Bihar Money-Lenders Act, lays down nothing more than a rule of limitation and in no way affects or is repugnant to the statutory provisions to which reference has been made. However, whatever S. 11, Bihar Money-Lenders Act, may be described as, whether as a mere rule of limitation, or as a provision of substantive law, it most certainly deprives the Court, as I have already stated, of the discretion given to the Court under Sec. 3, Usurious Loans Act of 1918 in cases in which the circumstances proved allow of the exercise of a discretion, and is most certainly opposed to the express provision of the law laid down in the Usury Loans Repeal Act in those cases to which Usurious Loans Act does not apply.

Nor can the validity of the Section be upheld because in the particular circumstances of some cases the discretion given to the Courts by the Usurious Loans Act may be exercised and yet the Court obey the express provisions of Sec. 11, i. e. in those cases in which the amount of the interest awarded does not exceed the limits provided by that Section. Those cases would be rare, as it is notorious especially in cases of the kind with which we are

17. Mia Khan v. Bibi Bibijan, (1870) 5 Beng L R 500 = 14 W R 308.

18. Madhwa Sidhanata Onahini Nidhi v. Venkataramanjulu Naidu, (1908) 26 Mad 662.

dealing, that owing to the fact that no interest is paid to the creditor for the whole or part of the period of limitation the amount of interest far exceeds the principal, even in those cases in which the Court exercises its discretion under the Usurious Loans Act. An Act cannot at the same time be valid and invalid, valid in those cases in which by the circumstances of the case, and not, by reason of the provisions of the Act itself, the Court keeps within the confines laid down, invalid in those cases, even allowing for the Court's discretionary powers, in which the limitations of S. 11, are exceeded. In my judgment the Section under consideration is repugnant to the earlier existing Indian law and, to the extent of the repugnancy, which is indicated above, is void. The result then is that the appeal fails and must be dismissed with costs. A certificate is granted under S. 205, Government of India Act.

Dhavye J. — This is an appeal by defendant 3 in a suit brought to enforce a mortgage bond executed years ago by his father and elder brother, defendants 1 and 2. The rate of interest provided in the bond was Re. 1-4-0 per cent, per mensem with yearly rests. The trial Court held that the rate was excessive and decreed the claim with only simple interest at Re. 1-4-0 per cent. per mensem. On an appeal by the plaintiff the District Judge held that the compound interest stipulated in the bond was not excessive, and therefore decreed the suit in full. Defendant 3 filed the second appeal to this Court in October 1936. In July 1938, the Bihar Money-Lenders Act, 3 of 1938, became law. S. 11 of this Act provides :

Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender in respect of a loan advanced before or after the commencement of this Act pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through Court or otherwise, is greater than the amount of the loan advanced, or if the loan is based on a document, the amount of loan mentioned in the document on which the suit is based.

Bihar Act 5 of 1938 which became law in September 1938, provided inter alia that S. 11 of Act 3 shall apply, and shall be deemed always to have applied, to suits brought by money-lenders in respect of loans advanced before the commencement of the said Act (Act 3 of 1938) and to appeals arising out of such suits, whether such suits or appeals were instituted before or after

Section 11 came into force. The Division Bench before which this appeal came in the first instance, has referred to a Full Bench the question whether S. 11, Bihar Act 3 of 1938, is ultra vires of the Provincial Legislature. It was the appellant that sought to take advantage of what may be called the rule of *Damdapat* embodied in S. 11 and the respondent that sought to meet this by urging that the Section was ultra vires. This contention is based on S. 107 (1), Government of India Act 1935, read with Item 10 "contracts," in List 3, the Concurrent Legislative List in Sch. 7 of the Act, and S. 2, Usury Laws Repeal Act 1855, which provides that

in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties.

This last is part of the "existing Indian law" as defined in Sec. 311, sub-sec. (2), Government of India Act, and relates to the law of contracts. It is urged for the respondent that S. 11, Bihar Act 3 of 1938, is repugnant to it, and that therefore under S. 107, sub-s. (1), Government of India Act, S. 2, Usury Laws Repeal Act ought to prevail over S. 11, Bihar Money-Lenders Act which must to the extent of the repugnancy be treated as void. On the other hand, it has been urged for the appellant that as the Bihar Act relates to "money-lending and money-lenders," a matter specifically included in Item 27 of the Provincial Legislative List, List 2 in Sch. 7, Government of India Act, the Provincial Legislature has, under sub-s. 3 of S. 100 of the latter Act, exclusive power to legislate with respect to the matter, and that these powers of legislation are plenary, "as large and of the same nature, as those of Parliament itself" : 5 I A 178.¹⁹ The relief of the debtor is not, it is pointed out, an unusual feature of Money-Lenders Acts, and it is contended that as the Bihar Legislature is empowered to legislate "with respect to" this matter, the Act "is not invalidated if incidentally it affects matters which are outside the authorised field" : (1937) A C 863.² S. 107 (1) places existing Indian law with respect to the matters enumerated in the Concurrent Legislative List on the same footing as Federal law in respect of repugnancies with Provincial Legislation, but it is contended that the Section is confined to repugnancies with the former occurring in Provincial laws enacted

19. *The Empress v. Burah*, (1879) 4 Cal 172 = 5 I A 178 = 3 C L R 197 = 3 Sar 834 (P).

with respect only to the matters enumerated in the Concurrent Legislative List. The Bihar Money-Lenders Act comes under the Provincial Legislative List, and it is therefore urged that S. 107 (1) has no application, and further that there is in fact no repugnancy between S. 11, Money-Lenders Act and S. 2, Usury Laws Repeal Act 1855, "which deals exclusively with the rate of interest which may be allowed" : 14 Cal 781.²⁰

I have already quoted the terms of the two Sections. In so far as S. 11, Bihar Act, forbids the passing of a decree for "an amount of interest" in excess of the amount of the loan advanced, there is plainly an apparent conflict with the requirement of S. 2 of the Act of 1855 that "the amount (of interest) shall be decreed by the Court at the rate agreed upon by the parties." In legislating on the subject of money lending and money lenders the Bihar Legislature is no doubt dealing with a matter within the competence of the Provincial Legislature, and of the Provincial Legislature alone. Indeed, sub-s. (3) of S. 100, Government of India Act, provides not only that the Provincial Legislature has power to make laws for a Province with respect to any of the matters enumerated in the Provincial Legislative List, but also that the Federal Legislature has no power to do so—an express exclusion of the latter on which much stress has been laid by the appellant. But there is a distinction between exclusive powers and unrestricted powers; and the power conferred upon the Provincial Legislature with respect to List II is by the very terms of the sub-section "subject to the two preceding sub-sections." Now, sub-s. 1 of S. 100 gives the Federal Legislature exclusive power to make laws with respect to any of the matters enumerated in List I, the Federal Legislative List, and this power is expressed to be "notwithstanding anything in the two next succeeding sub-sections." Sub-s. 2 gives power to the Federal Legislature, again "notwithstanding anything in the next succeeding sub-section," to make laws with respect to any of the matters enumerated in List III, the Concurrent Legislative List. The same sub-section also provides that "subject to the preceding sub-section" the Provincial Legislature has power to make laws with respect to the same

matters. The distribution of legislative powers with respect to the three Lists between the two kinds of Legislature, the Federal Legislature and the Provincial Legislatures, thus proceeds on lines not to be found in the North British America Act, 1867, on which a number of decisions ranging from (1882) 7 A C 96⁴ to 1937 A C 260,²¹ have been cited before us. The powers conferred on the Federal and the Provincial Legislatures can up to a certain point be expressed in the same terms "concurrent" as regards List III, and "exclusive" as regards Lists I and II respectively; and yet there is a vital difference between them, for the Federal Legislature is given exclusive and concurrent powers over Lists I and III respectively "notwithstanding" the powers of the Provincial Legislatures over Lists III and II, while these latter powers are "subject to" the former. The distinction may perhaps be more clearly brought out in another way as follows: the Federal Legislature has (1) exclusive power over List I, notwithstanding the concurrent power of Provincial Legislatures over List III and their exclusive power over List II; (2) concurrent power over List III, notwithstanding the exclusive power of Provincial Legislatures over List II; and (3) no power over List II which is confided to Provincial Legislatures, subject, however to the powers of the Federal Legislatures over Lists I and III; while the Provincial Legislatures have (1) no power at all over List I; (2) concurrent power over List III, subject however to the exclusive power of the Federal Legislature over List I; and (3) exclusive power over List II, subject to the powers of the Federal Legislature over Lists I and III.

If we turn to the items included in these three Lists, it becomes plain that Parliament intended to make an exhaustive enumeration of the powers confided to the two kinds of Legislature. This appears even more clearly from S. 104 which deals with "residual powers of legislation" and enacts that the Governor-General, acting in his discretion, may empower either the Federal Legislature or Provincial Legislature to enact a law with respect to any matter not enumerated in any of the three Lists. Apart from this (and from such special provisions as we find, for instance, in S. 102 which will be referred to later) either

20. Nobin Chunder Bannerjee v. Romesh Chunder Ghose, (1887) 14 Cal 781.

21. Forbes v. Attorney-General for Manitoba, (1937) A C 260.

Legislature has power to legislate with respect to the Concurrent Legislative List with its 36 items, including (be it noted) such general subjects as (1) Criminal law, (2) Criminal Procedure, (4) Civil Procedure including the law of limitation (5) Evidence, (8) Transfer of Property other than agricultural land, (10) Contracts, including special forms of Contracts but not including Contracts relating to agricultural land, and (14) Actionable wrongs (save in so far as included in List I or List II), while the Federal Legislature has for its own exclusive field List I with its 59 items of all-India or Federal concern, and the Provincial Legislatures their List II with its 54 items. In a very detailed scheme of this kind it was only to be expected that an absolutely sharp and definite distinction could not be attained and that some of the subjects assigned, say, to the Federal Legislature may unavoidably run into the Concurrent Legislative List (with its very general subjects) or the Provincial Legislative List. It could not have been the intention that conflicts should exist; and it seems therefore to have been provided on one hand that the Federal Legislature is to exercise its powers over List 1, notwithstanding the concurrent powers given to the Provincial Legislatures over List 3 and the exclusive powers given to them over List 2, and on the other, that these concurrent powers of the Provincial Legislatures over List 3 and their exclusive powers over List 2 are to be subject to the powers of the Federal Legislature over Lists 1 and 3.

The usual practice of the Courts in constitutional matters is to refrain from expressing an opinion on points which do not arise: *see* (1937) A C 326.²² But it is desirable, as in *Parsons' case*⁴ (already referred to), to take one or two illustrations in order to understand the inter-relations of the Federal and the Provincial Legislatures with reference to the three Lists and apply them to the particular question before us, namely, whether Sec. 107 (1) renders S. 11, Bihar Money-Lenders Act, void on the ground of its repugnancy to Section 2, Usury Laws Repeal Act. Thus, Item 54 in List 1, "Taxes on income other than agricultural income", might on the face of it easily run into or clash in part with Item 16 in List 3, "legal, medical and other professions" and Item 46 in List 2,

"Taxes on professions, trades, callings, and employments;" and vice versa. There are also Items 26 (carriage of passengers and goods by sea or by air) and 28 (Cheques, bills of exchange, promissory notes, and other like instruments) in List 1 which might easily run into Item 10 (Contracts) or 31 (Electricity) in List 3 and Items 27 (Trade and commerce within the Province) and 29 (. . . . distribution of goods) in List 2. Conflicts might thus arise not only when the two kinds of Legislature operate in the concurrent field, but also when one Legislature operates in its exclusive field and another in its exclusive or in the concurrent field; and these would all seem to have been provided against by the double method of imposing a limitation on the powers of Provincial Legislatures by making them "subject to" the powers of the Federal Legislature, while conferring powers on the latter "notwithstanding" the powers of the former in the Provincial no less than in the concurrent field. Which legislation is to prevail in case of actual conflict in any fields seems to be laid down in sub-s. (1) of Sec. 107 of the Act, while sub-s. (2) of this Section provides a special method by which a Provincial Legislature may effectively legislate on a matter in the concurrent field notwithstanding provisions to the contrary in a Federal or the existing Indian law in that field. If this be the right view, it would follow that so far as S. 11, Money-Lenders Act, is really repugnant to S. 2, Usury Laws Repeal Act, the latter must prevail.

Against this view Mr. P. R. Das has argued that the Government of India Act does not contemplate any conflict between Federal and Provincial legislation except in the concurrent field, for which alone (he has argued) specific provision is made in Sec. 107. In this connexion learned counsel has in the first place referred to S. 102 of the Act, which in sub-s. (1) empowers the Federal Legislature, on a "Proclamation of Emergency," to make laws for a Province with respect to any of the matters enumerated in the Provincial Legislative List, and in sub-s. (2) provides that such Federal laws (which by the succeeding sub-sections are to have effect for a limited time) shall prevail over any provisions of the Provincial laws that may be repugnant to it. The conflict dealt with in this Section is however a conflict arising only when two Legislatures—the Federal and the Provincial—

²². *Attorney-General for Canada v. Attorney-General for Ontario*, (1937) A C 326.

operate in one and the same, viz. the Provincial field, the former being empowered to do so in times of grave emergency. This does not, in my opinion, furnish any indication that Parliament did not think of, and therefore made no provision regarding conflicts that may arise in ordinary times when the Federal and the Provincial Legislatures exercise exclusive powers over Lists 1 and 2, respectively, and also exercise concurrent powers over List 3. All such conflicts *prima facie* come within sub-s. (1) of S. 107 which runs :

107 (1). If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the concurrent legislative list, then subject to the provisions of this Section, the Federal law whether passed before or after the Provincial law or as the case may be the existing Indian law shall prevail and the Provincial law shall to the extent of the repugnancy be void.

The expression "subject to the provisions of this Section" takes us to the next sub-section which is as follows :

107 (2). Where a Provincial law with respect to one of the matters enumerated in the concurrent legislative list contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter then if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter :

Provided that no bill or amendment for making any provision repugnant to any Provincial law, which having been so reserved, has received the assent of the Governor-General or of His Majesty shall be introduced or moved in either chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

It has been urged for the appellant that the words following "an existing Indian law" in sub-s. (1), namely "with respect to one of the matters enumerated in the Concurrent Legislative List", should also be read with the expressions "any provision of a Provincial law" and "any provision of a Federal law" occurring earlier in this sub-section; and the reason given is that the expression "subject to the provisions of this Section" in the same sub-section, has, so it is argued, the effect of making the repugnancies dealt with in sub-s. (1) identical with those dealt with in sub-sec. (2). The construction contended for is opposed

to the plain grammar of the sub-section, and there is nothing in the scheme of legislation laid down in the Act to indicate that Parliament intended it. As we have already seen, the enumeration of items in the three lists itself makes it far from improbable that conflicts of legislative provisions would arise in other fields no less than in the concurrent field; and there is no reason to suppose that Parliament intended to leave the former to the operation of S. 100 alone with its qualifications of "notwithstanding" and "subject to". Further, if Parliament had intended to provide in sub-sec. (1) of S. 107 for conflicts in the concurrent field alone, it could easily have done so by adopting the language of sub-s. (2) which is unmistakably confined to action in the concurrent field. Nor can I agree that the expression "subject to the provisions of this Section" in sub-s. (1) has the effect of confining the conflicts dealt with in this sub-section to conflicts in the concurrent field. That expression no doubt refers to sub-s. (2) which is confined to legislation in the concurrent field. But is the provision of this exceptional procedure for the concurrent field any reason for supposing that Parliament either was not aware of or decided to ignore possible conflicts between Provincial legislation in the exclusive field and Federal or the existing Indian law in the concurrent field? As we have seen already from Sec. 100, the powers of the Provincial Legislatures are subject to the powers of the Federal Legislature. S. 107 may be regarded as a supplement to that provision. In sub-sec. (1) it deals with the effect of repugnancies between Provincial and Federal legislation (whenever passed) without any reference to the fields to which the conflicting enactments may relate; and it also deals with repugnancies between Provincial legislation and the existing Indian law which has not been referred to in S. 100 and is here in the concurrent field only put on the same footing as Federal law irrespective of whether this relates to its exclusive or the concurrent field.

The sub-section provides in effect that in either case the Provincial law shall, to the extent of the repugnancy (and no more), be void. To this general rule the second sub-section provides an exception limited to Provincial, Federal, and existing Indian legislation, all in the concurrent field. That the exception is limited, in my

opinion, affords no reason for restricting the scope of the general rule.

We have in the present case to consider a conflict of a provision in a Provincial law on a matter enumerated in the Provincial Legislative List with a provision of the existing Indian law with respect to a matter enumerated in the Concurrent Legislative List; and as I have already remarked, the existing Indian law is placed on the same footing in this respect as Federal Legislation in sub-s. (1) of S. 107. The limitation placed in S. 100 on the powers of a Provincial Legislature over the Provincial Legislative List by making them "subject to" the powers of the Federal Legislature over the Concurrent Legislative List makes it impossible to accept the appellant's contention that the exclusive power of the Provincial Legislature with respect to money-lenders and money-lending is plenary; indeed in the very passage in 5 I A 178¹⁹ which was cited for the appellant, Lord Selborne clearly spoke of the powers of the Indian Legislature being "as large, and of the same nature, as those of Parliament itself", (only) when the former is acting within the limits which circumscribe these powers. The same limitation (with the corresponding power of Federal Legislature in the concurrent field 'notwithstanding' the exclusive power of the Provincial Legislature "with respect to" List II) goes far to show that it is not open to this latter Legislature, when operating in its exclusive field, to affect matters governed by Federal Legislation, even incidentally. The additional facts that the Provincial Legislature is itself empowered to operate in the concurrent field, but that this power (no less than the exclusive power over List II) is qualified by the provisions of S. 107, seem to me to leave no doubt that Provincial Legislation in the exclusive provincial field is not permitted to trench upon Federal Legislation, even if such invasion could be regarded as necessarily incidental to the effective exercise of its powers by the Provincial Legislature. The proper test to apply to the case before us is, in my opinion, not so much whether the Provincial Act is "with respect to" a matter in List II or in List III, as whether any provision in it is repugnant to the provision of an existing Indian law with respect to a matter enumerated in List III; for S. 107 in substance imposes a limitation upon what Provincial Legislation may validly effect

even in the two fields open to it. To powers so limited the principle in 1937 A C 863,² a case under such a very different Act as the Government of Ireland Act, 1920, cannot apply. For, as Lord Selborne L. C. said about the application of the doctrine of ultra vires in (1880) 5 A C 473,²³

whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires,

an observation which need not be confined to the interpretation of Railway Acts; and the express limitation of the powers of the Provincial Legislature by making them subject inter alia to Federal law in its appropriate fields (read with Sec. 107 as regards existing Indian law in the concurrent field) amounts to an equally clear prohibition of even an incidental invasion of the superior law in that field by the Provincial Legislature. Mr. Das has also urged that in giving relief to the debtor under S. 11 Provincial Legislature cannot be said to have travelled beyond the field of money lenders and money lending, especially as the rule of Damdupat is not unknown in this country and that the generality of the term contracts in Item 10, Concurrent List, should be interpreted as restricted by the specific language of Item 27 in the Provincial List, in accordance with what Lord Haldane in (1920) A C 1029⁸ called the well-established principle that subjects which in one aspect may come under a section describing the powers of a Provincial Legislature may, in another aspect that is made dominant, be brought within another section which gives the powers of the Federal Legislature (and vice versa). But the principle so set out refers to Ss. 92 and 91, British North America Act, 1867, and its scope appears more clearly from Lord Haldane's observations in (1921) 2 A C 91²⁴:

The rule of construction is that general language in the heads of S. 92 yields to particular expressions in S. 91, where the latter are unambiguous. The rule may also apply in favour of the Province in construing merely general words in the enumerated heads in S. 91 Whether an exception is to be read in either case depends on the application of the principle that language which

23. Attorney-General v. G. E. Ry. Co., (1880) 5 A C 473=49 L J Ch 545 = 42 L T 810 = 28 W R 769.

24. Great West Saddlery Co. Ltd., v. The King, (1921) 8 A I R P C 148=(1921) 2 A C 91=90 L J P C 102=125 L T 186=37 T L R 436.

is merely general is, as a rule, to be harmonized with expressions that are at once precise and particular by treating the latter as operating by way of exception. The two sections must be read together and the whole of the scheme for distribution of legislative powers set forth in their language must be taken into account in determining what is merely general and what is particular in applying the rule of construction. For, neither the Parliament of Canada nor the Provincial Legislature have authority under the Act to nullify, by implication any more than expressly, statutes which they could not enact. . . .

It is obvious that the question of construction may sometimes prove difficult. The only principle that can be laid down for such cases is that legislation, the validity of which has to be tested, must be scrutinized in its entirety in order to determine its true character.

The scheme of the British North America Act is however materially different from that of the Government of India Act. S. 92 of the former Act enumerates 16 classes of subjects assigned exclusively to the Legislatures of the Provinces, and S. 91 empowers the Parliament of Canada to make laws for the peace, order and good government of Canada in relation to all matters not coming within those classes, and further, for greater certainty etc., specifically enumerates 29 classes of subjects as within the exclusive authority of the Parliament of Canada "notwithstanding anything in this Act". There is another Section (S. 95) giving concurrent powers of legislation respecting two subjects only, agriculture and immigration, and providing that a Provincial law relative to these subjects shall have effect as long and as far only as it is not repugnant to any Act of the Parliament of Canada. But, among the subjects specified in S. 92 is a very comprehensive subject "property and civil rights in the Provinces", as against particular subjects enumerated in S. 91 like the regulation of trade and commerce, the raising of money by any mode or system of taxation, navigation and shipping, sea coast and inland fisheries, banking and incorporation of banks, bankruptcy and insolvency, marriage and divorce, and the criminal law. Particular subjects are also specified in S. 92, such as direct taxation, shop, saloon and other licenses, the incorporation of companies, and the solemnization of marriage. The Act exhausts the whole range of legislative power, and it was found that whatever was not given to the Provincial Legislatures rested with the Parliament, (1887) 12 A C 575,²⁵ but this certainly

²⁵ Bank of Toronto v. Lambe, (1887) 12 A C 575
= 56 L J P C 87 = 57 L T 877.

cannot be said of the Government of India Act in view of the provisions of S. 104. It would have been practically impossible for the Dominion Parliament to legislate upon several of the classes of subjects enumerated in S. 91 without affecting the property and civil rights of individuals in the Provinces, a subject specified in S. 92, and the general language of this last subject was interpreted as restricted by that of the former. The rules were therefore established that

the legislation of the parliament of the dominion, so long as it strictly relates to subjects of legislation expressly enumerated in S. 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislatures by S. 92,

and that

it is within the competence of the dominion parliament to provide for matters which, though otherwise within the legislative competence of the Provincial Legislature, are necessarily incidental to effective legislation by the parliament of the dominion upon a subject of legislation expressly enumerated in S. 91 : (1930) A C 111.¹⁰

Exceptions were similarly read in favour of the Provinces as regards particular subjects like the solemnization of marriage and direct taxation as against the subjects of marriage and divorce and the raising of money by any mode or system of taxation enumerated in Sec. 91, the reason being that the Legislature could not have intended that powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament; the principle was applied that the generality of the wording of S. 91 in such matters must be interpreted as restricted by the specific language of items found in S. 92. But can this principle be applied to the subject of money-lending and money-lenders in our List II as against contracts in List III? The Government of India Act places a large number of general subjects in the Concurrent List and provides a means by which Provincial Legislation may prevail in this field, but otherwise leaves Federal Legislation dominant in this as in field I and makes Provincial Legislation 'subject to' that legislation (together with the existing Indian law in the concurrent field); and as to conflicts or repugnancies, it makes special provision by Sec. 107, which may be compared and contrasted with the Canadian principle of the "occupied field." Mr. Das's contention that the item of contracts in the Concurrent List should be read as restricted by the item of money-lending and money-lenders

in the Provincial List is further rendered unacceptable by the fact that the former is defined with manifest deliberation as :

Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land,

while contracts relating to agricultural land, thus excepted, apparently come within "transfer, alienation and devolution of agricultural land" in Item 21 in the Provincial List. Provincial Legislation, which under S. 100 is confined to Lists II and III, will, in case of conflicts with competent Federal law or the existing Indian law relating to matters within List III, have the validity of its provisions judged under the Government of India Act by reference to the terms of Sec. 107, to which no real parallel can be found in the British North America Act; and our Act makes it clear that any provision of a Provincial law which is repugnant to any provision of the other law must, to the extent of the repugnancy, be treated as void, except so far as the Provincial Legislature may have put itself in a position to apply sub-s. (2) of the Section and obtained the necessary assent. From this point of view, it is not for the Courts to consider whether or not the Bihar Legislature could pass any really effective legislation on the subject of money-lending and moneylenders without trenching upon the existing Indian law with respect to contracts. The former subject is by no means wholly included in the latter, and unlike the Provincial Legislatures in the Dominion of Canada, the Bihar Legislature has power to get over the existing Indian law with respect to contracts by a resort to Sec. 107 (2). The exclusive power given to the Provincial Legislature over moneylenders and moneylending cannot therefore be enlarged in the way contended for on behalf of the appellant so as to include an incidental invasion of the dominant law in the concurrent field. I would hold accordingly that it cannot be validly exercised so as to override any provision of any existing Indian law, and that in case of repugnancy S. 107 (1) must take effect.

I now come to the contention of the appellant that there is in fact no repugnancy between Sec. 11 of the Bihar Act and S. 2, Usury Laws Repeal Act. This contention is rested, as I have already indicated, on the ruling in 14 Cal 781.²⁰ The relation of the Hindu law rule of Damdupat and the

Usury Laws Repeal Act has been the subject of a certain difference of opinion even in Calcutta, to say nothing of the contrary view that has prevailed in Madras : see 26 Mad 662.¹⁸ The questions that arose on the point were whether the Usury Laws Repeal Act only repealed previous legislation or also superseded the Hindu rule of Damdupat, and whether this rule was a rule regulating the rate of interest or only a rule of limitation. The learned Judges in 14 Cal 78²⁰ answered both these questions in favour of the rule (referred to as the law) of Damdupat, which was in force on the Original Side of that High Court in accordance with 21 George III, c. 70, s. 17. Those questions do not arise before us, for we have now to deal with the specific provision of the Bihar Act which on the face of it, precludes the passing of a decree required by S. 2, Usury Laws Repeal Act. Learned counsel for the appellant has not suggested how it is possible for a Court in this Province to comply with S. 11, Bihar Act, without infringing Sec. 2 of the other Act. I am not therefore prepared, on the authority of the ruling in 14 Cal 78²⁰ to hold that the apparent conflict between the two provisions is not an actual repugnancy.

It has been contended for the respondent that S. 11, Bihar Act, also offends against the existing Indian law relating to other items in the Concurrent List—No. 4, Civil Procedure, and No. 8, Transfer of Property. But the conflict, such as it is, is a conflict not as regards procedure but as regards the right to recover interest accrued at the agreed rate. The transaction was a mortgage, and if repugnancy is established in the domain of Contract (the main contention on behalf of the respondent), it seems unnecessary to consider whether there is a repugnancy in the domain of Civil Procedure as well, or in the other item which was referred to by the learned advocate for the respondent and on which the case in 26 Mad 662¹⁸ is relevant along with the criticism of Chaudhuri J. in 42 Cal 826.¹⁶ The result is that in my opinion Sec. 11, Bihar Money-Lenders Act, has not been competently enacted so as to supersede S. 2, Usury Laws Repeal Act, and must be treated as void. This conclusion is not affected by the facts that in circumstances which do not exist in this case, S. 3, Usurious Loans Act, Act 10 of 1918, gives certain powers to the Court notwith-

standing Sec. 2, Usury Laws Repeal Act, 1855, and that S. 22, Bihar Money-Lenders Act, saves those powers except as otherwise provided in S. 12. The case was (therefore) in fact argued before us on Sec. 2, Usury Laws Repeal Act. I would accordingly uphold the decree of the lower Appellate Court and dismiss this appeal with costs.

Manohar Lall J.—The question before the Full Bench is whether Sec. 11, Bihar Money Lenders Act, 1938 (hereinafter to be referred to as the Act) is intra vires of the Provincial Legislature as constituted under the Government of India Act, 1935, and if so, whether it can be applied in deciding the rights of the respondent, a mortgagee, to recover interest in full as stipulated in his mortgage bond. The question is of very far reaching importance to the litigants of this province. It is a matter of satisfaction that we have had able assistance from Mr. P. R. Das who appeared for the appellant and from Mr. L. K. Jha, who appeared for the respondent. The facts which are necessary to be stated are these. The appellant executed a mortgage bond for Rs. 400 on 24th Chait 1328, in favour of the respondent, the due date of payment whereof was in 1329. The interest stipulated on the principal sum was Re. 1.4.0 per cent. per mensem with yearly rest. The trial Court decreed the suit for the principal sum but disallowed the compound rate of interest and awarded only simple rate of interest at the stipulated rate. In appeal the learned District Judge held that the stipulated rate was not excessive, that the transaction between the parties was fair and that there was necessity for the loan. He therefore set aside the decree of the learned Munsif and granted to the plaintiff a decree at the compound rate of interest as claimed in the plaint. The defendant has appealed to this Court.

The appellant contends that by operation of S. 11 of the Act, (which admittedly has retrospective effect by reason of the Amending Act of 1938) no decree can be passed for any amount of interest which is greater than the amount of loan advanced as stated in the mortgage bond; in other words, that the plaintiff is entitled to a decree for Rs. 800 only. The respondent on the other hand contends that the Provincial Legislature has no power to make this provision in the Act as it conflicts with the existing Indian laws on the subject, namely Interest Act 32 of 1839, the Usury

Laws Repeal Act of 1855, Usurious Loans Act of 1918, Contract Act of 1872 (S. 37), Civil Procedure Code, 1908, Order 34 (the provision relating to mortgage decrees). It is necessary in the first instance to consider what is the pith and substance of the Act. The Act is stated to be an Act "to regulate moneylending transactions and to grant relief to debtors in the province of Bihar." The Act received the assent of His Excellency the Governor of this province on 6th July 1938. It is admitted that the Act has not received the assent of His Excellency the Governor-General or of His Majesty. The Act contains a detailed scheme as to the registration of moneylenders and the manner in which they are required to keep accounts (Secs. 4 to 7). Chapter 3 provides that in certain cases a moneylender shall not be entitled to institute a suit at all and limits the powers of the Courts to pass a decree for interest except at certain rates or up to a fixed amount and also provides that an agreement by a debtor to pay compound interest to the creditor shall, in respect of a loan advanced after the commencement of this Act be void. There are other provisions under this Chapter which give the Courts power to re-open certain transactions. In other Sections of the same Chapter provisions are made with the ostensible object of helping the debtors even in the execution stage. Chapter 4 deals with penalties and procedure. The provision of S. 22 is important. It specifically refers to the Usurious Loans Act of 1918 and provides that :

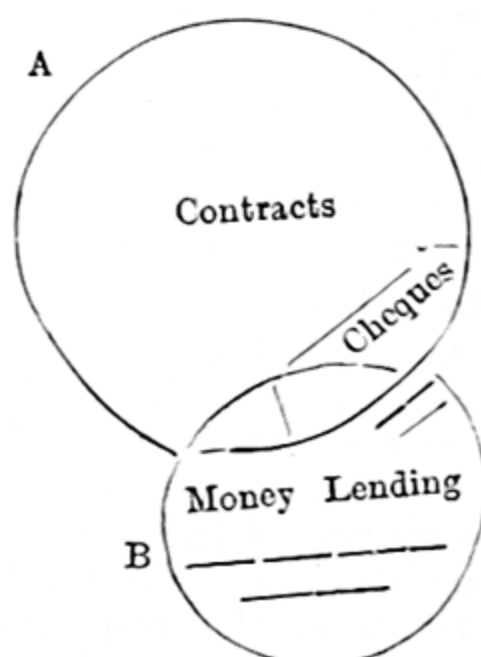
Save as otherwise provided in Sec. 12 nothing in this Act shall affect the powers of a Court under the Usurious Loans Act.

A consideration of the various provisions makes it clear that the Act attempts to deal completely and exhaustively with interest, the rate recoverable and the amount which can be decreed by the Courts in certain instances (irrespective of the contracts between the parties) and the registration of moneylenders. The Act also contains stringent provisions that if a moneylender fails to obey the mandatory provisions of the Act his suit is liable to be dismissed. Such in substance being the dominant character of the Act, it will be useful at this stage to examine the scheme of the Government of India Act which confers powers on the different Legislatures. A perusal of the various clauses of S. 100 and S. 107 leads to the conclusion that the scheme of the Government of India Act, 1935, appears to give

exclusive jurisdiction to the Federal Legislature over the subjects enumerated in List 1. There is a concurrent field called List 3 wherein both the Federal and the Provincial Legislature can legislate but subject nevertheless to the exclusive powers of the Federal Legislature regarding the subjects of List 1.

The Provincial Legislature again has been given exclusive powers to legislate over the matters of List 2 but nevertheless subject to the exclusive powers of the Federal Legislature as just pointed out. Any conflict between the Provincial law and the Federal law or the existing Indian law is avoided by the clear provisions of Sec. 107. From this I conclude that the framers of the Government of India Act must have foreseen that the sharp and definite distinction which they intended to carefully make between the powers of the two Legislatures might not have been attained or possibly could not be attained and that some of the classes of the subjects assigned exclusively to the Provincial Legislatures may have run into and were embraced by some of the enumerated classes of subjects in Lists 1 and 3. Therefore an endeavour was made to provide for cases of apparent conflict and it is with this object that Sec. 100 and Sec. 107 have been so carefully worded. This can be illustrated by taking a few examples from the lists : Item 13 in List 1 relates to Benares Hindu University and Aligarh Muslim University. Item 17 in List 2 is education and would appear to cover Item 13 of List 1. But, by virtue of S. 100, the powers of the Provincial Legislature under Item 17 of List 2 are subject to the exclusive powers of the Federal Legislature under Item 13, that is, the Provincial Legislature has no jurisdiction to legislate with regard to these two Universities. The same remarks apply to Item 52 of List 1 and Item 14 of list 2 as well as to Item 51 of list 1 and Item 30 of list 2. It is unnecessary to multiply further instances. A more apposite illustration is provided by Item 28 of list 1, Item 27 of list 2 and Item 10 of List 3 (the very matter under consideration). It cannot be denied that Item 28 of list 1 is a part of money-lending (Item 27 of list 2) if the words are taken in the general sense and also a part of Item 10, List 3. But by the operation of S. 100 the Provincial Legislature whether acting under List 2 or List 3, have no power to touch cheques and bills

of exchange. For example, this may be graphically illustrated by a diagram :



Circle A covers the whole field of contracts and, therefore, necessarily covers cheques which is the lower sector of that circle. Circle B deals with money-lending and must cover necessarily, if the words are to be taken in the largest and literal sense, both contracts and cheques; in other words this circle must cut the Circle A including the sector of cheques. The scheme of the Indian Act now comes to our aid to solve this difficulty of overlapping or repugnancy. If the words of S. 100 are kept in view the powers under the heading of money-lending will cover only that portion of Circle B which is not covered by cheques' sector. The Provincial Legislature having concurrent powers with Federal Legislature can legislate with regard to that portion of Circle B which falls within Circle A (outside the sector) provided always that if there is any existing Indian law on this matter, the latter will prevail by virtue of the express provision in S. 107. It should be stated here that any remarks that are being made by me in the course of this judgment with respect to the other provisions of the Act and of the Government of India Act must be clearly understood to be only incidental and must not be taken as deciding finally the questions that may arise hereafter.

A large number of Canadian cases which have come up for decision before their Lordships of the Judicial Committee beginning from (1880) 5 Appeal Cases right up to 1937 Appeal Cases, were freely cited before us on behalf of both the parties. These cases concerned the decision of the questions which were raised before their Lordships of the Privy Council from time to time as to whether a certain provision

of an Act passed by the Provincial Legislature of Canada or by the Dominion Parliament was or was not intra vires of the powers given to them under the Act — the question in each case being generally whether the provisions of S. 91 of the Canadian Act, in a particular matter controlled or dominated the provision under S. 92 on the same matter or on a cognate matter or vice versa. As instances, see the case of solemnisation of marriage (1912) A C 880,⁹ the Railway case (1907) A C 65,¹¹ the Timber case (1930) A C 357.²⁶ But in my opinion the cases which were referred to in argument are of no material assistance in deciding the matter in controversy before us. They are no doubt very useful and valuable guides to the application of the doctrine of the 'general and special' or the 'overlapping and the occupied field' rules (if applicable in the present case) but the scheme of the Indian Act to my mind is entirely different from the Canadian Act. The latter gives only exclusive powers to the Provincial Legislature with respect to the subjects enumerated specifically in Sec. 92 but, while bestowing full power on the Dominion Parliament with respect to the matters enumerated in S. 91 also leaves the residual power in the Dominion Parliament under the heading "peace, order and good government of Canada." In the Indian Act the scheme is wholly different.

The doctrine of the occupied field which is found stated in many cases of the Privy Council and which is Item 4 in the synopsis by Lord Tomlin in (1930) A C 111¹⁰ at p. 118 has been inserted for us in S. 107, Indian Act. It may also be useful to note that where it was found impossible to legislate on any of the matters enumerated in S. 91 or S. 92, Canadian Act, without incidentally trenching upon the jurisdiction of the other Legislature, the legislation under consideration was held by the Judicial Committee to be good. But that reasoning has no application to the consideration of the Act passed by the Indian Legislature created under the Indian Act because here the powers are given to both exclusively as well as concurrently. I can find no such parallel in the Canadian law of 1867 except to a limited extent under S. 95. The scheme of the Indian Act is

26. Attorney-General for British Columbia v. McDonald Murphy Lumber Co. Ltd., (1930) 17 A I R P O 173=124 I C 590=(1930) A C 357=99 L J P C 113=143 L T 1=46 T L R 266.

entirely different. The residual power is given to the Governor-General under Sec. 104; the Federal Legislature and the Provincial Legislature have been given exclusive powers in certain fields, concurrent powers in another field (the exercise of jurisdiction by the Provincial Legislature being wholly excluded from list 1). In my opinion, the key to the solution of the problem before us is very clearly indicated in S. 100 and S. 107. It will therefore be worse than useless, if not dangerous, to apply the principles which have been enunciated by the Privy Council to govern the construction of the Canadian Act, as governing the construction of the present Act under consideration which is framed entirely on different lines and based upon wholly different scheme of policy. The two Acts are not in pari materia. The Judicial Committee have condemned in strong language this method of construction which the appellant wished us to follow from the analogy of another Act. In dealing with the construction of certain Sections in the Income-tax Act (11 of 1922), the High Court in India had relied upon a large number of English cases which depended upon the construction of the English Income-tax Statute. Sir George Lowndes in delivering the judgment of their Lordships of the Judicial Committee in 6 I T C 178²⁷ made the following observations at page 180 :

Again, their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the English Income-tax Statutes—both the cases upon which High Court relied and the flood of other decisions which has been let loose in this Board. The Indian Act is not in pari materia; it is less elaborate in many ways, subject to fewer refinements and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other

See also the observation in 57 I A 110²⁸ at p. 114. I therefore decline to be led away by the argument from analogy based upon the reasonings adopted by their Lordships in deciding cases on the Canadian law. The real question to decide then, as I indicated in the course of the argument

27. Commr. of Income-tax, Bengal v. Shaw, Wallace and Co., (1932) 19 A I R P O 138 = 136 I O 742 = 59 Cal 1348 = 6 I T C 178 = 59 I A 206 (P O.)

28. Hansraj v. Bejoylal Seal, (1930) 17 A I R P O 59 = 122 I C 20 = 57 Cal 1176 = 57 I A 110 (P O.).

several times, is whether the provision under consideration in the Act is on a matter coming under List 2 and whether it conflicts with the provision of any existing Indian law with respect to a matter enumerated in List 3; in other words, whether the provision, that the Courts are precluded from passing a decree for interest beyond the amount of principal, is within the law making powers given to the Provincial Legislature and if so whether it conflicts with any existing Indian law with respect to any matter in List 3. It is obvious and this was not seriously contested before us, that on a plain reading the subject of S. 11 does not fall within the general words of Item 27 in List 2 "money-lending and money-lenders" as well as in Item 10 of List 3 "contracts". It therefore follows that the Provincial Legislature have complete powers to pass this enactment. But admittedly they have not followed the procedure laid down by S. 107, sub-cl. (2). No sanction of His Excellency the Governor-General has been obtained nor the assent of His Majesty has been signified to this Section. The provisions of S. 107 (1) now come into play and Sec. 11 will be of no validity in this Province if it conflicts with any existing Indian law on the subject.

Is there then any existing Indian law on this matter? The term "existing Indian law" has been defined by S. 311, Government of India Act. It was admitted and indeed it is manifest that there does exist an Indian law with respect to the matter in question. If the present Section had not been enacted we would have been able to dispose of the appeal by deciding the extent to which the respondent would have been entitled to obtain a decree for the amount of interest. But, the provisions of S. 11 leave us no discretion. Apparently therefore there is a serious conflict between the provisions of S. 11 and the provisions of one or more existing Indian laws with respect to this matter which I have already held is enumerated in the concurrent legislative list. The Usury Laws Repeal Act of 1855 by S. 2 definitely directs that in any suit in which interest is recoverable the amount shall be decreed by the Court at the rate agreed upon by the parties.

Section 11 of the Act comes into direct conflict with this provision. The Usurious Loans Act of 1918, which is specially mentioned in S. 22 of the Act, was enacted to give additional powers to Courts in certain cases of usurious loans. The powers given

by the Act of 1918 are mentioned in S. 3 of that Act, namely it gives powers to the Court "notwithstanding anything in the Usury Laws Repeal Act of 1855" to reopen the transactions between the debtor and creditor where the Court thinks that the interest is excessive and the transaction between the parties is substantially unfair. It is to be noticed that this Section gives the Court wide powers within which it may exercise its discretion but does not cut down the discretion. S. 11 of the Act leaves the Court no discretion whatsoever and therefore it comes into conflict with the Usurious Loans Act of 1918. Similarly, the Indian Contract Act of 1872 by S. 37 provides that the parties to a contract

must perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Before the passing of the Act under consideration, there was no other law beyond that contained in Sec. 16, Contract Act, or the provisions contained in the two Acts of 1855 and 1918, which I have just referred to, which would excuse the performance of a contract if valid to pay the amount of interest calculated at the rate agreed upon by the parties. Therefore S. 11 of the Act comes into conflict with this provision of Sec. 37, Contract Act also. When Sec. 107, sub-cl. (1), is applied to this state of affairs it is clear to my mind that these existing Indian laws, just referred to, shall prevail and the enactment of the Provincial Legislature shall, to the extent of repugnancy, be void; in other words S. 11 cannot operate at all to override the provisions to be found in these Acts of 1855, 1872 and 1918. But, it was argued by learned counsel for the appellants that it is impossible to conceive of any Act which can be framed regarding money-lending and money-lenders which would not contain a provision like Sec. 11, if the Legislature wanted to make such a provision. He referred as an illustration to the two English Acts 63 and 64 Victoria, Chs. 51, 17 and 18, Geo. 5, Ch. 21. The answer to this argument is that the Provincial Legislature have not been deprived of the power to make this provision. They can always do so by following the procedure laid down by Sec. 107, sub-cl. 2, namely by obtaining the assent of His Excellency, the Governor-General or of His Majesty. Mr. Das argued that if Lists 3 and 2 are read together and the doctrine of the general and special as laid

down in the Canadian cases is applied, the subject of S. 11 must be deemed to be excluded from Item 10 of List 3 and must be interpreted to fall wholly within the ambit of Item 27 of List 2. As I have already stated it is not permissible to apply the principles which the Privy Council laid down in considering the Canadian Act to the consideration of the Indian Act. The two lists must be read as they stand and if the subject of S. 11 falls within Item 10 on a plain reading thereof, effect must be given to that reading. The Provincial Legislature is not debarred from passing this enactment but if it is to prevail against any existing Indian law they have only to follow the procedure indicated by S. 107, sub-cl. 2. I therefore overrule this contention.

Learned counsel for the appellant finally contended that the provision in Sec. 11 to restrict the amount of interest recoverable is not a provision which conflicts with any existing Indian law on the subject because, so he argued, this provision is merely a provision regarding the limitation of suits. He relied upon the observations of the learned Judges of the Calcutta High Court in a number of cases beginning with 12 W R O C 9²⁰ and 5 Beng L R 500.¹⁷ In these cases, it was held that the rule of Damdupat was a rule of limitation of suits and therefore was applicable when the parties to a litigation were Hindus residing within the presidency in the town of Calcutta. In my opinion this argument has no weight because apart from the fact that Sir Barnes Peacock did not approve of this argument in 3 Beng L R O C 113³⁰ and the observations of Phear J. in 14 W R 308¹⁷ are expressly obiter, it seems to me that the Calcutta decisions could be justified by the very words of S. 37, Contract Act. The rule of Damdupat prevails as a rule of law within the presidency town if the parties are Hindus. In other words the performance of the contract to pay interest when the principal is reached is excused under the provision of the rule of Damdupat which is "any other law" — the rule of Damdupat does not prevail in this province.

The learned advocate for the respondent also contended that the provision under consideration comes into conflict with the provision to be found in O. 34, R. 11, Civil

P. C. Civil Procedure, he argued, is expressly mentioned in Item 4 in List 3. But I do not agree with this argument. R. 11, O. 34, is part of an adjective law and points out only the mode in which interest is to be calculated after the Court has decided the rate of interest that should be decreed in the particular case before it. The Court decides the rate of interest recoverable not by virtue of its powers under the Code of Civil Procedure but by virtue of the provisions of those existing Indian laws which have been referred to by me above. With the wisdom of this Act this Court is in no sense concerned. A Court of law has nothing to do with a Provincial or a Federal Act lawfully passed except to give it effect according to its tenor. With the wisdom or expediency or policy of an Act lawfully passed no Court has a word to say. All therefore that I can consider and have considered in the arguments under review is whether it is proved that this provision in the Act is within the authority of the Provincial Legislature and if so whether it conflicts with any existing Indian law. Having given this case my most anxious consideration, I come clearly to the conclusion that the provisions of S. 11 of the Act though intra vires of the Bihar Legislature cannot be applied in favour of the appellant in this appeal. I would therefore dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 73

WORT AG. C. J. AND MANOHAR LALL J.

Rup Chand Panna Lal — Appellant.

v.

Subedar M. A. Huq and others —

Respondents.

Appeal No. 12 of 1938, Decided on 24th August 1938, from appellate order of Dist. Judge, Manbhum, D/- 10th September 1937.

Insolvency — Debts in insolvency exceeding Rs. 5000 — Proceeding should proceed before District Judge and not Deputy Commissioner— Mere fact that Rs. 1800 is doubtful debt makes no difference.

Where the debts in an insolvency exceed the sum of Rs. 5000, the insolvency proceedings should proceed before the District Judge and not before the Deputy Commissioner. The mere fact that Rs. 1800 is a doubtful debt makes no difference, when one of the debts which have to be taken into consideration in administering the insolvent's

29. Ramlall Mookerjee v. Harrachunder Dutt, (1869) 12 W R O C 9=8 Beng L R O C 180.

30. Kumara Upendra Krishna v. Nabin Krishna, (1872) 8 Beng L R O C 113=17 W R 870n.

estate and that debt together with the debts included in the schedule would amount to a sum over Rs. 5000. [P 74 C 1]

S. C. Mazumdar — *for Appellant.*

S. M. Gupta — *for Respondents.*

Wort Ag. C. J.—It seems to me quite clear that the Deputy Commissioner here was right that he had no jurisdiction over these insolvency proceedings. From the figures stated in the judgment of the District Judge in reversing the decision of the Deputy Commissioner, it would appear that the debts in the insolvency exceeded the sum of Rs. 5000. The mere fact that Rs. 1800 was a doubtful debt to the Urban Bank makes no difference. This was one of the debts which had to be taken into consideration in administering the insolvent's estate and this debt of Rs. 1800 together with the debts included in the schedule would amount to a sum over Rs. 5000. In those circumstances the insolvency proceedings will proceed before the District Judge and not before the Deputy Commissioner. The appeal is therefore allowed. There will be no order as to costs.

Manohar Lall J.—I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1939 Patna 74

DHAVLE J.

Durga Dutt Jha and another —
Petitioners.

v.

Ashariflal Mahtha and others —
Opposite Party

Civil Revn. No. 289 of 1938, Decided on 14th October 1938, against order of Munsif, 2nd Court, Madhubani, D/- 23rd June 1938.

Civil P. C. (1908), S. 115—Suit on mortgage executed by father—Son added as defendant—Issue framed whether mortgaged property was self-acquired property of father or property of joint family—Trial Court disallowing this question and removing son from category of defendants on imaginary ground of hardship—Order of Court held could be revised.

In a suit brought on a mortgage executed by a father, his son was added as a defendant along with the father. After the son was added as a party an issue was framed whether the mortgaged property was the self-acquired property of the father or the property of the joint family. The trial Court however disallowed the question put on behalf of the defence whether the mortgaged property was the self acquired property of the father or the property of the joint family and removed the name of the son from the category

of the defendant on the imaginary ground of inconvenience and hardship :

Held that the Court acted with material irregularity in disallowing the question and further, striking off the party, and hence his order was revisable under S. 115 : *A I R 1926 Pat 207, Disting.* [P 75 C 1]

B. P. Sinha — *for Petitioners.*

Sant Prasad — *for Opposite Party.*

Order.—This is an application in revision against an order of the Munsif of Madhubani directing that the name of defendant 2 be removed from the category of the defendants in a suit brought on a mortgage executed by defendant 1, father of defendant 2. This order was passed on 23rd June last. The Government Pleader, who appears for the petitioners, who were the defendants below, points out that on 26th May 1938, the learned Munsif had overruled the plaintiffs' objection and allowed the prayer of defendant 2 to be brought on the record. The order complained of by the petitioners was passed less than a month after this order, and the learned Munsif purports to pass this order on the grounds of inconvenience and hardship and paramount title. The learned advocate, who appears for the opposite party here, is not able to support the later order of the Munsif on the grounds of inconvenience or hardship. As a matter of fact, the Government Pleader points out that it was after certain evidence had been taken and certain documents admitted by consent that the pleader for the plaintiffs opposite party objected to a question put on behalf of the defence regarding whether the property was the self-acquired property of defendant 1 or the property of the joint family. It was then that certain rulings about the paramount title were cited before the learned Munsif, and acting, as he thought on them, the learned Munsif proceeded to undo his order of 26th May on the grounds of inconvenience and hardship.

The inconvenience and hardship appear to be purely imaginary in view of the fact, as I have already stated, that the learned advocate for the opposite party is unable to make either of them out. He has however contended on the authority of 4 Pat 723¹ that this Court has no jurisdiction to interfere in revision with the later order of the trial Court. It was held in that case that an order refusing to add a party as defen-

1. *Kali Rai v. Tulsi Rai*, (1926) 13 A I R Pat 207 = 93 I C 932 = 4 Pat 723 = 7 P L T 499.

dant cannot be revised under S. 115, Civil P. C., but that in such a case the High Court may interfere under S. 107, Government of India Act, if there is a denial of the right of fair trial. The present case is distinguishable on the facts, and it is clearly a case where it can be confidently said that assuming that the Munsif had jurisdiction to cancel the order of 26th May 1938, he has acted with material irregularity in the exercise of that jurisdiction in cancelling that order on 23rd June for the reasons given by him—reasons which the learned advocate for the opposite party is entirely unable to support.

It is obvious that whether or not the bond was executed by defendant 1, on the footing that the property mortgaged was self-acquired property, the question of whether it is not joint family property will have to be gone into, if not in the suit, then in the execution proceedings. The learned advocate for the opposite party has laid stress on the fact that other members of the joint family have not been impleaded. But it was not the duty of defendant 1 to implead them, though we need not be surprised at the failure of the plaintiffs to implead them if it was their case that the property was the self-acquired property of defendant 1. I understand that after the order of 26th May adding defendant 2 as a party, an additional issue was actually framed. The papers before me do not show what that issue was, but it is suggested—and I have no reason to doubt the correctness of the suggestion—that this issue related to whether the mortgaged property was the self-acquired property of defendant 1 or the property of the joint family. Defendant 2 having been added, and this issue having been framed, it was idle for the plaintiffs to object to the question put on that point by the defence, and the learned Munsif acted with material irregularity in disallowing the question and further, striking off the party. The result is that this application must be allowed with costs. Hearing fee, one gold mohur. The trial Court will now proceed with the suit in due course of law, including the issue in question and defendant 2 as a party.

D.S./R.K.

*Application allowed.***A. I. R. 1939 Patna 75**WORT AG. C. J. AND
MANOHAR LALL J.*Kameshwar Singh Bahadur* —
Petitioner.

v.

Bisheshwar Singh and others —
Opposite Party.Civil Revn. No. 660 of 1937, Decided on
29th July 1938, from order of Sub-Judge,
Darbhanga, D/- 22nd September 1937.**Hindu Law — Joint family — Surviving member is not representative of deceased member.**

In no sense is a member of a joint Hindu family a representative of a deceased member. When one member dies, his share survives to the other members but they do not obtain by that survivorship the share of the deceased member but their own share is enlarged. [P 75 C 2]

Sir Sultan Ahmad, L. K. Jha, R. Misra
and S. P. Srivastava—*for Petitioner.*
A. K. Mitra, B. C. De and Raghunath
Jha — *for Opposite Party.*

Order. — In this case this Court should interfere under its revisional powers and make the rule in this case absolute. Bisheshwar apparently was substituted in place of Kalikanand, deceased, on the footing that he, in some sense, represented the interest of Kalikanand. They were both members of a joint Hindu family. Bisheshwar had been a party to the previous action which resulted in the family property being sold up. Kalikanand had not been a party to that action and it is presumed that it was on that footing that he brought this action out of which this application arises. In no sense is a member of a joint Hindu family a representative of a deceased member. When one member dies his share survives to the other members but they do not obtain by that survivorship the share of the deceased member but their own share is enlarged. They are not representative and certainly not representative in the sense the learned Judge in the Court below seems to have understood the matter. The rule is made absolute and the order of the learned Judge is set aside with costs; hearing fee one gold mohur.

N.S./R.K.

Rule made absolute

A. I. R. 1939 Patna 76

WORT AND AGARWALA JJ.

Inderjit Rai — Plaintiff — Appellant.

v.

*Bulak Chand and others —**Defendants — Respondents.*

Appeal No. 566 of 1937, Decided on 18th October 1938, from appellate decree of Dist. Judge, Shahabad, D/- 22nd December 1936.

(a) Bengal Land Revenue Sales Act (11 of 1859), S. 33—No arrears of land revenue—Suit to set aside sale not barred.

Where a sale is held for arrears of land revenue in cases where there were no such arrears, a suit to set aside the sale is not barred under S. 33 : 25 Cal 833 (P C), Rel. on. [P 76 C 2]

(b) Bengal Land Revenue Sales Act (11 of 1859), S. 33—Taking out money order in office of origin is not payment to Collector of revenue.

In no part of the rules in the Tauzi Manual it is suggested that the Government have agreed that the post office should be the agent for the purpose of receiving payment and hence it cannot be held that the taking out of a money order to the office of origin can be considered a payment to the Collector of the revenue : A I R 1924 Cal 839, Dis-sent. [P 77 C 2]

S. M. Mullick and G. P. Shahi —

for Appellant.

B. C. De and B. N. Rai—*for Respondents.*

Wort J. — This appeal arises out of an action to set aside a sale for arrears of revenue. The appeal is by the plaintiff. It is not disputed that the last date of the payment of the revenue of the particular kist in question was 28th March 1933, nor is it disputed that the actual payment made by money order arrived on 1st April ; this was the plaintiff's own case. The money order arrived on 1st April although in fact it was taken out by the plaintiff on 24th March 1933 and should have, in the ordinary course of events, arrived in time. It appears from the evidence which the plaintiff himself adduced in the case that the delay was caused by the post office of origin. Now, it might have been the case of the plaintiff that, having regard to all the circumstances of the case, the Court ought to have assumed that the payment was made in time. But this was not his case; his case in the plaint and throughout in the Courts below had been that the last day of payment was not the 28th March 1933 within the meaning of S. 3 of Act 11 of 1859, but some later date presumably the 1st May. It was on that allegation that the action failed as I have already stated. Two or three points were raised in this case.

One is the objection to the suit by reason of S. 33 of the Act; this is raised by Mr. De who appears on behalf of the defendants-respondents. In my judgment however that is not a bar to the suit if in fact there were no arrears of revenue. The view I have taken of 25 I A 151¹ is that their Lordships of the Judicial Committee in the opinion expressed by Lord Watson held that in the case of there being no jurisdiction to sell in the sense that there were no arrears of revenue, S. 33 of Act 11 of 1859 would not stand in the way of the plaintiff even although he had not raised the question before the Commissioner. Lord Watson in the course of his judgment in that case made this observation :

The result is that the whole proceedings of the Collector, with a view to the sale of the 5 annas share, were beyond his jurisdiction, and are not entitled to the protection given him by the Act in cases where sale is authorized, although it may be attended with some irregularity or illegality.

The 'illegality' as I understand the expression used by the learned Law Lord in that case, did not mean an illegality in the sense that there were no arrears of revenue, and therefore the Collector had no jurisdiction to sell. In my judgment therefore so far as S. 33 of the Act is concerned, there is no bar to the plaintiff's suit. But in the view that I take of the matter that question does not strictly arise. Mr. Sushil Madhab Mullick relies upon the Board's Touzi Manual, 1923, which purports to be a manual of instructions for the guidance of the establishment engaged in keeping the accounts of the ordinary land revenue and the local cess demands. Had the circumstances been otherwise, the plaintiff could have got great assistance from R. 30 of those rules (at p. 32 of the Manual). R. 30 provides inter alia :

If a remittance of land revenue by money order is received in the Treasury after the sunset of kist day (the latest date of payment) a note should similarly be made across the acknowledgment in red ink that the payment is 'too late for kist day' (the latest date of payment).

In this case the acknowledgment was sent back and received by the plaintiff without this endorsement ; and Mr. Sushil Madhab Mullick contends that, as they did not comply with their own rules, there was some form of estoppel. The only estoppel there could possibly be would in my judgment amount to this, that they would be estopped from asserting that the money

1. Balkishen Das v. Simpson, (1898) 25 Cal 833 = 25 I A 151 = 2 C W N 513 = 7 Sar 363 (PC).

was not received in time. But as pointed out in the earlier part of my observations, the plaintiff's own case is that the money was received on 1st April. In those circumstances Mr. Sushil Madhab Mullick relies upon the decision in 51 Cal 776.² Newbould and Ghose JJ. in delivering the judgment of the Court there, came to the conclusion that the presumption would have to be that the money had been received one day before the last date of payment. They then said that apart from that point they would have to hold as a matter of law that the contract had been performed quite apart from the dates, because Government prescribed or sanctioned a certain method of payment and that that method of payment had been adopted by the estate-owner or the zamindar, and therefore as a matter of law, it would have to be held that the payment had been made in time. The learned Judges made this observation :

The question appears to us to depend, not on whether the post-office can be considered the agent of the Collector authorized to give a valid receipt for arrears of revenue, but on whether the payment was made in a manner and at a time prescribed or sanctioned by Government.

References were then made to Illus. (d) of Sec. 50, Contract Act, 9 of 1872, and to R. 61, Touzi Manual which prescribes payment by means of a revenue money order as one of the manners in which a payment of land revenue may be made.

It was held that this rule must be read subject to the other rules as summarized in the 'instruction for the remittances' guidance.'

Reference was then made to the fifth instruction providing Remittances of land revenue should be made a sufficient time before the kist day to ensure their reaching the Treasury on or before that day.

The learned Judges then proceeded to say as follows :

We are unable to hold that the condition prevents the plaintiff from establishing that his payment at the post office was a payment in the manner and time prescribed so that it would take effect from the time of payment there.

I have already indicated with great respect to the learned Judges that the observation on this point is a mere obiter having once come to the decision that the payment was in fact made in time, and with equal respect I would disagree with the conclusion that in the circumstances they were entitled to hold as a matter of law that the

payment was made at the time that the money order was taken out to the office of origin. The learned Judges appear to consider the rules made in the Tauzi Manual as being a sort of contract between the parties. They do not forget the rule relating to the payment to be made in time. But if one part of the rules of the Tauzi Manual is taken as a contract the other part of the rules must also be so taken. In no part of the rules could it be said that the Government have agreed that the post office should be the agent for the purpose of receiving payment and it is only in circumstances of that kind that it could be held that the taking out of a money order in the office of origin could be considered a payment to the Collector of the revenue. The difficulties of the plaintiff in this case are largely his own construction. He has asserted that the payment was made on 1st April. Had he left it to an assertion that the payment was made in time and relied upon the estoppel which Mr. Mullick now relies upon, the case might have been different. But it is impossible in my judgment to hold that the payment was made in time having regard to what in my opinion are the plain facts of this case and the presumptions in law which could be raised from those facts. One of those presumptions is not a presumption that a payment made or a money order taken out at the office of origin is a payment of revenue. That being so it seems to me that the appeal fails and must be dismissed with costs.

Agarwala J.—I agree.

N.S./R.K.

Appeal dismissed.

* A. I. R. 1939 Patna 77

MOHAMAD NOOR AND CHATTERJI JJ.

Bansi Lal and others — Appellants.

v.

Mohammad Hafiz — Respondent.

Appeal No. 131 of 1938, Decided on 14th September 1938, from original order of Sub-Judge, Patna, D/. 14th July 1938.

* (a) Civil P. C. (1908), S. 60 — Debt for being attachable need not necessarily had become payable — Remuneration which has become due can be attached though it has not become payable till after certain time.

A debt for the purpose of being attachable need not necessarily had become payable. For instance, a bond which has not matured and which will become payable after some time is certainly a debt which can be attached and sold and the person

2. Bilash Chandra Roy v. Rajendra Chandra Das, (1924) 11 A I R Cal 889 = 78 I C 661 = 51 Cal 776.

who purchases it will be entitled to realize the amount of the bond or the debt when it becomes payable. It is not an uncertain sum, nor merely a right to sue. It is an existing property vested in the judgment-debtor, though the time of its realisation has not come. Hence where an advocate is engaged to conduct a case on daily fee which for convenience sake is payable only after the end of the month, the fee which has become due can be attached though it is not payable till after the end of the month. [P 79 C 1]

(b) Civil P. C. (1908), S. 2 (17) (h) — Advocate engaged by Government to conduct civil suit on behalf of Government on daily fees is public officer.

An advocate who is engaged to conduct a case on behalf of Government is for the purpose of that case in the pay of Government, because he is being paid for the work which he performs for it. Assuming however that he does not come within the category of an officer being in the pay of the Government, he certainly comes under the third category because he is being paid by fees for performing a public duty. Conduct of a suit on behalf of the Government for the recovery of public money is performing a public duty which an advocate undertakes. Civil suits by the Government or against the Government are public suits though with some exceptions the procedure of trial is the same as of suits between two private individuals. Government property is public property and recovering it is in the interest of the public and it is the duty of the Government to recover it from those who are not entitled to retain it. A lawyer engaged by the Government to represent it before a Court performs a public duty when he does so. He has to exercise a right of employment in the suit to conduct it on behalf of the Government. He is an officer and a public officer. [P 79 C 2 ; P 80 C 1]

(c) Civil P. C. (1908), S. 60 (1) (h) and (i) — Salary covers daily fee of advocate engaged by Government to conduct civil suit on its behalf.

There is nothing which restricts the word 'salary' to an emolument which is payable monthly. It cannot be said that it refers only to the emolument payable to a man who holds a permanent or a semi-permanent employment. Salary covers daily fee payable to advocate engaged to conduct a civil suit on behalf of Government. [P 80 C 2]

(d) Civil P. C. (1908), S. 60 (1) (h) and (i) — Scope of Cl. (i).

The scope of Cl. (i) cannot be restricted by saying that salary mentioned in Cl. (i) refers to the salary of one who is entitled to get allowances mentioned in Cl. (h). [P 80 C 2]

(e) Legal Practitioner — Fee of clerk of advocate.

Under the High Court Rules a clerk of an advocate is entitled to get not less than five per cent. of the advocate's fee. Ten per cent. is reasonable and not excessive. [P 81 C 1]

B. P. Sinha — for Appellants.

K. Husnain, S. A. Khan, A. Reza, S. M.

Saleem, M. Azizullah and A. Moin — for Respondent.

Mohamad Noor J. — This appeal arises out of an execution proceeding and the

facts leading up to it are these: The appellants hold a decree for a certain sum of money against the respondent who is an advocate of this Court. The Provincial Government engaged the advocate to conduct a civil suit at Chaibassa for recovery of public money. His remuneration was fixed at a certain sum as daily fee, which included the remuneration of his clerk also. It was also understood that the fee for a month would be paid if billed for at the end of the month. It is not disputed that the advocate judgment-debtor began working for the Government at Chaibassa in the month of April 1938, and continued to do so till at least the end of May, or perhaps till some time in June. His remuneration for the month of April amounting to Rs. 1950 and for the month of May amounting to Rs. 3120 were payable to him by the officers of the Provincial Government at the close of each of these two months.

On 17th May the decree-holder appellants executed their decree and asked for attachment of the remuneration of the advocate which had already become due from the Government and those which were likely to fall due to him. Later on, a second application was made some time in June for the attachment of remuneration of May also which had, according to the contention of the decree-holders, become due by then. The attachments were accordingly ordered. The judgment-debtor raised two objections to the attachment. One was that out of the money due to him from the Government, ten per cent. was the remuneration of his clerk and to that extent it was not the property of the judgment-debtor. Regarding the rest, he relied upon S. 60 (1) (i), Civil P. C., as it stood prior to the amendment of 1937, and contended that not more than half of it was attachable. The learned Subordinate Judge allowed the objections and he withdrew the attachment to the extent of eleven-twentieths of the money due to the judgment-debtor from the Government and maintained the attachment for the rest of it, that is to the extent of nine-twentieths of the amount. The decree-holder has preferred this appeal.

The judgment-debtor has also preferred a cross-objection questioning the attachment itself. It will be convenient to dispose of the cross-objection first. Now, the objection that the money due to the judgment-debtor from Government was not attachable at all was not raised before the learned

Subordinate Judge, and then the objection itself has no substance. The learned advocate for the judgment-debtor contended that the judgment-debtor had only an actionable claim against the Government, and it was not attachable. We have seen the letter of Government appointing the judgment-debtor to conduct the case on behalf of the Government. It clearly specifies a certain daily fee payable to him, and also says that it would be convenient if the advocate submitted his bills for the payment of the money at the end of each month. I have no doubt that after each day's work the daily fee stipulated became due to the judgment-debtor from the Government and that all the daily fees of a month became payable to him at the end of the month. Therefore there is no question that when the decree-holders applied for attachment on 17th May 1938, fees for the month of April were not only due to the judgment-debtor but in fact had become payable and the fees up to 17th May were due to the judgment-debtor though they had not become payable till then.

A debt for the purpose of being attachable need not necessarily have become payable. For instance, a bond which has not matured and which will become payable after some time is certainly a debt which can be attached and sold and the person who purchases it will be entitled to realize the amount of the bond or the debt when it becomes payable. It is not an uncertain sum, nor merely a right to sue. It is an existing property vested in the judgment-debtor, though the time of its realization has not come. Take another instance; a person has deposited his money in a bank on 12 months' or two years' notice. The money is not payable by the bank till the time of payment comes, but nevertheless the money is the property of the depositor and is liable to be attached and sold. Therefore I have no doubt that the remunerations earned by the judgment-debtor till 16th May were attachable when the application was made on 17th May, and whatever objection could have been raised about the attachment of the remuneration of the subsequent period, which had not been earned and had not become due, the objection is not available to the judgment-debtor, as in the month of June an application for attachment was made and no objection to the attachment was raised on his behalf. The Court rightly or wrongly

ordered the attachment of it and the judgment-debtor acquiesced in it. On the whole I am convinced that there is no merit in the cross-objection.

I now take up the main appeal itself. The learned advocate for the appellants has contended first, that the judgment-debtor was not a public officer; and secondly, that if he was a public officer, his remuneration is not exempt under S. 60 (1) (i), Civil P. C. He has also contended that 10 per cent. allowed for the clerk is excessive. The first thing to be considered is whether the judgment-debtor during the time when he was acting for the Government, was a public officer within Sec. 2, Civil P. C. The only clause which can be applied is (h) of Section 2 (17) which runs thus :

Every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty.

This clause refers to three classes of persons, first every officer who is in the service of Government, it does not matter whether he is paid or not. As long as he is in the service of the Government, or in other words he serves the Government, he is a public officer. In the second category are those who are in the pay of the Government. Here the Legislature has not specified the work which these persons are to perform, that is to say, it has been presumed that when an officer is in the pay of the Government he must have been performing a public duty. In the third category are those who are remunerated by fees or commission and in order that they be held to be public officers it is necessary that the payment should be for the performance of any public duty. In my opinion during the period the judgment-debtor was engaged by the Government to conduct a civil suit, he was in the pay of the Government. An advocate who is engaged to conduct a case on behalf of a client is for the purpose of that case in the pay of his client, because he is being paid for the work which he performs for him. Assuming however that he did not come within the category of an officer being in the pay of the Government, he certainly comes under the third category because he was being paid by fees for performing a public duty. Conduct of a suit on behalf of the Government for the recovery of the public money is performing a public duty which an advocate undertakes. Civil suits by the Government or against the Government are public suits though with some exception the procedure

of trial is the same as of suits between two private individuals. Government property is public property and recovering it is in the interest of the public and it is the duty of the Government to recover it from those who are not entitled to retain it. A lawyer engaged by the Government to represent it before a Court performs a public duty when he does so. When a Government enforces a claim or refutes a claim, it does so on behalf of the public as the Government is a public institution.

The learned advocate for the appellant contended that the judgment-debtor though he may be in the pay of the Government and remunerated by fees for performing a public duty, was not a public officer as he was not an officer. The word "officer" has not been defined in the Code and therefore we must apply the dictionary meaning of the word. In Stroud's Judicial Dictionary the word "officer" is defined as "one who holds an office", and the word "office" is defined as "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging." The judgment-debtor in this case on his appointment as a lawyer by the Government had to exercise a right of employment in the suit to conduct it on behalf of the Government. He was an officer and a public officer.

The next consideration is whether the emoluments of the judgment-debtor come within the exemptions of Cl. (i) of Sec. 60 (1), Civil P. C. Cls. (h) and (i) of S. 60 (1) which except the salaries of public officers have been amended by Act 9 of 1937. But the amended Section has no application in proceedings arising out of a suit instituted before 1st June 1937. As in this case the suit in which the decree under execution was passed was instituted long before June 1937, the law applicable will be the law as it stood before the amendment. The two clauses (h) and (i) as they stood before the amendment must be read together. They ran thus :

(h) Allowances (being less than salary) of any public officer or of any servant of a Railway Company or local authority while absent from duty;

(i) the salary or allowances equal to salary of any such public officer or servant as is referred to in Cl. (h) while on duty, to the extent of, &c. &c.

They refer to three kinds of emoluments of a public officer. Cl. (h) deals with allowances which are given to him while he is not on duty. If this allowance is less

than his salary, it is absolutely exempt from attachment. Clause (i) deals with two classes of cases. One is the "allowances" which are referred to in sub-clause (h) but when they are equal to the salary, and the second refers to the salary itself. These two are attachable to a limited extent, as prescribed in the clause itself. The learned advocate for the appellants however contended that salary does not cover the daily fees which were payable to the judgment-debtor. He contended that salary is what is payable to a permanent or semi-permanent employee, and not the remuneration of a temporary employee engaged on daily fee. One need not refer to the new Sec. 60, Civil P. C., which makes the matter clear where the salary for the purposes of Cls. (h) and (i) means the total monthly emolument excluding any allowance which is exempted by Government. I do not wish to take help from this amended Section because it is not applicable to the present case. But here again one must have resort to the dictionary meaning of the word "salary". Stroud's Judicial Dictionary defines the word "salary" as "recompense or consideration given unto any man for his pains bestowed upon another man's business." I do not find anything which restricts the word "salary" to an emolument which is payable monthly or that it refers to the emolument payable to a man who holds a permanent or a semi-permanent employment.

The learned advocate further contended that clause (i) is applicable to the case of those to whom Cl. (h) applies, namely the salary mentioned in clause (i) refers to the salary of one who is entitled to get allowances mentioned in Cl. (h). I see no reason to restrict the scope of Cl. (i). Whether a particular officer is entitled to get any allowance while absent from duty is a matter of contract between him and his employer, the Government. Then the exemptions are not in favour of public officers only. They extend to any servant of a Railway Company or local authority. There may be cases in which under the terms of the employment a servant of a Railway Company or local authority is not entitled to any allowances while absent from duty. No doubt Cl. (i) refers to Cl. (h) but only to avoid repetition of the description of officers whose salaries have been exempted. It does not follow that their salary for the period for which they are on duty is

not covered by Cl. (i) of S. 60 (1). Regarding the fee of the clerk which the learned Subordinate Judge has held to be 10 per cent. of the amount payable to the judgment-debtor, he is, in my opinion, correct. Under the High Court Rules a clerk of an advocate is entitled to get not less than 5 per cent. 10 per cent. is reasonable and not excessive.

On the whole I am of opinion that the learned Subordinate Judge had taken the correct view of the case and the appeal must be dismissed. The result is that the appeal and cross-appeal are both dismissed but there will be no order for costs. The order of temporary attachment passed by the Registrar for the money beyond what has been attached by the Subordinate Judge is vacated. The attachment to the extent ordered by the learned Subordinate Judge will remain in force.

Chatterji J. — I agree.

D.S./R.K. *Appeal and cross-appeal dismissed.*

A. I. R. 1939 Patna 81

ROWLAND AND CHATTERJI JJ.

Sadhu Prasad Sah — Plaintiff —
Appellant.

v.

Satnarain Sah and another —
Defendants — Respondents.

Appeal No. 138 of 1935, Decided on 26th October 1938, from original decree of Sub-Judge, Chapra, D/- 24th June 1935.

(a) Civil P. C. (1908), O. 38, R. 7—Property not mentioned in writ of attachment cannot be said to be under attachment.

The question whether a particular property has been attached has to be determined with reference to the writ of attachment. Even if the property is mentioned in the application for attachment before judgment and the order for attachment is made in terms of that application, but if the writ of attachment served by the Civil Court peon does not mention the property, the property cannot be said to be under attachment and the judgment-debtor is not prohibited from transferring it. [P 83 C 1]

(b) Civil P. C. (1908), O. 38, R. 7—Attachment before judgment of immovable property—Actual attachment is to be effected in manner prescribed in O. 21, R. 54 for which proper form is Form No. 24, Appendix E.

There cannot be valid or effective attachment before judgment of immovable property unless the requirements of O. 21, R. 54, Civil P. C., are satisfied. Although Form No. 5, Appendix F, is the form in which the order under O. 38, R. 5 is to be served, yet the actual attachment where the pro-

perty is immovable, is to be effected in the manner provided in O. 21, R. 54, for which the proper form is prescribed in Appendix E, Form No. 24. An attachment before judgment of immovable property although issued in the form prescribed in Appendix F, Form No. 5 is not an effective attachment within the meaning of O. 21, R. 54 : *A I R 1927 Cal 885, Rel. on.* [P 83 C 1, 2]

(c) Civil P. C. (1908), O. 21, R. 63—Onus to prove that sale is colourable and without consideration is on decree-holder.

Where the judgment-debtor has sold his property to another person, the fact that he was seriously embarrassed at that time by pressing creditors and had motive for disposing of the property to persons out of their reach does not prevent the burden from still lying on the decree-holder to show that the transaction of sale was not a real transfer.

[P 82 C 2]

B. B. Sahay and B. C. De —
for Appellant.

S. S. Rakshit, Syed Naqui Imam and
S. M. Siddique — *for Respondents.*

Rowland J.—This is an appeal by the plaintiff in a suit under O. 21, R. 63. The plaintiff had a decree against Mr. H. L. Russel, defendant 2, in execution of which he sought to sell sixteen annas proprietary interest in village Hasanpur, Mahal Hasanpur, tauzi No. 2130 as being the property of his judgment-debtor. A claim was presented by defendant 1, Sitaram Sahu, alleging that he had bought the property from defendant 2 on 6th September 1926 by a deed of sale. The plaintiff's case was that the said deed of sale was a farzi transaction and no title passed under it, the beneficiary ownership of the property still remaining with Mr. Russel. The plaintiff further contended that the property had been attached before judgment on an application by the plaintiff in the suit in which he obtained the decree which he is now seeking to execute. The claim was allowed by the Subordinate Judge and the present suit has been instituted because the plaintiff is not satisfied with that position. The substantial issues were whether there was any attachment before judgment of this property in the plaintiff's mortgage suit of 1924 and whether the sale deed executed by Mr. Russel in favour of defendant 1 is fraudulent and colourable and without consideration. Both these issues were decided against the plaintiff by the Subordinate Judge. Hence this appeal in which the same points are raised.

Mr. De for the appellant has pointed out that in his application for attachment before judgment (Ex. 2) a list of properties to be attached is annexed and No. 25 of the

properties in that list is Mauza Hasanpur. The order sheet shows that the Court in general terms directed attachment of the properties specified in the application. The plaintiff was further ordered to file the talbana and notices, etc. duly filled in. In pursuance of this order writs of attachment were issued and they with the reports of service are Exs. 1 and 3. Ex. 3 is the service of a writ issued through the Civil Court nazarat and served by a Civil Court peon. The list of properties annexed to this service return has not been printed but at the hearing we were referred to it and have found that property No. 25 of the list annexed to the petition for attachment finds no place in the list of properties annexed to the writ. This may have been as Mr. De contends an oversight; but the writ can only operate to effect attachment over properties mentioned in it. The return of service shows that it was served in villages Sonbarsa, Sandali, Fatehpur, Rampur and Sadhaua; but there is no reference to Hasanpur at all. It is clear that so far as this writ is concerned, attachment of Hasanpur was not effected and there is nothing here either to prohibit or to invalidate any subsequent dealing with the property by the defendant, Mr. Russel. The other writ is Ex. 1 which was sent to the Subdivisional Officer, Gopalganj, for service.

The properties specified in this writ are the entire sixteen annas of proprietary interest in Mauza Sadhaua, Mahal Hasanpur, Kothia Rampur, pargana Dangsi, district Saran, tauzi No. 2130, sadarjama of the entire mahal being Rs. 251-4-3. It was forwarded for service and return. The report of service by the peon, Ramnagina Rai, is that he went to the mahal and after getting proclamation by beat of drum he caused a copy of the writ to be hung up in a tree and got a report written by the chaukidar. The chaukidar's report is that a writ in respect of mahal Hasanpur having been brought by Ramnagina Rai he made a proclamation by beat of drum and hung up a copy of the writ in respect of the said mahal on a banyan tree. From the reports it might appear that the peon and chaukidar read the order as being an order of attachment of the entire mahal. But this it certainly was not. The mahal consists of four villages, Sadhaua, Hasanpur, Rampur and Kutlupur, and of these Kutlupur had previously passed out of the ownership of Mr. Russel. There remained only three vil-

lages which could possibly be attached. In the description of the property Sadhaua, one of these villages is mentioned by name and after its name the words "Mahal Hasanpur" following are to be taken as descriptive and not as meaning another mauza nor yet as meaning the entire mahal including property never intended to be attached. The Subordinate Judge is right in saying that Mauza Hasanpur is not mentioned in either of the writs and so it follows that attachment of this mauza was not effected at all. We cannot look behind the writs to see what it was the intention of the plaintiff to attach, but we must see from the writs themselves what was the property that was attached. On this issue therefore the plaintiff fails. There was nothing in the writs by which attachment of other properties was effected to prohibit Mr. Russel from transferring this property Hasanpur or to invalidate any such transfer.

It remains to consider the second issue and our attention has been drawn to the fact that Mr. Russel was seriously embarrassed at that time by pressing creditors and had motive for disposing of the property to persons out of their reach. That does not of course prevent the burden of proof from still lying on the plaintiff to show that in this case the transaction was not a real transfer. There was at the time a decree in course of execution against Mr. Russel. It was obtained at the instance of one Ramgolam Singh and the sale deed itself recites that a portion of the consideration money, namely Rupees 4242-7-6 is required for satisfying this execution creditor. The evidence is that his decree was satisfied out of the sale proceeds of this property. Exs. A, B and C are petitions in the execution case acknowledging receipt of the decretal moneys. Then there is oral evidence of the passing of balance of the consideration in cash. In addition defendant 1 supports his possession by rent receipts and counterfoils such as, by proof of mutation of his name in Register D and by certified copies of books in rent suits. Against this the plaintiff has nothing but suggestion and some not very satisfactory oral evidence. It can be said for the plaintiff that Sitaram Sahu has not gone into witness-box himself and has not produced his books of account. But this is not enough to shift the burden of the proof on to the other side and in my opinion the burden of proof is not discharged. *Prima facie*, possession

has passed to and is with Sitaram Sahu, the transferee, and the evidence does not displace the presumption arising. In my view the plaintiff fails on both the issues and the appeal must be dismissed with costs.

Chatterji J.—I agree, but I wish to add a few words. The question whether a particular property has been attached has to be determined with reference to the writ of attachment. In the present case no doubt the property in question, Mauza Hasanpur, was mentioned in the application for attachment before judgment and the order for attachment was made in terms of that application; but the writ (Ex. 3) served by the Civil Court peon obviously does not mention this mauza at all. As regards the writ (Ex. 1) which was served through the collectorate, the description of the property may perhaps be said to be rather ambiguous but it is difficult to hold that Mauza Hasanpur was included. Even assuming that the writ Ex. 1 was in respect of Mauza Hasanpur and the attachment was effected as reported by the chaukidar who served it, still the question remains whether the attachment was valid. O. 38, R. 7, Civil P. C., lays down :

Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Now the mode of effecting attachment of immovable property in execution of a decree is prescribed in O. 21, R. 54, Civil P. C., which is as follows:

(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

This rule will apply to attachment before judgment of immovable property as there is no other express provision as to how such attachments are to be effected. There cannot be valid or effective attachment of immovable property unless the requirements of Order 21, Rule 54, Civil P. C., are satisfied. Admittedly in the present case there was no prohibitory order as contemplated by that Rule. Consequently there was no valid attachment. Mr. B. C. De, the learned advocate for the appellant, contends

that where, as in the present case, there is an order of conditional attachment before judgment the appropriate form of the attachment process to be issued is that prescribed in Form 5, Appx. F, Civil P. C., and this is the form which was employed in the present case. But this form must be read with O. 38, R. 5 which speaks of an order for conditional attachment but does not provide how the attachment is to be effected where the property is immovable. Looking to the form itself, it seems to suggest that it primarily contemplates the attachment of moveable property because it directs the serving officer to keep the property under safe and secure custody. However it is the form in which the order under O. 38, R. 5 is to be served, but the actual attachment where the property is immovable, is to be effected in the manner provided in Order 21, R. 54 for which the proper form is prescribed in Appendix E, Form 24. I am supported in this view by the decision in 55 Cal 545¹ where under similar circumstances it was held that an attachment before judgment of immovable property, although issued in the form prescribed in Appx. F, Form 5, was not an effective attachment within the meaning of O. 21, R. 54.

D.S./R.K.

Appeal dismissed.

1. *Bharat Chandra Pal v. Gouranga Chandra Pal*, (1927) 14 A I R Cal 885=104 I C 340 = 55 Cal 545.

A. I. R. 1939 Patna 83

DHAVLE AND AGARWALA JJ.

Bahuria Ramsawari Kuer and another — Defendants — Appellants.

v.

Dulhin Motiraj Kuer and others — Plaintiffs — Respondents.

Appeal No. 289 of 1937, Decided on 16th August 1938, from appellate decree of Dist. Judge, Saran, D/- 18th November 1936.

(a) **Appeal — Order rejecting memorandum of appeal without giving time to make up deficiency in court-fee is appealable.**

An order rejecting memorandum of appeal on the ground that it was insufficiently stamped passed without giving appellant any time at all to make up the deficiency is a decree and is therefore appealable : *Case law discussed.* [P 84 C 1, 2]

(b) **Court-fee—Determination — Decision of taxing officer is final.**

The decision of the Taxing Officer in the matter of court-fees is final. The court-fee fixed by him must be paid : *A I R 1918 Pat 210, Rel. on.*

[P 84 C 2; P 85 C 1]

(c) Civil P. C. (1908), S. 149—Memorandum of appeal insufficiently stamped accepted by Court by inadvertence — Appellant appearing to have made honest attempt to comply with law — Court may allow time to make up deficiency.

If an insufficiently stamped memorandum of appeal has in fact been accepted by the Court by inadvertence or when the amount of the court-fee payable is open to doubt, or the amount of the fee cannot be ascertained by the Court till the record is received, or it appears that the appellant has made an honest attempt to comply with the law, the Court may properly receive the appeal and allow time for the deficiency, if any, to be made good : *A I R 1917 Pat 26, Rel. on.*

[P 85 C 2]

B. P. Sinha and S. C. Chakravarty —
for Appellants.

K. Husnain and Jaleshwar Prasad —
for Respondents.

Judgment. — This is an appeal against an order of the District Judge of Saran, rejecting a memorandum of appeal on the ground that it was insufficiently stamped. The learned advocate for the plaintiffs-respondents has raised a preliminary objection that no appeal lies against such an order, citing in support 59 Cal 388.¹ That however was a case in which the point actually decided was that though the District Judge had rejected a memorandum of appeal on the failure of the appellant to put in deficit court-fees by the time allowed, he had jurisdiction to entertain a fresh application for time under O. 7, R. 13, applying S. 5, Limitation Act. In the case before us the District Judge rejected the memorandum of appeal as soon as the deficiency in court-fees was brought to his notice. In *A I R 1922 Pat 281*,² following the Allahabad and Madras rulings in 7 All 887³ and 16 Mad 285,⁴ moreover it was held in this Court that an order of dismissal by a District Judge construed as an order rejecting a memorandum of appeal for the appellants' failure to make up a deficit in court-fees is tantamount to a decree within the meaning of the Civil Procedure Code. An order of rejection passed without giving the appellant any time at all to make up the deficit would seem even more clearly to be

a decree, for to such an order it is impossible to apply O. 7, R. 13, the provision on which the decision in 59 Cal 388,¹ was rested. The learned Calcutta Judges did indeed make it clear that in their opinion the definition of "decree" in S. 2, as inclusive of the rejection of a plaint is not extended by S. 107 (2), to the rejection of a memorandum of appeal. But the cases from 7 All 887³ and 16 Mad 285⁴ were decided under the Code of 1882 which provided that an order rejecting a plaint "is within the definition" of "decree" and this provision is substantially reproduced in the present Code, even though the clause defining "decree" was materially modified in other respects in 1908.

It may at first sight seem rather strange that the rejection of a plaint should under S. 2, be deemed to include the rejection of a plaint and yet under O. 7, Rule 13, should not of its own force, preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action; but this is probably to be got over by a reference to the usual words in the defining Section (S. 2), "unless there is anything repugnant in the subject or context." Be that as it may, the rejection of the memorandum of appeal in the present case was not rejection in any of the circumstances specified in any clause of R. 11 of O. 7, as happened in 59 Cal 388,¹ and R. 13 only refers to rejection on the grounds given in R. 11. If it had been the intention of the Legislature to make the rejection of a memorandum of appeal, in circumstances to which O. 7, Rule 13 does not apply, non-appealable, the rulings under the Code of 1882 would, it may be presumed, have led to a material change as regards the rejection of a plaint in the definition of decree or to a clear provision to that effect somewhere else in the Code of 1908. From this point of view, it is impossible to hold that the rejection of the memorandum of appeal in the present case is not a decree (and is therefore not appealable as such) merely because S. 107 (2) of the Code, as Suhrawardy J. pointed out, does not purport to give the order passed by an Appellate Court the same effect as an order passed by an original Court of a like nature.

The preliminary objection must therefore be overruled. The learned Government pleader, who appears for the appellants, began by endeavouring to show that the memorandum of appeal was not in fact insufficiently stamped. This is however

1. *Jnanadasundari Shaha v. Madhabchandra Mala*, (1932) 19 A I R Cal 482=138 I C 643 =59 Cal 388.

2. *Suraj Pal Pandey v. Uttam Pandey*, (1922) 9 A I R Pat 281=63 I C 99=3 P L T 117=6 Pat L J 625.

3. *Rup Singh v. Mukhraj Singh*, (1885) 7 All 887 =1885 A W N 260.

4. *Ayyanna v. Nagabhoosanam*, (1893) 16 Mad 285.

opposed to an express decision of the taxing Judge in 3 Pat L J 443.⁵ The learned advocate referred to our recent Full Bench decision in 14 Pat 4,⁶ where several previous decisions relating to court-fees payable by a mortgagee decree-holder when he appeals or proceeds to execution were approved. But in the present case it was the defendants (the mortgagor and her transferees) that appealed to the lower Appellate Court. It has been pointed out in several cases that the relief that defendants in such suits have to seek from the Appellate Court is different from what a plaintiff-appellant would have to seek. On this being realized, the point was not pressed, and it must be held that the appeal to the District Judge was not in fact sufficiently stamped.

It was next contended that the learned District Judge should not have summarily rejected the memorandum of appeal on noticing the deficiency, but ought to have given the appellants some time for filing the necessary stamps. O. 7, R. 11, which deals with the powers of original Courts in such matters has been recently considered by a Full Bench of this Court in 16 Pat 600⁷ and it has been held that it is the duty of the Court in cases coming under Cl. (c) of R. 11 of O. 7 to require the plaintiff to supply the requisite stamp paper within a time to be fixed by the Court before rejecting the plaint. It has been pointed out on behalf of the respondents that there has been some difference of opinion on the question whether O. 7, R. 11, applies to Courts of appeal. The Bombay High Court in 38 Bom 41⁸ held that S. 107 (2), Civil P. C., does make O. 7, R. 11 applicable to appeals. This view was not accepted in Madras in 26 I C 33,⁹ but the learned Judges in this case proceeded on what had been held in 12 All 129,¹⁰ regarding High Courts to which O. 7, R. 11 (c), is made applicable by O. 49, R. 3. In 59 Cal 388¹ it seems to have been held that O. 7, R. 11,

is applicable to the Court of the District Judge as a Court of Appeal; and the same view is applied in A I R 1922 Pat 281,² which has been already referred to. In Allahabad and Calcutta the view also taken seems to be that if an insufficiently stamped memorandum of appeal has in fact been accepted by the Court by inadvertence, time may be given to the appellant to supply the deficiency. Now, this is what happened in the present case, for the memorandum of appeal was presented on 17th November 1936 (the first open day after the Civil Court vacation) and was ordered by the District Judge on that date to be registered; it was rejected on the following day on a stamp report pointing out the deficiency in court-fees. The learned advocate for the respondents has relied on the observation in 3 Pat L J 74,¹¹ that S. 149 should not be construed and time extended in such a way as to nullify S. 6 of the Court-fees Act. But it was also said in that case that :

When the amount of the court-fee payable is open to doubt, or the amount of the fee cannot be ascertained by the Court till the record is received, or it appears that the appellant has made an honest attempt to comply with the law, the Court may properly receive the appeal and allow time for the deficiency, if any, to be made good.

The appellants (as already indicated) were the defendants in the mortgage suit, and they valued their appeal at the figure at which the plaintiffs had valued it in the trial Court. According to the ruling in *Rowline's case*⁵ they ought to have valued it a little higher by including the interest pendente lite, a relatively small matter. There was also a number of rulings which would at first sight suggest that the appellant need not pay court-fees on such interest. It is plain that the learned Judge's who decided 3 Pat L J 74¹¹ would have had no hesitation, on the principles laid down by them, in giving such an appellant the benefit of Sec. 149 or O. 7, R. 11. The argument for the appellants becomes all the more irresistible when we see that the stamp report about the deficiency was evidently dealt with by the District Judge without the knowledge of the appellants. The learned advocate for the respondents has endeavoured to argue that no consideration ought to be shown to the appellants, because after the rejection of their memorandum of appeal, they applied to the District

11. Ram Sahay v. Lachmi Narain, (1917) 4 A I R Pat 26=42 I C 675=3 Pat L J 74.

5. T. K. Rowlin v. Lachmi Narain Jha, (1918) 5 A I R Pat 210=44 I C 50=3 Pat L J 443.
6. Thakan Chaudhuri v. Lachmi Narayan, (1934) 21 A I R Pat 571=152 I C 244=14 Pat 4=15 P L T 548 (F B).
7. Baijnath Prasad Singh v. Umeshwar Singh, (1937) 24 A I R Pat 550=172 I C 138=16 Pat 600=18 P L T 665 (F B).
8. Achut v. Nagappa, (1914) 1 A I R Bom 249=21 I C 337=38 Bom 41=15 Bom L R 902.
9. A. Narayana Rao v. A. Seshamma, (1915) 2 A I R Mad 426=26 I C 33=27 M L J 677.
10. Balkaran v. Gobind, (1890) 12 All 129=1890 A W N 89 (F B).

Judge under Sec. 151, Civil P. C., and when it was pointed out to them that their proper remedy was by an application under O. 41, R. 1, which required the payment of court-fees equal to half the court-fees payable on the appeal, they took no further action. What this however has to do with the propriety of the order of rejection passed by the District Judge on 18th November 1936 it is not very easy to see. The appeal must, in our opinion, be allowed, and the order of rejection passed by the lower Appellate Court set aside, the case being sent back to the lower Appellate Court for disposal in accordance with the law.

D.S./R.K.

*Appeal allowed.***A. I. R. 1939 Patna 86**

WORT AND AGARWALA JJ.

*Kaluram Agarwala —**Plaintiff — Appellant.*

v.

*Janistha Lal Chakrabarty and others**— Defendants — Respondents.*

Appeal No. 390 of 1937, Decided on 21st October 1938, from appellate decree of Dist. Judge, Purulia, D/- 11th June 1937.

(a) Limitation Act (1908), S. 14 (1)—Jurisdiction—Leave granted to file suit subsequently recalled—Case falls within "other cause of like nature".

Where the jurisdiction of a Court to entertain a particular suit depends upon leave being granted by that Court, and leave is so granted, the subsequent recalling of the leave brings the case within the words "other cause of a like nature" in sub-s. (1) of S. 14. Hence time from the granting of leave till it is recalled should be excluded under S. 14 : *A I R 1928 Cal 46; A I R 1927 Pat 256 and 32 Cal 118, Disting.* [P 88 C 2]

(b) Limitation Act (1908), S. 14—Good faith—Choice of plaintiff to file suit in either of two Courts—Plaintiff's choosing Court inconvenient to defendant does not constitute lack of good faith.

Plaintiff who has a right to institute a suit in more than one Court is not bound to consider the convenience of his opponent in making his choice. If the unfortunate effect of that choice is to cause inconvenience to the defendant it does not constitute lack of good faith on the part of the plaintiff in the sense in which that phrase is used in Section 14. [P 89 C 1]

S. M. Mullick, S. N. Dutt and S. C. Mazumdar — *for Appellant.*

Dr. P. K. Sen and R. S. Chattarji — *for Respondents.*

Wort J.—This appeal from a decision of the District Judge arises out of an action

on a promissory note. So far as the merits of the case are concerned, they were decided in favour of the plaintiff, but the question upon which the suit was dismissed in the Court below was that of limitation. When the case was first opened, it appeared to present some difficulties but now it seems to be a very clear case. The short facts, so far as is necessary for raising the point, are that the plaintiff was the assignee of the promissory note. Taken from the date of the promissory note the assignment was on the last day of limitation. On that very day the plaintiff assignee instituted the suit with the leave of the Master on the Original Side of the High Court at Fort William. The matter proceeded, it would appear, but subsequently on 15th July 1935, about a year after the suit was instituted, Panckridge J. on the objection by the defendants, discharged the order allowing the suit to be instituted in the Calcutta High Court and rejected the plaint. The plaintiff then brought this action by filing a plaint in the Purulia Court. Now, as I have already indicated, it is clear that if the suit is taken to have been instituted on the day on which the plaint was presented in the Calcutta High Court, no question arises. But the plaint in the Purulia Court being filed on 16th July 1935, it was clearly barred by limitation, unless the plaintiff can take advantage of S. 14, Limitation Act. The requirements of S. 14 are that the plaintiff must have been prosecuting in good faith the suit in another Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it. The learned Judge in the Court below has come to the conclusion that the action of the plaintiff was mala fide; that is to say, the act of the plaintiff in instituting the suit in the Calcutta High Court was mala fide, and therefore the Judge comes to the conclusion that S. 14, Limitation Act, did not apply.

The first matter to be considered is whether the Calcutta High Court was unable to entertain the plaint for defect of jurisdiction. Now, there could be no question on that narrow point; but, had the plaintiff bona fide started his suit in the Calcutta High Court and that Court had ultimately decided that it had no jurisdiction, S. 14, Limitation Act, would have no doubt applied. The question seems to me to be determined by asking the question whether the Section could be said not to apply when

the Calcutta High Court having given leave to prosecute the suit in that Court eventually revoked that leave. In my judgment it is impossible to contend that the plaintiff in those circumstances (quite apart from the question of mala fides and bona fides) can be in a worse position than he would be in circumstances to which I at first referred. Now, was there any defect of jurisdiction? That seems to me to be determined by the effect of the order of Panckridge J. made in July 1935. It is impossible to look to that order other than to deal with it as an order which dated back from the date of the institution of the suit; in other words, anything done in the suit would necessarily fall (if I may use the expression) as the result of the revocation of the order of Panckridge J. and it seems to me to be a question to be determined in relation to the jurisdiction of the Court which ultimately decided the case. The Purulia Court had jurisdiction in this case, and could it be said that the High Court at Calcutta had jurisdiction to pronounce judgment and make a decree? There seems to me to be only one answer to that question and that is that the Court, by reason of the order of Panckridge J. would not have such jurisdiction. The only question that remains is whether the plaintiff was prosecuting in good faith in a Court which suffered from defect of jurisdiction. Was he prosecuting in good faith? I should have thought that that matter is concluded by stating the fact that the Court gave the plaintiff leave to pursue his remedy in the Calcutta High Court. Even assuming that it does not conclude the matter, we have to determine whether the plaintiff acted in good faith? Dr. Sen contends that the finding of the learned Judge in the Court below is conclusive of the matter. The finding of the Judge had better be stated in order to make the matter perfectly clear. The learned Judge says this :

It should be borne in mind however that the real question with which we are concerned here is not so much whether there was a genuine assignment for consideration, but whether in making the assignment in Calcutta the parties acted in good faith or did so with the ulterior motive of harassing the defendants. I think that if the matter is considered in the light of reason and probability it is difficult to escape the conclusion that the object was vexatious and tainted with mala fides.

So far as that part of the judgment is concerned, with respect to the learned Judge, he was considering a wholly irrelevant matter, and that finding of his cannot

be binding on this Court in second appeal. A little later the learned Judge says :

The point therefore is not that the plaintiff was under any incorrect impression of the law, but rather that his motive in bringing the suit in Calcutta was malicious and vexatious . . . I have no doubt that the Section (S. 14) is intended to apply to plaintiffs who have been misled into litigating in a wrong Court by a bona fide mistake of facts and law, and never to those who have deliberately chosen a remote Court with an ulterior motive which is essentially vexatious.

That again in my judgment is a wholly irrelevant consideration. Whether it was vexatious to the defendant or it harassed the defendant, whether his (the plaintiff's) motive was malicious is wholly irrelevant for the consideration of this point. If the plaintiff was acting as the law would allow him to act, whatever his motive be, it could not be said that he was not prosecuting his case in good faith. The learned Judge seems to be under the impression that the plaintiff here went to the Calcutta High Court for the purpose of getting perhaps a summary judgment against the defendant and that in doing so he intended to harass the defendant. I suppose that by getting a summary judgment the plaintiff would to some extent harass the defendant; but the question that had to be determined under the Section was whether the plaintiff was pursuing or prosecuting this suit in good faith in another Court; in other words, whether he really was under the impression that that Court had jurisdiction to entertain his suit. It is only in those circumstances could it be stated that Sec. 14 applied. The motive of the plaintiff as between him and the opposite party (the defendant) had nothing to do with the matter. Could it be said that he was not acting in good faith when he asked for leave from the Calcutta High Court and that Court gave him leave to bring his suit in that Court? Only one answer to this is possible. It is unnecessary for us to consider whether there was evidence on which the learned Judge could come to his conclusion on the point but there are conclusions expressed by the learned Judge in the Court below which are wholly irrelevant for the purpose of the decision of this case.

Dr. Sen in support of his argument relies upon certain authorities. The first of them is 46 C L J 452.¹ That was a case in which a suit had been brought (as in this case) in

1. *Bonomali Gope v. Fakir Chand Pal*, (1928) 15 A I R Cal 46=106 I C 324=46 C L J 452.

another Court. The first Court there was the Union Court of Behar. Then on an order of the Court the suit was brought in the Court of the Small Cause Court Judge. That case has no application to the facts of this case, because it was decided in that case on an application in revision that having regard to what fell from the Union Court on 6th June the learned Judge was not prepared to hold that that Court intended thereby to decline to entertain the suit or to decide that it had no jurisdiction. Once that is stated, of course, S. 14 becomes inapplicable. Reliance was then placed upon the decision in 8 P L T 561² which was again a case on S. 14. There the Court held that the plaintiff's agent negligently filed an execution application in the Munsif's Court and in those circumstances his act could not be said to be done with due care and attention and he was not entitled to have the time during which the petition was pending in the Munsif's Court excluded under Sec. 14, Limitation Act. This is again a case which has no application to the facts of the case before us. The third case relied upon is 32 Cal 118.³ There both suits had been commenced in the same Court. The first suit had claimed mesne profits and whether by inadvertence or otherwise the Court had given the full amount which the plaintiff desired. He then brought another suit. The mere statement of the facts, I should have thought, is sufficient to show that S. 14 did not apply and this is what the Court held. In any event that case has got no application to the facts of the case before us. In my judgment this is a clear case in which the plaintiff should have had the advantage of the time extended by reason of Sec. 14, Limitation Act, and, as the merits of the case were decided in favour of the plaintiff, in allowing the appeal of the plaintiff I would direct that he be given a decree in the terms of the relief claimed in the suit. The appeal is allowed with costs throughout, the decision of the learned Judge in the Court below is set aside and that of the trial Court is restored.

Agarwala J.—The plaintiff-appellant is the assignee of a handnote dated 2nd June 1931. The handnote was executed by defendants 1 and 2 in favour of defendant 3 who

assigned the same to the plaintiff. The suit out of which this appeal has arisen was instituted at Purulia on 16th July 1935. It was decreed by the Munsif who tried it, but that decision has been reversed by the learned District Judge of Purulia on the ground that the action was barred by limitation. Prima facie the decision of the learned District Judge on the ground of limitation is correct, but the plaintiff-appellant invokes the provisions of S. 14, Limitation Act, 1908. The material words of sub-s. 1 of that Section are as follows :

In computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding against the same defendant shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

The facts upon which this Section is called in aid are as follows: Defendant 3 assigned the handnote to the plaintiff on 1st June 1934, that is to say, one day before the expiry of the period of limitation prescribed for the suit. On the same day the assignee instituted a suit on the handnote in the Calcutta High Court and under Cl. 12, Letters Patent of that Court obtained the leave of the Court to do so. That leave was subsequently recalled on 15th July 1935, on the ground that there was no reason why the discretionary powers of the High Court should have been exercised in a suit of this nature to enable the plaintiff to sue in Calcutta instead of in the district of Purulia where the handnote was executed. The plaintiff-appellant seeks to exclude the period which elapsed between the date when the leave to sue in the Calcutta High Court was granted, namely 1st June 1934, and the date when it was recalled, namely 15th July 1935. In my view there can be no doubt that from the date when leave to sue in the Calcutta High Court was granted until the date when the leave was recalled the Calcutta High Court had jurisdiction to entertain the suit. It seems to me however that where the jurisdiction of a Court to entertain a particular suit depends upon leave being granted by that Court, and leave is so granted, the subsequent recalling of the leave brings the case within the words "other cause of a like nature" in sub-s. (1) of S. 14, Limitation Act.

Learned counsel for the respondents however relies upon what he calls the

2. *Fazlul Jamil v. Halal-ud-din*, (1927) 14 A I R Pat 256=101 I C 674=8 P L T 561.

3. *G. S. Hays v. Padmanand Singh*, (1905) 32 Cal 118.

finding of fact of the learned District Judge with regard to the good faith of the plaintiff in instituting the suit at Calcutta. This finding, in the first place, relates to the conduct not of the plaintiff but of the assignor. The learned District Judge has found that the object of the assignor was to harass the defendant and that this object was achieved by making the assignment of the handnote at Calcutta which had the effect of enabling the assignee to institute the suit in the Calcutta High Court, instead of at Purulia where the defendant's witnesses were more readily available. Now the phrase "in good faith" in sub-s. (1) of S. 14 is clearly an adverbial phrase governing the verb 'prosecuted,' and it seems to me that what the Court ought to have investigated was whether the plaintiff prosecuted the suit in good faith, and not what the object of the assignor was in making the assignment at Calcutta. It is not contested that the claim on the handnote is a good one, nor is it contended that the assignor had no right to make the assignment at Calcutta; nor could it be contended that a plaintiff who has a right to institute a suit in more than one Court is bound to consider the convenience of his opponent in making his choice. If the unfortunate effect of that choice is to cause inconvenience to the defendant, it does not constitute lack of good faith on the part of the plaintiff in the sense in which that phrase is used in S. 14, Limitation Act. I agree to the order proposed.

N.S./R.K.

*Appeal allowed.***A. I. R. 1939 Patna 89**

WORT J.

Bajo Sahu — Plaintiff — Appellant.

v.

*Chedi Barhi and another —**Defendants — Respondents.*

Appeal No. 114 of 1934, Decided on 20th November 1936, from appellate decree of Dist. Judge, Monghyr, D/- 20th December 1933.

Defamation—Slander — Information given to police regarding certain person's character resulting in search of his house—Action brought by that person against persons giving information is neither action for malicious house search nor for trespass but for slander.

If as a result of an information given to police regarding certain person's character that person's house is searched by the police, an action brought by that person against persons who have given

information is neither an action for malicious house search which *eo nomine* is unknown to the law, nor is it an action for trespass, but it would be an action for slander. The fact that the police did not act upon the information in making the search would not in any way affect the plaintiff's right of action for slander. If brought against the police it would be an action for trespass and the plaintiff in that case would have to establish not the lack of reasonable and probable cause but that the police had gone beyond their powers given to them by the law, for instance, S. 165, Criminal P. C., or that they had gone beyond their powers which the warrant, which they might have held, entitled them to exercise : 24 Cal 691 and 36 Cal 433, *Ref.* [P 89 C 2; P 90 C 1]

Rai Paras Nath — *for Appellant.*M. K. Mukharji — *for Respondents.*

Judgment. — The attempt in India to avoid technicalities and the complete lack of training in drawing pleadings in both the advocates engaged in the Courts and the Judges of the Courts as well, has led to the confusion which has arisen in this case. The plaintiff brought an action against two persons who had given certain information to the police regarding his (the plaintiff's) character. Exactly what that information was it is unnecessary for me to state. The plaintiff's case was that as a result the police searched his house. He then proceeded to bring an action which was entirely unknown to the law *eo nomine*. He called it an action for malicious house search. That an action for searching a house illegally may be maintained, there can be no dispute. But it is an action of an entirely different character from the one the plaintiff brought. If the plaintiff was to bring an action for malicious house search it would be an action against the police who searched his house. But that would not be an action raising issues which are raised in an action for malicious prosecution. Both the Courts below treated this as an action for malicious prosecution and the District Judge has spoken of reasonable and probable cause. I repeat, there is no such action known to the law. It would be an action in trespass if it was brought against the police and the plaintiff in that case would have to establish not the lack of reasonable and probable cause, but that the police had gone beyond their powers given to them by the law, for instance S. 165, Criminal P. C., or that they had gone beyond their powers which the warrant which they might have held entitled them to exercise. But the action was brought against the persons who gave information to the police, and it is neither an action for malicious house search which

as I say, *eo nomine* is unknown to the law, nor is it an action for trespass, but it would be an action for slander. None of these matters has been considered but one matter has been, and that is a question of fact, namely whether the defendants gave information to the police as the plaintiff alleged. It is possible on the finding to come to the conclusion that the Judges in the Courts below were of the opinion that some information was given to the police, but it is quite clear that they have found that it was not as a result of this information that the police acted. Now, the fact that the police did not act upon the information would not in any way affect the plaintiff's right of action for slander. But it is a matter to be taken into consideration in arriving at a conclusion as to whether the plaintiff should be allowed to withdraw his suit and bring another suit raising the proper issues. It may not, as I have said and repeat, have been an obstacle in law to the plaintiff's suit for damages for slander, but the fact that the police appear not to have acted upon any statement made by the defendants rather indicates that there is very little substance in a case for slander.

I should have referred to the decisions of the Calcutta High Court in 24 Cal 691¹ and 36 Cal 433² where illegal searches of houses have been treated on their proper footing as trespass. In my judgment the appeal fails and is dismissed with costs. The appeal fails on grounds entirely different from those upon which the lower Appellate Court has dealt with the matter. Both the Courts below completely confused the issues. I cannot allow leave to the plaintiff to withdraw his suit for the reasons I have stated. Leave to appeal is refused.

D.S./R.K.

Appeal dismissed.

1. Bahabal Shah v. Tarak Nath Choudhry, (1897) 24 Cal 691.
2. Clarke v. Brojendra Kishore, (1909) 36 Cal 433 = 2 I C 436 = 9 C L J 298 = 13 C W N 458.

A. I. R. 1939 Patna 90

MOHAMAD NOOR AND CHATTERJI JJ.

Vishwanath Narayan Singh —

Judgment-debtor — Appellant.

v.

Harihar Gir — Decree-holder

— Respondent.

Civil Misc. Appeal No. 254 of 1938,
Decided on 20th September 1938.

(a) Practice — Rules of procedure — New rules should be followed in case pending when new procedure is prescribed.

The procedure to be followed in pending cases, when a new procedure is prescribed by law, will be according to this new rule, so far as it is applicable and not according to the old rule.

[P 91 C 2]

(b) Bihar Money-lenders Act (3 of 1938), S. 16 — Scope.

Section 16 does not over-ride any contract between the parties or the decree. [P 92 C 1]

(c) Government of India Act (1935), S. 107 — Object of Section.

The object of S. 107 (1) and (2) is to make the Governor-General or His Majesty the co-ordinating authority in respect of concurrent legislation, to avoid conflict between a Provincial Act and an existing Indian law or Federal legislation.

[P 93 C 1]

(d) Bihar Money-lenders Act (3 of 1938), Ss. 16 and 17—S. 16 must be read with S. 17—Court is required to mention in sale proclamation value of property estimated by it.

Section 16 is not a self-contained Section and does not stand by itself but is to be read with Sec. 17 without which it would have been absolutely a useless piece of legislation. [P 94 C 1]

When therefore Sec. 16 is read with S. 17 the Court by necessary implication is required to mention in the sale proclamation the value of the property estimated by it. [P 94 C 1]

(e) Interpretation of Statutes — Provisions of two enactments when repugnant to each other stated.

In order that two provisions of law may be called repugnant to one another they should be so contradictory that it will be impossible to carry out both of them. [P 94 C 2]

(f) Government of India Act (1935), S. 107—Proviso to O. 21, R. 66, Civil P. C., as amended by Patna High Court, is repugnant to Sec. 16 read with S. 17, Bihar Money-lenders Act — Latter enactment not being reserved for assent of Governor-General or His Majesty, S. 16 read with S. 17 of the latter Act is void.

While the Proviso to O. 21, R. 66, Civil P. C., as amended by the Patna High Court asks the Court not to mention any estimate of value in the sale proclamation except those, if any, given by the parties and not to vouch for the correctness of any of them, Sec. 16, Bihar Money-lenders Act read with S. 17 of the same Act orders the Court to fix the value very carefully and by necessary implication compel them to put the value estimated by them in the sale proclamation and to sell the property if the price fetched is only according to the value fixed by them. Hence, the provisions of S. 16 read with Sec. 17 of the above mentioned Act are repugnant to the Proviso of O. 21, R. 66 and as the said Act was not reserved for the assent of the Governor-General or the signification of the pleasure of His Majesty, the provisions of S. 16 read with S. 17 are void. [P 94 C 1, 2]

(g) Government of India Act (1935), Item 4. of List 3 of Sch. 7 — Concurrent Legislative subject—Meaning of civil procedure explained.

Civil procedure as used in Item 4 of list III in Sch. 7, Government of India Act, includes law of limitation and all matters included in the Code

of Civil Procedure as it stood on the day the Government of India Act was passed. In other words, all matters whether relating to procedure or not included in the Code of Civil Procedure on the date of the passing of the Government of India Act are Concurrent Legislative Subjects. The words "and all matters, etc." enlarge the subjects of Concurrent Legislation by including every matter included in the Code of Civil Procedure on the date of passing of the Government of India Act. [P 95 C 1]

Baldeva Sahay, Harinandan Singh and
Brijkishore Prasad Sinha —

for Appellant.

Khurshaid Husnain, Sarjoo Prasad and
R. J. Bahadur — *for Respondent.*

Mohamad Noor J.—This appeal arises out of a proceeding for execution of a mortgage compromise decree. In Miscellaneous Appeal No. 199 of 1938 (not admitted as yet) which arises out of the same execution proceeding and is by the same appellant, this Court on 6th July 1938 ordered that if the judgment-debtor-appellant deposited to the credit of the decree-holder a sum of Rs. 100 by 11th July next, the sale of the mortgaged properties would be adjourned for two months and if within that period he deposited Rs. 6000 the execution would be stayed. The judgment-debtor-appellant deposited Rs. 100 but did not deposit Rs. 6000. In the meantime a fresh sale proclamation was issued fixing 12th September 1938 for sale. On 15th July 1938 came into force certain Sections (including Ss. 16 and 17), Bihar Money-lenders Act, of the Provincial Legislature (Act 3 of 1938). The judgment-debtor raised fresh objections to the execution and asked the Court to take steps under the new Act. One of them which alone has been pressed before us was that the Court should fix the value of the properties to be sold as enjoined in S. 16 of the Act. The learned Subordinate Judge held that it could not be done as the Section was applicable only when application for execution of a decree was made after the Act came into force. The objections were rejected and the judgment-debtor has preferred this appeal, and the only point urged is the non-compliance of S. 16, Money-lenders Act.

The learned Advocate-General for the appellant contended that the views of the learned Subordinate Judge as to the applicability of S. 16, Bihar Money-lenders Act are erroneous. Its application cannot, in its terms, be restricted to the execution proceedings started after the Act came into force. Mr. Khurshaid Husnain for the res-

pondent has supported the order of the learned Subordinate Judge on three grounds: the first is that the Section applies only to proceedings which were started or will be started after the Act came into force, namely 15th July 1938, and not to all the pending execution proceedings; the second is that S. 16 overrides only the provision contained in any other law or in anything having the force of law, but unlike S. 15 it does not override the contracts between the parties or a decree or order already passed and the decree-holder is entitled to proceed to sell the entire property without its being valued by the Court beforehand; the third ground is that S. 16 of the Act along with S. 17 which follows it, is void under S. 107, Government of India Act of 1935, as it is repugnant to a provision of the Code of Civil Procedure, an "existing Indian law," namely O. 21, R. 66, as it stood on 1st April 1937.

As regards the first contention that the Section is applicable only to execution proceedings started after the Act came into force, there is no substance in it, though this view was adopted by the learned Subordinate Judge. In my opinion the words, 'when an application is made for the execution of a decree passed in respect of a loan, &c., &c.' mean nothing more than when a decree specified in the Section is under execution. It was contended that steps provided in this Section are to be taken immediately after an application is made for the execution of a decree and as the application for execution in this case was made when the Act was not in force, the steps provided in the Section cannot be taken now. This contention, if accepted, will lead us to a number of complications and anomalies. Under the amended Order 21, Rule 22, notice to judgment-debtor is necessary in all cases except when there is an oral application for execution by arrest. It is obvious that unless notice is issued and served upon the judgment-debtor, no enquiry about the valuation of the properties can be made. S. 16, Money-lenders Act, prescribes procedure for the sale of the property of the judgment-debtor and the procedure to be followed in pending cases, when a new procedure is prescribed by law, will be according to this new rule, so far as it is applicable and not according to the old rule. On a reading of the Section, it is quite clear to me that in those execution cases which on 15th July 1938 were at a

stage when the properties were not sold, the sale must be according to the procedure laid down in that Section, provided of course that the Section is not void. Therefore the view taken by the learned Subordinate Judge was, in my opinion, wrong.

Apart from this the question has been made clear by a declaratory Act of the Provincial Legislature (Act 5 of 1938), which came into force when this appeal was being heard by us (19th September 1938). This Act declares [S. 3 (2)] that the provisions of Ss. 15 to 18 (both inclusive) of the Money-lenders Act shall apply and shall be deemed to have always applied to proceedings in execution arising out of suits referred to in sub-s. (1) of S. 3 whether such proceedings were instituted before or after the said Sections came into force.

The next contention of the learned advocate for the respondent has been that S. 16 of the Act overrides anything contained in any law or anything having the force of law, but it does not override contracts or previously passed decrees or orders of Court. This contention also is, in my opinion, untenable. First of all, the learned advocate has not been able to show us any contract by which the judgment-debtor agreed that his property should be sold without fixing any value for it. What the judgment-debtor agreed at the time of the passing of the compromise decree was that in case he made default in the payment of the instalments fixed therein, the mortgaged properties or sufficient portion thereof would be sold. How the sale was to be effected is a matter of procedure and must be governed by the rules of procedure in force at the time of sale.

Mr. Khurshaid Husnain contended that as the compromise decree did not specify the part sufficient for the satisfaction of the decree, the executing Court could not by virtue of Sec. 16 of the Act, which does not override the agreement or the decree, decide what part is to be sold. There is no force in this contention. The decree itself provides that either the entire mortgaged property or a part of it sufficient for the satisfaction of the decree would be sold. This provision does not preclude the Court from fixing the value of the property and of its part sufficient for the satisfaction of the decree. In my opinion therefore S. 16 of the Act does not override any contract between the parties or the decree. The

learned advocate next contended that this Court on 6th July 1938, in Miscellaneous Appeal No. 199 of 1938 ordered that the properties of the judgment-debtor would be sold if Rs. 6000 be not deposited within two months of that date. That order meant that the property would be sold in the manner and according to the procedure under which it was going to be sold before that order. No new procedure could now be applied for sale. This argument also in my opinion, has no force. If after the order of this Court the Legislature has intervened and provided that the property is to be sold only under the procedure prescribed by it, the order of the Court will be of no avail in the face of a positive legislative enactment.

The most serious contention of the learned advocate for the respondent has been that Sec. 16, Money-lenders Act, on account of its being repugnant to a provision of the Code of Civil Procedure as it stood on 1st April 1937 is void. This argument requires a careful consideration. Civil procedure is mentioned in the Concurrent List of the Legislative Subjects in Sch. 7, Government of India Act, 1935. In other words, the Provincial Legislature as well as the Central Legislature can deal with matters relating to it. But the Government of India Act has provided safeguards to avoid conflict between the two Legislatures in connexion with those matters for which the legislative authority is concurrent, that is to say for which both the Provincial and the Central Legislatures can pass enactments. S. 107, Government of India Act, runs thus :

If any provision of Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this Section, the Federal law whether passed before or after the Provincial law or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

In other words this sub-s. (1) of S. 107 says (leaving aside from consideration the Federal Legislation to be passed) that when a Provincial Legislature enacts any law in respect of any matter enumerated in the Concurrent Legislative List which is repugnant to the existing Indian law, it will be void to the extent of that repugnancy. There is an exception to this in sub-s. (2) of the Section which provides that in case a Bill has been reserved for the assent of

the Governor-General or for signification of His Majesty's pleasure and such assent be given, the Provincial legislation, though repugnant to the existing Indian law, will not be void. There is a further proviso that if such assent is given and the Provincial Legislature overrides the existing Indian law, the Federal Legislature will not be able to amend it again without the previous sanction of the Governor-General. The object of S. 107 (1) and (2) is to make the Governor-General or His Majesty the co-ordinating authority in respect of concurrent legislation to avoid conflict between a Provincial Act and an existing Indian law or Federal legislation.

Mr. Khurshaid Husnain contended that S. 16, Bihar Money-lenders Act, is repugnant to the Code of Civil Procedure which is the existing Indian law so far as the matter before us is concerned.

"Existing Indian law" means any law, ordinance, order, by-law, rule or regulation passed or made before the commencement of Part 3 of this Act by any Legislature, authority or person in any territories for the time being comprised in British India, being a Legislature, authority or person having power to make such a law, ordinance, order by-law, rule or regulation : S. 311, Government of India Act.

Therefore, the Code of Civil Procedure, as it stood on 1st April 1937, namely the day on which Part. 3, Government of India Act, came into force, is an existing Indian law. It is now necessary to examine the provisions of the Code to which Sec. 16, Money-lenders Act, is urged to be repugnant, namely O. 21, R. 66. This Rule as originally enacted by the old Imperial Legislative Council provides that when any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made. Then it specified the contents of the sale proclamation and provided that it should be drawn up after notice to the decree-holder and the judgment-debtor and should state the time and place of sale. Among the things which the sale proclamation is to contain is everything which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. It was held that it was incumbent upon the Court to ascertain the value of the property advertised for sale and put the value in the sale proclamation. Judicial pronouncements went so far as to say that mentioning a grossly inadequate value in the sale

proclamation was a material irregularity. This rule was amended by this Court under its rule-making power under S. 122, Civil P. C. Notice to decree-holder and judgment-debtor was dispensed with as a notice under Rule 22 was provided in every case except in case of oral application for execution by arrest and a provision to the following effect was added :

Provided that no estimate of the value of the property, other than those, if any, made by the decree-holder and judgment-debtor respectively together with a statement that the Court does not vouch for the accuracy of either shall be inserted in the sale proclamation.

The amendment came into force on 1st March 1936. The effect of this Proviso is that the Courts are not to estimate the value of the property to be sold and are prohibited from inserting in the sale proclamation any value other than those, if any, mentioned by the decree-holder and the judgment-debtor and if the value given by parties is inserted, the Courts must state that they do not vouch for their accuracy. This was the law, as I have said, on 1st April 1937 when the Government of India Act came into force, and as it was a rule framed by a competent authority empowered by the Code itself to frame rules, it was the existing Indian law as defined in S. 311, Government of India Act. It was argued on behalf of the appellant that the Proviso which came into force on 1st March 1936 is not covered by the Concurrent Legislative List and I shall deal with this point later. Now, it is admitted that the assent to the Bihar Money-lenders Act was given by the Governor and it was not reserved for the assent of the Governor-General or for the signification of the pleasure of His Majesty. Therefore, its provisions if repugnant to the existing Indian law are void.

The learned Advocate-General for the appellant has not argued that the Proviso to O. 21, Rule 66, as it stood on 1st April was not the existing law of India. What he argued was that Sec. 16, Bihar Money-lenders Act, was not repugnant to it. He contended that S. 16 of the Act makes no mention of inserting any value of the property in the sale proclamation and argued that while Proviso to O. 21, R. 66, prohibits insertion in the sale proclamation the estimate of value other than those mentioned by the decree-holder and judgment-debtor and enjoins the Court to mention that it does not vouch for the accuracy of the value mentioned by either, S. 16, Bihar

Money-lenders Act, simply asks the Court to fix the value of the property which the decree-holder wants to be sold and also the value of that portion of it the proceeds of which the Court considers sufficient to satisfy the decree. This argument would have been of some force if Sec. 16 would have stood by itself and would have been self-contained which it is not. It is followed by Sec. 17 without which it would have been an absolutely useless piece of legislation. By itself, it does not describe the purpose for which the Court is to use its time in fixing the value not only of the property which the decree-holder wants to sell but also of a portion of it the proceeds of which the Court considers sufficient for satisfying the decree. Then we find that so much importance has been given to the fixing of this value that the order has been made appealable. Then while the main Section says that the Court shall fix the value of that portion of the property, the proceeds of which, in its opinion, is sufficient for the satisfaction of the decree; the Proviso says :

That the Court may order the whole property of the judgment-debtor to be sold if it is satisfied that by reason of the nature of such property or any other special circumstances such property cannot reasonably or conveniently be sold in part.

The purpose of ascertaining the value of the property has been specified in Sec. 17. There among others it is provided that except under circumstances mentioned therein the property advertised shall not be sold for a price lower than that specified in the sale proclamation. This clearly enjoins upon the Court to mention the value as ascertained by it under Sec. 16 in the sale proclamation. Otherwise how could the Court be told not to sell a property (except under certain circumstances) for a price lower than the price mentioned in the sale proclamation? What is the price mentioned in the sale proclamation to which reference has been made in Sec. 17? Surely not the value given by the decree-holder or judgment-debtor. The Court is not to vouch for the accuracy of either. Therefore by necessary implication the Court is required to mention the value estimated by it in the sale proclamation. Thus while O. 21, R. 66, Civil P. C., as it stands after the amendment by this Court, provides that the Court shall not enter any estimate of the value of the property in the sale proclamation other than the value, if any, given by the decree-holder and the

judgment-debtor and requires it not to vouch for the correctness of either, Sec. 16 read with Sec. 17 of the Act enjoins the Court to estimate the value and mention it in the sale proclamation, such value being of such a binding character that the property cannot be sold for a lesser price except under certain specified circumstances. In other words, the Court is to vouch for the absolute correctness of the value as fixed by it. I am clearly of opinion that Sec. 16 which must be read with Sec. 17 is repugnant to O. 21, R. 66, Civil P. C.

I do not wish to discuss in detail the meaning of "repugnancy". It has been discussed in a number of decided cases. For the purposes of this case, I will construe it very strictly and hold that in order that two provisions of law may be called repugnant to one another, they should be so contradictory that it will be impossible to carry out both of them; in other words if one says "do" and the others say "do not". Here we have got two orders given to the Courts : one is by the Proviso to Order 21, R. 66, Civil P. C., which asks them not to mention any estimate of value in the sale proclamation except those, if any, given by the parties and not to vouch for the correctness of any of them; the other is Ss. 16 and 17 of the Act which order them to fix the value very carefully, make their orders appealable to the higher tribunals and by necessary implication, compel them to put the value fixed by them in the sale proclamation and to sell the property only if the price fetched is according to the value fixed by them, unless of course some other considerations arise. In my opinion it is impossible for the Courts to carry out both the orders. They will have to disregard the one or the other. The framers of the Money-lenders Act seem to have been cognizant of the fact that the provision for estimating the value of the property was inconsistent with the Civil Procedure Code as it stands and therefore they have expressly said that notwithstanding anything to the contrary contained in any other law or in anything having the force of law.

The reference is obviously to the Civil Procedure Code. I do not know of any other law dealing with the procedure for sale of property in execution of decree and estimating its value by the Courts. The Section therefore obviously repeals the provisions of O. 21, Rule 66 of the Code as it

stands now. I do not wish to enter into the discussion of the propositions on which a somewhat elaborate argument has been addressed to us by Mr. Khurshaid Husnain that other provisions of Sec. 17 are also repugnant to the Civil Procedure Code and to other existing Indian laws. They are not before us and have not been replied to by the learned Advocate-General who appeared for the appellant.

Mr. Harinandan Singh who also appeared for the appellant and who replied in the absence of the learned Advocate-General contended that O. 21. R. 66, as it stands, came into force in March 1936 and therefore is not a Concurrent Legislative subject mentioned in List III of Sch. 7, Government of India Act, because it is not a procedure which was in force on the date when the Government of India Act of 1935 was passed. This argument, in my opinion, is fallacious and is based upon a misreading of Item (4) of List III in Sch. 7. This item makes Civil Procedure a Concurrent Legislative subject. Civil Procedure includes law of limitation and all matters included in the Civil Procedure Code as it stood on the day the Government of India Act was passed. In other words, all matters whether relating to procedure or not included in the Civil Procedure Code on the date of the passing of the Government of India Act are Concurrent Legislative Subjects. The words "and all matters, &c. &c." enlarge the subjects of Concurrent Legislation by including every matter included in the Civil Procedure Code on the date of passing of the Government of India Act. The matter in this connexion is the procedure to be adopted for the sale of the property of the judgment-debtor, i. e. issue of sale proclamation, etc. This is a matter of civil procedure and was included in the Civil Procedure Code as it stood on the date when the Government of India Act was passed, and in that connexion the existing Indian law is the law as it stood on 1st April 1937.

To sum up my reasons, the matter relating to the execution of decree and sale proclamation was a matter included in the Civil Procedure Code on the date the Government of India Act was passed. The existing Indian law in this connexion is O. 21, Rule 66, Civil P. C., as amended by the High Court and as it stood on 1st April 1937. The law subsequently enacted by the Provincial Legislature which is con-

tained in Ss. 16 and 17, Bihar Money-lenders Act, is repugnant to it, and not having been assented to either by the Governor-General or His Majesty is void. The order of the lower Court refusing to fix the value of the properties to be sold must be upheld though on different grounds. The result is that the appeal is dismissed with costs.

Chatterji J. — I agree.

By the Court. — We certify that this case involves a substantial question of law as to the interpretation of the Government of India Act and is therefore a fit one for appeal to the Federal Court.

N.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 95

JAMES J.

Mohammed Wasi Ahmed — Petitioner.
v.

Mt. Bibi Jamila Khatoon —

Opposite Party.

Civil Revn. No. 272 of 1938, Decided on 20th October 1938, from order of Sub-Judge, First Court, Gaya, D/- 12th April 1938.

(a) Revision — Court in declaring party in possession of ornaments as pauper does not act illegally or with material irregularity — Revision does not lie.

A Court does not act illegally or with material irregularity in permitting a party in possession of ornaments to sue as a pauper and hence the order cannot be interfered with by the High Court in revision. [P 96 C 1]

(b) Civil P. C. (1908), O. 33, Rule 1—Ornaments worn by woman posing as pauper whether can be classed necessary wearing apparel (*Quære*).

It is doubtful whether certain ornaments about a woman's person can be classed as necessary wearing apparel when she is posing as a pauper: *A I R 1927 Cal 309* and *A I R 1928 Lah 271*, *Ref.* [P 96 C 1]

Raj Kishore Prasad — *for Petitioner.*

Syed Ali Khan, A. H. Fakhruddin and S. M. Saleem — *for Opposite Party.*

Order.—This is an application for revision of the order of the Subordinate Judge of Gaya permitting the opposite party to sue as a pauper. The Subordinate Judge has found that the opposite party is in possession of ornaments worth Rs. 412; but on the authority of the decision of the Calcutta High Court in Civil Revn. No. 544 of 1926¹ he has held that these ornaments are

1. *Sm. Mabin Khatun v. Sk. Satkari*, Reported in (1927) 14 A I R Cal 309=100 I C 264=45 C L J 68.

to be classed as necessary wearing apparel within the meaning of O. 33, Rule 1. On behalf of the petitioner, it is argued that a more correct view of the matter was taken by the Lahore High Court in A I R 1928 Lah 271² wherein the Calcutta decision was criticized. If this matter were before me in appeal, I doubt whether I should find myself able to hold that a certain amount of metal about a woman's person is to be classed as necessary wearing apparel when she is posing as a pauper; but I do not consider that it can be said that the learned Subordinate Judge acted illegally or with material irregularity when he adopted that view. I do not consider that we have any authority to interfere in revision with his order declaring the opposite party a pauper; and this application is dismissed. I make no order for costs.

N.S./R.K. *Application dismissed.*

2. Lal Chand v. Mt. Pisto, (1928) 15 A I R Lah 271=110 I C 122=29 P L R 229.

A. I. R. 1939 Patna 96

WORT AG. C. J. AND MANOHAR LALL J.

Firm Rampratap Sirinarayan —

Defendant — Appellant.

v.

Darsan Ram, Plaintiff and others,

Defendants — Respondents.

Appeal No. 878 of 1936, Decided on 15th August 1938, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 2nd May 1936.

(a) **Mortgage — Priority — Decree creating charge on property passed on 19th February 1932—Same property mortgaged on 26th April 1932—Decree registered on 10th June 1933 — Mortgagee held had priority over decree-holder.**

A decree-holder obtained a compromise decree on 19th February 1932 by which a charge was created on certain immovable property of the judgment-debtor. The same property was however mortgaged to a third party on 26th April 1932. The compromise decree was registered on 10th June 1933 :

Held that the mortgagee had priority over the decree-holder as the registration was invalid, the Registrar having no jurisdiction to register the decree. [P 96 C 2; P 97 C 1]

(b) **Registration Act (1908), S. 87 — Scope and operation.**

The operation of S. 87 does not extend to those cases in which an application for registration is made out of time: A I R 1929 P C 279, *Rel. on.* [P 96 C 2]

K. K. Banerji — *for Appellant.*

B. C. De and A. B. Jha —

for Respondents.

Wort Ag. C. J. — This appeal raises a question of priority. The appellant obtained a compromise decree (so it is stated) on 19th February 1932, by which a charge was created on the property which was the subject-matter of a mortgage executed in favour of the respondent in this appeal on 26th April 1932. The compromise of the appellant was registered on 10th June 1933 and in those circumstances the Court below has held that the registration was invalid and as a consequence of that finding has held that the mortgagee of the mortgage of 26th April 1932, has priority over the appellant.

Mr. K. K. Banerji on behalf of the appellant contends that the registration was a valid registration. His argument depends on a further contention that the decree was not drawn up by the Calcutta High Court on its Original Side until 1st June 1933, which would make the registration in the same month within time under S. 23, Registration Act. If we are to accept that statement although there is no evidence of it before us, that is to say, there is no finding in the Court below on this question of fact, it puts Mr. Banerji's client completely out of Court by reason of S. 47, Registration Act, because we must assume *prima facie* that the operation of the charge dated from 1st June 1933, the date upon which the decree was drawn up by the Master of the Court as I have stated. That would appear to conclude the matter. There was one suggestion during the course of the argument that, even assuming that the compromise was to be taken as having been executed on 19th February 1932, (in which event of course the appellant would have priority), the registration of 10th June 1933, must be valid on the assumption that what ought to have been done was in fact done, and that in any event the irregularity in registering the document would be cured by S. 87, Registration Act. There is a clear authority however, of the Judicial Committee of the Privy Council in 56 I A 379,¹ that the operation of S. 87 does not extend to those cases in which an application for registration is made out of time.

The further contention is that under S. 47, the operation of this decree of 1st June 1933 (if we are to take it to be as on that date), must take effect from the date

1. Ma Pwa May v. Chettyar Firm, (1929) 16 A I R P C 279=120 I C 645=7 Rang 624=56 I A 379 (P C).

upon which the parties entered into it. After a careful consideration of that point it seems to me to be an impossible construction of S. 47. S. 47 refers to a registered document and its operation from the date on which it would have operated if no registration had been required or made. Mr. Banerji's further argument forces us to the conclusion that the operation of the decree would date from 1st June 1933, the compromise of February 1932 being a mere contract between the parties which led to the drawing up of the formal decree on 1st June 1933. It will be seen that I have assumed that the decree was dated 1st June 1933, throughout this judgment; but if we are to take it that the decree was dated from 19th February of the previous year, the appellant would fail on the other ground, namely that the Registrar had no jurisdiction to register the document. Mr. Banerji's client, therefore, unfortunately finds himself on the horns of a dilemma on either one of which he is implied. The result is that the decision of the Court below is affirmed and the appeal dismissed with costs.

N.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 97

COURTNEY-TERRELL C. J. AND
FAZL ALI J.

Bajinath Prasad and others —

Plaintiffs — Appellants.

v.

Binda Prasad Singh and others —

Defendants — Respondents.

First Appeals Nos. 113 of 1935 and 10 of 1936, Decided on 31st March 1938, from decision of Addl. Sub-Judge, Patna, D/ 31st March and 9th April 1935.

(a) Hindu Law — Alienation — Manager — Power of manager to alienate joint family property is not so restricted as to disqualify him from doing anything to improve condition of family—Only limitation which can be imposed on him is that he must act with prudence.

The karta of a joint Hindu family being merely a manager and not an absolute owner, the Hindu law has placed certain limitations upon his powers to alienate property belonging to the joint Hindu family. The Hindu law-givers could not however be intended to impose any such restriction on his power as would virtually disqualify him from doing anything to improve the condition of the family. The only reasonable limitation which can be im-

1939 P/13 & 14

posed on a karta is that he must act with prudence and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct. The manager will thus not be allowed to enter into any transaction which may be speculative or fraught with risks or which may involve a possibility of loss to the family and the Courts will not encourage him either to part with the joint family property or to encumber it merely in order to increase the immediate income of the property, because a prudent person will not sacrifice a certain and stable income in favour of the mere prospect of a better income. [P 102 C 2]

In certain peculiar circumstances, the alienation of part of the joint family property by a karta for the acquisition of new property may be upheld. [P 102 C 2]

Where therefore no less than seven adult members of a joint Hindu family with the knowledge available to them and possessing all the information about the means and requirements of the family were convinced that the proposed purchase of the new property was for the benefit of the estate and the evidence on the record showed, that they were not guided by merely sentimental considerations but acted as a prudent owner would have acted in the circumstances of the case and it was not shown that the property mortgaged by the manager was of any particular utility to the family but on the other hand the evidence showed that as a result of the purchase the members of the joint family acquired certain other proprietary interests, the consolidation of which had the effect of converting them from mere tenants, who had to pay a heavy rent to the landlord, into landlords, which fact by itself was of great advantage to the family and having regard to the attitude of all the adult members of the family then living it could not be said that the plaintiffs-mortgagees, when they advanced the loan, did not act honestly or that they had not good reason to be satisfied that the manager was acting, in the particular instance, for the benefit of the estate :

Held that the transaction was binding on all the members of the joint family : 6 M I A 393 (P C); A I R 1925 Pat 189; A I R 1929 Pat 130 and A I R 1926 All 511, Rel. on; A I R 1917 P C 33, Expl.; Case law discussed. [P 103 C 1]

(b) Hindu Law—Debts—Manager—Manager borrowing money on hundi or promissory note to meet joint family necessity—Other members of the family can be sued on and made liable upon hundi or promissory note.

Where the manager of a joint Hindu family borrows money on a hundi or a promissory note to meet a joint family necessity, the other members of the family may be sued on and made liable upon the hundi or promissory note. A managing member cannot be regarded as a mere agent for the family, because he is himself a member of the family and having regard to the powers which vest in him under the Hindu law he may well be regarded as the principal. At any rate a joint Hindu family being a legal person according to Hindu law may be represented and may act through the managing member or the head thereof. Hindu law does not recognize any distinction between the liability of the joint family when the debt is contracted by the karta under a promissory note or a bill of exchange and its liability when the debt is

contracted otherwise. All that is necessary to make all the members of the family liable is that the debt should have been contracted for family necessity or for the benefit of the family. There is nothing in the Negotiable Instruments Act which should preclude a Court from applying the principles of Hindu law to a suit based on negotiable instruments. Indeed, it would always be open to the holder of the instrument to sue the maker and acceptor of the instrument and he need not sue all the members of the joint family if he so chooses. He will also be entitled to avail himself fully of the benefit of the specific provision in the Negotiable Instruments Act which is to the effect that once the execution of the document is proved, consideration will be presumed. He may however waive the benefit of this provision and adduce direct evidence to prove the passing of consideration. Similarly, there should be nothing to prevent him if he has evidence in his possession from proving that the maker of the instrument borrowed money to meet a family necessity and if he succeeds in proving it the Court would not refuse to apply the Hindu law on the subject merely because the suit is based on a negotiable instrument : *A I R 1934 P C 4; A I R 1922 All 116; A I R 1933 Lah 494 and A I R 1933 Pat 263, Rel. on; A I R 1918 P C 146, Expl.; A I R 1925 Cal 1062; A I R 1925 Cal 1153; 21 M L J 526 and A I R 1934 Pat 629, Not foll.; Case law discussed.* [P 104 C 1; P 105 C 1,2; P 106 C 1]

Baldeo Sahay, Chaudhury Mathura Prasad, Harinandan Sahay Sinha and S. Mehdi Imam — *for Appellants.*

B. C. De, B. N. Rai, Krishna Deva Prasad, A. N. Lal and Ram Swarup Sinha — *for Respondents.*

Fazl Ali J. — These appeals arise out of two suits instituted by the plaintiffs to recover from the defendants, who constitute a Hindu joint family, their dues under a mortgage bond dated 17th August 1913 and four hundis dated 26th October 1930. The mortgage bond as well as the hundis were executed by a deceased member of the defendants' family, namely Jang Bahadur who had been given a general power of attorney by all the adult members of the family, about six in number, and who according to the plaintiffs was to all intents and purposes the karta of the family. By this bond (which is the subject-matter of mortgage suit No. 48 of 1933) Jang Bahadur mortgaged certain joint family properties to secure a loan of Rs. 10,000 and agreed to pay compound interest at the rate of Rupees 15 per cent. per annum with annual rests. The hundis (which form the subject-matter of the second suit—Money Suit No. 3 of 1934) had been drawn by him for a sum of Rs. 16,100 to replace three other hundis for Rs. 12,000 which according to the plaintiffs had been signed by Jang Bahadur on 2nd August 1927 to

satisfy certain dues other than the dues under the mortgage bond. Both the suits were tried together as the parties were common and the main defence put forward on behalf of the defendants in them was that Jang Bahadur was not the karta of the family and neither the mortgage bond nor the hundis were binding on the defendants, inasmuch as there was no legal necessity for the debts contracted by means of these documents. In the mortgage suit the defendants raised two further pleas, viz. (1) that the rate of interest provided in the mortgage bond was exorbitant and it was not at all necessary for Jang Bahadur to contract a loan at that rate and (2) that the debts for which Jang Bahadur is alleged by the plaintiffs to have given the first hundis in 1927 had been paid off prior to that date and these hundis had in fact been drawn in part payment of the dues under the mortgage bond dated 17th August 1913. In support of the last plea the defendants rely on an endorsement in the mortgage bond itself and it is contended on their behalf that the account given by the plaintiffs in the plaint is incorrect, inasmuch as no credit has been given for the sum of Rs. 12,000 for which the hundis had been drawn by Jang Bahadur on 2nd August 1927. The defendants raised various other pleas in the Court below but none of them was pressed during the hearing of the appeals in this Court.

In dealing with the appeal in the mortgage suit it will be convenient at this stage to dispose of the defendants' criticism of the account put forward by the plaintiffs in respect of the dues under the mortgage bond. It appears that Jang Bahadur had made certain payments from time to time in connexion with the debt due under the mortgage bond and these payments had been duly endorsed on the back of the bond. The aggregate of the payments which were made before 22nd August 1927 came to Rupees 12,000 and after going through the accounts in presence of Jang Bahadur Baijnath Prasad, one of the plaintiffs, made the following note on the back of the bond :

The principal and interest in respect of the bond comes to Rs. 34,430-4-0 on adjustment of account, out of which Rs. 2430-4-0 is remitted; Rs. 12,000 received formerly stands credited as above, the balance Rs. 10,000 has been received today, on account of interest, so there remains due up to this date the balance Rs. 10,000 (rupees ten thousand), on which interest will run according to the terms of the bond, the interest and compound interest from this day will run according to the terms in the bond, etc.

A similar note was made by Jang Bahadur on the bond which runs as follows :

On calculating interest and compound interest, on setting off the amounts credited above and on paying Rs. 10,000 in cash this day, we paid in full the interest and compound interest up to this date. Now Rs. 10,000 principal, remained due by us, upon which interest and compound interest will run from today in accordance with the stipulations made in the bond.

These endorsements plainly mean that on 22nd August 1927 a sum of Rs. 10,000 only was found to be due to the plaintiffs under the mortgage bond but this is not what the figures upon which the account is based show. These figures show that out of an aggregate sum of Rs. 34,430-4-0, Rupees 2430-4-0 was remitted and Rs. 10,000 was paid by Jang Bahadur. This leaves a balance of Rs. 22,000 and not Rs. 10,000. The defendants' explanation of the discrepancy is that on the very date which the endorsements bear Jang Bahadur had paid off Rs. 12,000 by drawing three hundis for that sum in favour of the plaintiffs which were accepted by Janki Singh, the senior-most member of the defendants' family and thus the debt due under the mortgage bond was reduced to Rs. 10,000. The plaintiffs' case on the other hand is that the hundis had been drawn by Jang Bahadur to pay off an entirely separate debt (to which I shall have to advert presently) and that by oversight the sum of Rs. 12,000 which had been paid before 22nd August 1927 and which had been already taken into consideration in arriving at the total figure of Rs. 34,430-4-0 was deducted once more from that sum. Their case in short is that on 22nd August 1927 the defendants owed to them Rs. 22,000 and not Rs. 10,000 and the statement in the endorsement that they owed Rs. 10,000 is a mistake.

Now *prima facie* it seems difficult to believe that the plaintiffs who are money-lenders by profession would commit such a palpable error in adding up the account but after hearing the arguments addressed to us on behalf of the parties I am not on the whole inclined to disagree with the learned Subordinate Judge who seems to have devoted considerable attention to this part of the case. It is both parties' case that the sum of Rs. 34,430-4-0 found due to the plaintiffs as a result of the accounting between the parties had been arrived at after giving credit to the defendants for the sum of Rs. 12,000 which had been paid before 22nd August 1927 by several

instalments but in the endorsements made by Baijnath on that date it is stated that :

Rupees 12,000 received formerly stands credited as above and the balance Rupees 10,000 has been received today.

These words do lend some support to the case of the plaintiffs that the sum of Rs. 12,000 was calculated twice over and their case is further strengthened by the fact that there is no reference to the hundis in the endorsement nor is it stated that in addition to the sum of Rs. 10,000 paid in cash on 22nd August 1927 a further sum of Rs. 12,000 had been paid to the plaintiffs on that date. What is of still greater importance is that such evidence as there is on the record strongly points to the conclusion that the hundis of 22nd August 1927 had been drawn by Jang Bahadur to pay off debts other than the debt due under the mortgage bond. It will be convenient at this stage to refer to the nature of those debts.

It appears that Jang Bahadur used to manage on behalf of the plaintiffs two villages named Manikpur which the plaintiffs had purchased from its previous proprietor in 1913 and village Saksora of which they are *ijardars*. The plaintiffs' case is that on going through the accounts it was found that a sum of Rs. 8691 was due to the plaintiffs from Jang Bahadur out of the total collections made by him in these two villages and the defendants further owed to the plaintiffs a sum of Rs. 6370 as rent for two other villages which were held by them in *Thika* under the plaintiffs through Jang Bahadur. The defendants further owed a sum of Rs. 4000 which was the price of an elephant and a horse both of which had been purchased by Jang Bahadur from the plaintiffs. From the total of these three sums of money and a sum of Rs. 859 charged as interest there had to be deducted various sums which had been previously paid by Jang Bahadur and this left a balance of Rs. 12,000 for which Jang Bahadur drew in favour of the plaintiffs three hundis which were accepted by Janki Singh, the senior-most member of the defendants' family. These facts are fully supported by a number of entries in the plaintiffs' account books and although some attempt was made on behalf of the defendants to show that certain entries in the account books were not reliable the defendants entirely failed to substantiate their case. If therefore the plaintiffs' account books are

accepted as they must be in the present state of the evidence the defendants' case that the hundis had been drawn by Jang Bahadur to pay off a portion of the debt due under the mortgage bond must fail. It may be stated here that defendants 1 and 2 have admitted in paragraph 8 of their written statement that the total dues of the plaintiffs including the price of an elephant and a pony and what is described as tahwil or collection money amounted to a little over Rupees 23,000; but their case is that the whole of this amount was paid off by them before 2nd August 1927. They have however produced no reliable evidence to support their statement.

The next point to be decided in the mortgage suit is whether the mortgage by Jang Bahadur is binding upon the entire joint family of the defendants. Now, there appears to have been some controversy before the learned Subordinate Judge as to whether Jang Bahadur was or was not the karta of the family in the strict sense of the term. But from the clear and exhaustive summary to be found in the judgment of the learned Subordinate Judge of the evidence on the point, the only conclusion which can be reasonably drawn is that Jang Bahadur, though he was not the senior-most member of the family, was in fact its karta and was allowed to act in that capacity by all the major members of the family. Thus, the real question to be determined is whether the mortgage transaction concluded by Jang Bahadur can be justified on the ground of legal necessity or benefit to the joint family to which he belonged. Now it is recited in the mortgage bond that out of the total sum of Rs. 10,000 borrowed by Jang Bahadur a sum of Rs. 600 was required to meet certain expenses in connexion with the marriage of a female member of the family and the defendants do not dispute that so far as this item is concerned the borrowing was justified. The dispute really centres round the rest of the money which was required to purchase a proprietary interest in village Sirsi known as the patti of Raja Babu. It appears that in village Sirsi there are two other pattis known as the patti of Nandkishore and the patti of Mahkumar. The defendants have admittedly spent a considerable sum of money in purchasing the patti of Nandkishore and an eight annas share in the patti of Mahkumar. The patti of Raja Babu was also purchased through

Jang Bahadur for a sum of Rs. 34,000 out of which Rs. 9500 was raised by means of the present mortgage bond and Rs. 15,000 by means of another mortgage bond in favour of the vendor of the property in question who had been persuaded to charge interest at the very low rate of six per cent. per annum. The remaining Rs. 9000 apparently came from the joint family savings. Now from the evidence of one of the defendants himself (Narendra Narayan Singh, defendant 6) it appears that all the adult members of the family (who were seven in number) not only approved of this transaction but were of the opinion that "the family would be a great loser if they did not purchase the property." This witness had further made the following statement on the subject :

For three months before we purchased the property several members of the family stayed at Barh for humouring Raja Babu (the vendor of the property) and his mokhtaram Ghasita Lal to sell that property to us. We were anxious to purchase that property at any cost . . . and we never repented the purchase of that property.

These statements are sufficient to show that not only Jang Bahadur but all the adult members of the defendants' family regarded the transaction as highly beneficial to the family. The learned Subordinate Judge has also after reviewing the evidence at great length shown that the income of the property was sufficient to leave a profit of about Rs. 600 to the family after paying interest on the sums borrowed by Jang Bahadur for purchasing the property in question. This conclusion is, to some extent, supported by the admission of Narendra Narayan Singh, defendant 6, who has stated that the patti of Raja Babu was in thika with the defendants' family and after paying the thika rent the defendants' family made an annual profit of Rs. 300. Further the evidence of Nanhu Mahto (P. W. 3) who worked as a patwari in this village under Jang Bahadur shows that the defendants possessed 100 to 125 bighas of raiyati kasht land in Raja Babu's patti most of which was held by them at a bhaoli rent which they saved by becoming proprietors of the estate. It would seem therefore that the transaction for which the money was raised by Jang Bahadur was rightly regarded as a profitable one by the major members of the defendants' family.

It is, however, strongly contended on behalf of the defendants that even if it is

assumed that the transaction was expected to bring some profit to the family, it cannot be upheld, because under the Hindu law the manager or karta of a joint Hindu family, which includes some minor members also, has no authority to encumber the whole or any portion of the joint property of the family in order to raise money to purchase fresh property. This contention is supported by a number of authorities and I propose to deal with it at some length. The most authoritative pronouncement on the subject is to be found in the judgment of the Judicial Committee of the Privy Council in the famous case in 6 M I A 393.¹ In that case their Lordships said :

The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded . . . Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under the circumstances, he is bound to see to the application of the money.

The rule laid down in this passage has been constantly applied to alienations by shebait, heads of maths as well as managers of joint Hindu families and it is conceded by both the parties that this authority must govern the decision of the present case also. The important point however to be decided is how the expression "benefit to the estate" used in this authority is to be construed. On this point there are numerous decisions which may be broadly divided under two heads. On the one hand there is a line of authorities which lay down that the benefit contemplated by their Lordships of the Privy Council was benefit of a defensive nature calculated to protect the estate from some possible or threatened danger or destruction :

1. Hunooman Persaud Panday v. Mt. Babooee Munraj Koonweree, (1854-57) 6 M I A 393 = 18 W R 81 = 2 Suther 29 = 1 Sar 552 (P O).

see 10 Cal 823,² 45 All 390,³ 47 All 381,⁴ 50 All 776⁵ and 53 Bom 419.⁶ On the other hand it has been held in a number of cases that transactions justifiable on the principle of benefit to the estate are not limited to those transactions which are of a defensive nature but must be proved to be such as a prudent owner would have carried out in the interest of the family with the knowledge available to him at the time: see 50 All 969,⁷ 42 All 559,⁸ 46 All 364,⁹ 46 Bom 312,¹⁰ 48 All 592,¹¹ 3 Pat 451¹² and 7 Pat 798.¹³ The conflict between these two views seems to have been greatly accentuated since the pronouncement of the Judicial Committee in 44 I A 147¹⁴ in which while dealing with an alienation by a mahant of debuttar land which is governed by the same principle as an alienation by the manager of a Hindu joint family their Lordships observed as follows:

No indication is to be found in any of them (the cases cited before their Lordships) as to what is in this connexion the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation . . . the defence against hostile litigation affecting

2. Hurry Mohun v. Ganesh Chunder, (1884) 10 Cal 823 (F B).
3. Bhagwan Das v. Mahadeo, (1923) 10 A I R All 298 = 71 I C 959 = 45 All 390 = 21 A L J 271.
4. Shankar Sahai v. Baichu Ram, (1925) 12 A I R All 333 = 86 I C 769 = 47 All 381 = 23 A L J 204.
5. Inspector Singh v. Kharak Singh, (1928) 15 A I R All 403 = 112 I C 881 = 50 All 776 = 26 A L J 577.
6. Ragho v. Zaga, (1929) 16 A I R Bom 251 = 118 I C 555 = 53 Bom 419 = 31 Bom L R 364.
7. Jagat Narain v. Mathura Das, (1928) 15 A I R All 451 = 116 I C 484 = 50 All 969 = 26 A L J 641 (F B).
8. Tula Ram v. Tulsi Ram, (1920) 7 A I R All 11 = 60 I C 3 = 42 All 559.
9. Mahabir Prasad v. Amla Prasad, (1924) 11 A I R All 379 = 79 I C 517 = 46 All 364 = 22 A L J 295.
10. Nagindas v. Mahomed Yusuf, (1922) 9 A I R Bom 122 = 64 I C 923 = 46 Bom 312 = 23 Bom L R 1094.
11. Jado Singh v. Nathu Singh, (1926) 13 A I R All 511 = 98 I C 773 = 48 All 592 = 24 A L J 633.
12. Beni Madho v. Ohander Prasad, (1925) 12 A I R Pat 189 = 83 I C 603 = 3 Pat 451 = 6 P L T 233.
13. Jan Mahomed v. Bikoo Mahto, (1929) 16 A I R Pat 130 = 116 I C 33 = 7 Pat 798 = 10 P L T 811.
14. Palaniappa Chetty v. Devasikamony Pandara Sannadhi, (1917) 4 A I R P O 33 = 39 I O 722 = 40 Mad 709 = 44 I A 147 (P O).

it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connexion, to be taken as benefits and what not.

It has been pointed out in some cases that there is nothing in these observations to encourage the notion that any adventurous or speculative transaction which might probably bring profit to the estate could properly be regarded as beneficial to the estate but rather they import that any act for which the benefit to the estate can reasonably be claimed must necessarily be a defensive act undertaken for the protection of the estate already in possession of the family. The view expressed above has also in some cases been supported by a reference to the 28th and 29th Verses in Chap. 1 of the Mitakshara which deal with the power of a father to alienate ancestral property without the consent of his sons. The 28th Verse which contains the text of Brihaspati runs as follows :

Even a single individual may conclude a donation, mortgage, or sale of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes.

The text is explained in Verse 29 as follows :

The meaning of that text is this : while the sons and grandsons are minors and incapable of giving their consent to a gift and the like or while brothers are so and continue unseparated, even one person who is capable may conclude a gift, hypothecation, or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary or indispensable duties, such as the obsequies of the father or the like make it unavoidable.

Now as pointed out by Patkar J. in 53 Bom 419⁶ the explanation of the text of Brihaspati by Mitakshara in Verse 29 is by no means to be considered as exhaustive and may be treated as illustrative. I venture to suggest that the same remarks apply to the passage which I have quoted from the judgment of the Judicial Committee in 44 I A 147.¹⁴ In that passage their Lordships simply enumerated certain obvious cases of "benefit to the estate," but the very fact that they took care to emphasize that it was impossible to give a precise definition of that expression applicable to all cases, and that it was difficult "to draw the line as to what are benefits and what not," clearly indicates that they did not intend to lay down any exhaustive rule on the subject. On the other hand, in 6 M I A 393,¹ they draw a distinction between a

case of 'need' and one of "benefit to the estate" and also between "a danger to be averted from the estate" and "the benefit to be conferred upon it" which shows that necessity and benefit are two separate tests and not merely two different expressions conveying necessarily the same meaning. It is no doubt true that where there is a pressure on the estate or it is threatened with danger and the pressure or the danger, as the case may be, is removed, the estate is necessarily benefited thereby; but it does not follow that every case of benefit must also be a case of necessity or protection of the estate from danger. In my opinion the proper way to investigate the matter is not to attach too much importance to mere verbal expressions used either in the texts or in the judgments of the Privy Council but to extract the true principle from them.

Now, the karta of the family being merely a manager and not an absolute owner, the Hindu law has like other systems of law placed certain limitations upon his power to alienate property of which he is not the absolute owner. It appears to me however that the Hindu law-givers could not have intended to impose any such restriction on his power as would virtually disqualify him from doing anything to improve the condition of the family. This is evident from the comprehensive expression "for the sake of the family" or "for the purposes of the family" used in the old text of which the expression "benefit to the family" is the modern translation. I think therefore that the only reasonable limitation which can be imposed on the karta is that he must act with prudence, and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct. The manager will thus not be allowed to enter into any transaction which may be speculative or fraught with risks or which may involve a possibility of loss to the family and the Courts will not encourage him either to part with the joint family property or to encumber it merely in order to increase the immediate income of the property, because a prudent person will not sacrifice a certain and stable income in favour of the mere prospect of a better income. There are however reported cases in which in certain peculiar circumstances the alienation of a part of the joint family property by a karta for the acquisition of new property has been upheld : see 3 Pat 451,¹² 7 Pat 798¹³ and 48 All 592.¹¹

Now as I have already stated the peculiar feature of the present case is that no less than seven adult members of the defendant's family with the knowledge available to them and possessing all the necessary information about the means and the requirements of the family were convinced that the proposed purchase of the new property was for the benefit of the estate and so far as the materials on the record go, they show that they were not guided by merely sentimental considerations, but acted as a prudent owner would have acted in the circumstances of the case. Indeed it has not been shown to us that the property which was mortgaged in this case was of any particular utility to the family; on the other hand, there is evidence on the record to show that in village Simri the defendants had acquired certain other proprietary interests and the consolidation of these interests had the effect of converting them from mere tenants, who had to pay a heavy rent to the landlord, into landlords, which fact by itself was of great advantage to the family. Besides, having regard to the attitude of all the adult members of the family then living, it cannot be said that the plaintiffs when they advanced the loan did not act honestly or that they had not good reason to be satisfied that Jang Bahadur was acting in this particular instance for the benefit of the estate. On the whole therefore I am inclined to think that the learned Subordinate Judge was right in upholding the transaction.

The only other point which arises in the mortgage suit is whether the high rate of interest at which the money was borrowed was justified in the circumstances of the case. The learned Subordinate Judge has answered the point in favour of the defendants and he has given the plaintiffs a decree only for Rs. 7000 odd which sum was arrived at by calculating simple and not compound interest on the principal sum at the rate of Rs. 15 per cent. per annum. Now it appears that the defendants have already paid a sum of about Rs. 22,000 to the plaintiffs and that if the rate of interest mentioned in the bond is applied throughout they would be entitled to a further sum of Rs. 49,000 odd at the date of the suit. These being the circumstances of the case there was no real controversy between the parties that the defendants were entitled to some relief. The parties were also agreed that there is nothing per se wrong

or improper about compound interest being claimed by a creditor, especially when the debtor does not pay interest from year to year or at such periods when the interest is payable. The real dispute between the parties was confined to the rate of interest to be charged in the circumstances of the case. Having, however, given careful consideration to the arguments addressed to us on the subject, we have come to the conclusion that the decision of the learned Subordinate Judge, which was based not only upon the evidence adduced before him but upon his knowledge of the local conditions, should be upheld.

The only point which remains to be considered is one which arises in the money suit based upon the hundis and it is whether the entire joint family is liable for the debts contracted by means of these hundis. The first question to be considered is whether the debt for the payment of which these hundis were executed was a joint family debt. The arguments on this subject were confined to two items only (1) an item of Rs. 4000 which is said to represent the price of an elephant and a horse supplied by the plaintiffs to Jang Bahadur and (2) an item of Rs. 8691 which represents the amount due by Jang Bahadur on account of the collections or as it is called tawhil of two villages Manikpura and Sak-sora of which he was in charge on behalf of the plaintiffs. Prima facie there seems to be considerable force in the argument advanced before us on behalf of the defendants that these amounts cannot be regarded as legal necessity. But here again the question has to be decided with reference to the peculiar circumstances of the case. Upon the evidence on the record there can be no doubt that these debts were regarded as legitimate debts not only by Jang Bahadur but by all the adult members of the family and when Jang Bahadur executed the hundi, he executed it with the concurrence of all the adult members. There was no dispute before us that at least three members of the family, namely Jang Bahadur himself, his son Binda and Janki Singh, who was according to the case of the defendants themselves the senior-most member and karta, were present when the accounts were gone into and they accepted the accounts. It appears also that though the hundi was drawn by Jang Bahadur, it was accepted by Janki himself. The circumstances of the case thus strongly

suggest that the tawhil money for which the hundis were executed must have been spent on the legitimate needs of the family though naturally owing to lapse of time and because the defendants are not willing to disclose the true facts the evidence as to how the money was actually spent is not available. As to the price of the elephant and the horse, it is contended that they are more in the nature of a luxury than necessity but in determining the question one cannot ignore the circumstances under which the family was placed and the fact that the elephant and the horse were in use of the entire family and regarded as the common property. This is virtually conceded in the evidence of one of the defendants himself. Besides, if the view, which seems to me to be fully justified by the evidence and the probabilities of the case, is correct that the debts covered by the hundis had been virtually contracted by all the adult members of the family through Jang Bahadur, all the defendants must necessarily be liable to pay the debts, because they are sons or grandsons of one or the other of the adult members.

The question which still remains to be considered is whether in those cases where the manager of a joint family borrows money on a hundi or promissory note to meet a joint family necessity the other members of the family may be sued on the hundi or promissory note. The question has arisen in many cases in connexion with a promissory note, but as both a promissory note and a hundi are negotiable instruments, it is clear that the answer must be the same in each case. It appears that before the decision of the Judicial Committee in 46 Cal 663,¹⁵ the view which prevailed in several High Courts was that all the members of a joint family were liable to be sued on a promissory note executed by the manager of the family alone, provided that it was established that the money was borrowed on the promissory note for joint family purposes : see 23 Mad 597,¹⁶ 7 C W N 725¹⁷ and 11 C W N 139.¹⁸ Since that decision however there has

arisen a conflict of opinion among the High Courts with the result that while in some cases the view expressed in older cases has been adhered to: see 44 All 393,¹⁹ A I R 1933 Lah 494²⁰ and 14 P L T 623;²¹ in others it has been held that the manager of a joint family cannot by executing a promissory note in his own name bind the other members of the family, no other names appearing on the document as those to be charged: see 52 Cal 802,²² 41 CLJ 535,²³ 21 M L J 526²⁴ and 16 P L T 117.²⁵ In 18 P L T 527²⁶ I had the occasion to deal with the matter at some length but out of deference to the decision of a Division Bench of this Court in 16 P L T 117,²⁵ I preferred to rest my judgment in that case on another point which was quite sufficient for the purpose. As however the question is an important one and it has been raised repeatedly in this Court as well as in other High Courts, it appears to me to be necessary to decide it in the present case.

In 46 Cal 663¹⁵ their Lordships of the Judicial Committee had to deal with a case in which the chief question to be decided was whether on certain hundis executed by a certain person without disclosing that he was acting as an agent for another person he could be heard to say that he had executed the hundis not on his own behalf but on behalf of an undisclosed principal. Their Lordships of the Judicial Committee decided that the plea was not available to him and observed as follows :

It is not sufficient that the principal's name should be "in some way" disclosed, it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bills.

15. Sadasukh Janki Das v. Kishan Pershad, (1918) 5 A I R P C 146=50 I C 216=46 Cal 663=46 I A 33 (P C).
16. Krishna Ayyar v. Krishnasami Ayyar, (1900) 23 Mad 597.
17. Nagendra Chandra Dey v. Amar Chandra Kundu, (1903) 7 C W N 725.
18. Baisnab Chandra De v. Ramdhon Dhor, (1907) 11 C W N 139.

19. Krishnanand Nath v. Raja Ram Singh, (1922) 9 A I R All 116=66 I C 150=44 All 393=20 A L J 233.
20. Bhagwan Singh & Co. v. Bakshi Ram, (1933) 20 A I R Lah 494=149 I C 556.
21. Tikam Chand v. Sudarsan Trigunait, (1933) 20 A I R Pat 263=144 I C 325=14 P L T 623.
22. Sreelal Mangtula v. Lister Antiseptic Dressing Co. Ltd., (1925) 12 A I R Cal 1062=89 I C 328=52 Cal 802=29 C W N 828.
23. Hari Mohan Ghosh v. Sourendra Nath Mitter, (1925) 12 A I R Cal 1153=88 I C 1025=41 C L J 535.
24. Kutti Ammu v. Purushotham Doss, (1911) 21 M L J 526=8 I C 851=(1911) 1 M W N 45.
25. Birkeshwar Raut v. Ram Lochan Pandey, (1934) 21 A I R Pat 629=154 I C 95=16 P L T 117.
26. Sirikant Lal v. Sidheshwari Prasad Narain Singh, (1937) 24 A I R Pat 455=170 I C 357=16 Pat 441=18 P L T 527.

Their Lordships' attention was directed to Ss. 26, 27 and 28, Negotiable Instruments Act of 1881, and the terms of these Sections were contrasted with the corresponding provisions of the English Statute. It is unnecessary in this connexion to decide whether their effect is identical. It is sufficient to say that these Sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.

Now, there can be no doubt that if the manager of a joint family acted merely as an agent for the other members, the principle laid down by the Judicial Committee would be fully applicable to a hundi or a promissory note executed by him; but as I ventured to point out in 18 P L T 527²⁶ the Hindu joint family is an institution peculiar to this country and Hindu law gives its karta the power to contract loans to meet a family necessity or for the benefit of the family according to his own discretion and without any express authority from the other members of the family. A managing member cannot thus be regarded as a mere agent for the family, because he is himself a member of the family and having regard to the powers which vest in him under the Hindu law, he may well be regarded as the principal. At any rate as was pointed out in 44 All 393¹⁹ a joint Hindu family being a legal person according to Hindu law may be represented and may act through the managing member or the head thereof. Thus, in my opinion, the decision in 46 Cal 663¹⁶ could not have the effect of overruling the earlier decision which propounded the view that if money was borrowed on a promissory note by a manager for the benefit or necessity of the joint family, the other members of the family in a suit on the promissory note would be liable. The matter which is now before us seems to have been very lucidly dealt with by Shephard J. in 23 Mad 597¹⁶ in the following passage :

At Common law, a married woman and her husband were both liable on her contracts entered into before marriage and the liability of the husband was in no way dependent on or limited by the existence of property derived by him from his wife. If, before marriage, she made a promissory note, an action could be brought against her husband and her : see form in Bullen and Leake's 'Pleadings', Edn. 3; Byles on 'Bills', p. 74, citing (1797) 7 T R 348.²⁷ The Married Woman's Property

Act, 1882, altered the law by limiting the liability of the husband to the value of his wife's property acquired by him. There is in this case no joint liability, nor is the liability of the husband that of a surety, but it resembles it, inasmuch as any defence which would be open to the debtor would equally be open to him : (1890) 23 Q B D 316.²⁸ It appears to me that these observations apply equally to the present case or to that of a Hindu father whose son is joined in an action for debt brought against them. If it is consistent with the English rule of law relating to bills of exchange that the husband may be joined in an action against his wife, it is no less consistent with the law of this country that a member of a Hindu family should be joined in an action against the manager on a promissory note made by him. In the one case, as in the other, there is a liability which is, so to speak, external to the obligation arising on the making of the promissory note, and in both cases that liability is limited, while the liability of the maker is absolute.

It seems obvious that if a person suing on a promissory note executed by a Hindu father impleads not only the father but also the son as a defendant on the doctrine of the Hindu law that a son is under a pious obligation to pay his father's debt, a Court may pass a decree not only against the father but also against the son. I think that the same rule would have applied, if there had been an express enactment to the effect that in all suits where the manager of a Hindu joint family is sued on debts contracted for family necessity all the members of the joint family would be liable and no exception was made in that enactment with regard to suits based on negotiable instruments. If it is so, I do not see how the position is altered, if the rule enunciated above, though not subject of an express enactment is part of the law of the country. As I have pointed out on an earlier occasion, Hindu law does not recognize any distinction between the liability of the joint family when the debt is contracted by its karta under a promissory note or a bill of exchange and its liability when the debt is contracted otherwise. Under that law all that is necessary to make all the members of the family liable is that the debt should have been contracted for family necessity or for the benefit of the family. Where therefore these conditions are satisfied I do not see on what ground a Court can refuse to grant a decree against the other member of the family, unless it is compelled to do so by something to be found in the Negotiable Instruments

27. *Mitchinson v. Hewson*, (1797) 7 T R 348=101 E R 1013.

28. *Beck v. Pierce*, (1890) 23 Q B D 316=58 L J Q B 516=61 L T 448=38 W R 29=54 J P 198.

Act or the principles underlying it. The learned advocate appearing for the defendants read out to us various Sections of the Negotiable Instruments Act but we found nothing in any of these Sections which should preclude a Court from applying the principles of Hindu law to a suit based on negotiable instruments. The learned advocate for the defendants was further unable to show to us how the negotiability of the document or otherwise affected can be retarded, if the rule of Hindu law is applied to a suit based on such an instrument. Indeed, it would always be open to the holder of the instrument to sue the maker and the acceptor of the instrument and he need not sue all the members of the joint family, if he so chooses. He will also be entitled to avail himself fully of the benefit of the specific provision in the Negotiable Instruments Act which is to the effect that once the execution of the document is proved, consideration will be presumed. He may, however, waive the benefit of this provision and adduce direct evidence to prove the passing of consideration. Similarly, there should be nothing to prevent him if he has evidence in his possession from proving that the maker of the instrument borrowed money to meet a family necessity and I do not see why if he succeeds in proving it, the Court should refuse to apply the Hindu law on the subject, merely because the suit is based on a negotiable instrument. The matter however need not be pursued any further, because the view which I have ventured to put forward seems to me to be supported by the decision of the Judicial Committee in 15 P L T 99.²⁹ In that case an action had been brought by the plaintiff on two promissory notes executed by a person held to be the karta of a joint family and the question to be decided was whether the members of the joint family other than the karta could be made liable on them. It is obvious that if the correct legal position is that in an action based on a negotiable instrument no person other than the maker of the instrument can in any circumstances whatsoever be held to be liable, the case might well have been disposed of by the Privy Council on that ground alone. Their Lordships however found it necessary to decide whether the particular sums for which the action

was brought had been borrowed for the purpose of the joint family business and they dismissed the action against the members other than the karta on the ground that the evidence was not sufficient to prove the plaintiff's case. They also had to point out that when a promissory note is signed by the karta, there is no presumption that the borrowing was for the purpose of the joint family and the lender must prove it. In my opinion, this decision should set at rest all controversy on the subject and in this view it seems unnecessary for us to refer the matter to a larger Bench. I may state here that My Lord the Chief Justice who was a party to the decision in 16 P L T 117²⁵ takes the same view of the matter.

There is one peculiar aspect of the case to which our attention has been called by the learned advocate for the plaintiffs. It appears that if the main pleas raised by the defendants in these appeals are given effect to, they will be placed in a far more unfavourable position than they are under the decree passed by the Subordinate Judge. Their main plea in the money suit is that there should be a money decree only against the heirs of Jang Bahadur who drew the hundi and those of Janki who accepted it. It is true that if this plea is accepted, some of the properties which have been sold in execution of the decree of the Subordinate Judge and passed into the possession of the plaintiffs may have to be returned to them. On the other hand if we accept the case of the defendants that no mortgage decree in the mortgage suit can be passed, because the mortgage was not justified by legal necessity, the defendants are, as was conceded by them, faced with this position that there must be a money decree not only against the seven adult members who approved of and affirmed the mortgage transaction but also against the other defendants who are the sons and grandsons of these persons. It is also not disputed that in that case the money decree will have to be passed not merely for the sum of Rs. 7000 for which a decree has been passed by the Subordinate Judge but for the sum of Rs. 49,000. Thus the result will be that the plaintiffs will have a decree for the large sum of Rs. 49,000 against all the defendants in the mortgage suit and the money decree passed by the Subordinate Judge will be upheld with this modification, that it will be enforceable only

29. *Abdul Majid v. Saraswati Bai*, (1934) 21 A I R P C 4=147 I C 1=30 N L R 60=61 I A 90=15 P L T 99 (P C).

against the shares of the heirs of Jang Bahadur and Janki. Such a situation even the defendants cannot possibly contemplate with equanimity and their advocate frankly conceded before us that a decree in these terms will be of no use to them. In the result both the Appeals Nos. 10 and 113 as well as cross-objection in Appeal No. 113 are dismissed, but, in the circumstances of the case, we would direct the parties to bear their respective costs in this Court. It seems also unnecessary to fix a fresh period of grace, for the mortgage decree passed by the learned Subordinate Judge is upheld.

Courtney-Terrell C. J. — I have carefully read and considered the clear and careful judgment prepared by my brother Fazl Ali. I agree entirely with his opinion on the facts and on the law and have nothing to add.

R.M./R.K.

Order accordingly.

A. I. R. 1939 Patna 107

WORT AG. C. J. AND MANOHAR LALL J.

Commissioner of Income-tax, Bihar and Orissa — Petitioner.

v.

Kameshwar Singh Bahadur of Darbhanga — Assessee — Opposite Party.

Miscellaneous J. C. No. 25 of 1937,
Decided on 20th July 1938.

Income-tax — Loss — Capital or income — Assessee investing money in shares of company — Company going into liquidation out of which new company formed — New company agreeing to allot shares and debentures to assessee — Agreement not fulfilled resulting in assessee losing much of originally invested money — Loss held of capital and not of income and hence not accountable in assessment.

The assessee purchased shares to the value of a big amount in a limited company. The company afterwards went into liquidation and out of that liquidation a new company was formed. This company having acquired the assets of the old company agreed to allot certain shares and debentures to the assessee but the agreement was not fulfilled with the result that the assessee lost a considerable sum of the money of his original investment made in the old company :

Held that the difference between what the assessee has in fact got and what he originally invested was a loss which was clearly a loss of capital and therefore it could not be taken into consideration for the purpose of arriving at the assessable income.

[P 108 C 1]

S. M. Gupta — *for Petitioner.*

Sir Sultan Ahmed, Murari Prasad and
S. P. Srivastava — *for Opposite Party.*

Wort Ag. C. J.—The case which has been stated by the Commissioner of Income-tax arises out of the following circumstances. The assessee purchased shares to the value of Rs. 8,75,000 in the Eastern Iron Co. Ltd., which went into liquidation in the year 1924. Out of that liquidation a new company was formed known as Eastern Coal Syndicate Ltd. This company having acquired the assets of the old company agreed to allot certain shares and debentures to members of the old company. In that agreement the assessee was promised 43 shares of Rs. 100 each and debentures to the extent of Rs. 5,72,000. This agreement was not fulfilled inasmuch as all the debentures were not granted to the assessee as promised. It will be seen from the figures I have given that the assessee has lost a considerable sum of the money of his original investment made in Eastern Iron Co. Ltd. His contention before this Court and the question which is submitted to this Court for opinion is whether that loss is to be treated as a capital loss or loss of income and if the latter, whether it can be taken into consideration in assessing the assessee's income for the purpose of income-tax.

Sir Sultan Ahmed appearing on behalf of the assessee contends that in considering the matter the investment in the original company must be excluded from one's attention; that it must be treated merely as an agreement by the new company to grant these debentures; and also that it must be treated as a loan by the assessee to the new company. That a debenture in essence is a loan and debenture in essence is a mortgage may be true, but it is impossible to accept the argument put forward by Sir Sultan Ahmed in this respect. Indeed it is a self destructive one. First, it seems to disregard the original investment which cannot be done, because the rights of the assessee under that investment is the basis of the contract entered into by the new company and as the consideration for that contract. Secondly, if we are to disregard the existence of the original investment, then all that we have is a promise by the new company to grant debentures to the assessee which, as my learned brother pointed out in the course of the argument, is a *nudum pactum* in the circumstances. If a *nudum pactum*, the assessee has lost nothing, neither income nor capital. But we are bound in deciding this question to take

into consideration the fact of the original investment. Now if the assessee had been a person whose business was to trade in shares, the loss which he has sustained might have been taken into consideration in computing his profits assessable to income-tax; but there is no such finding and it would be impossible in the circumstances to have arrived at any such finding. It is clear that the difference between what the assessee has in fact got and what he originally invested is a loss which is clearly a loss of capital and therefore it cannot be taken into consideration for the purpose of arriving at the assessable income. The question submitted therefore must be answered in the negative. The Crown is entitled to costs assessed at five gold mohurs.

Manohar Lall J.—I agree.

N.S./R.K.

Answered in negative.

A. I. R. 1939 Patna 108

WORT AG. C. J.

Nathuni Sao — Plaintiff — Appellant.

v.

Mt. Lachhminia and others —

Defendants — Respondents.

Appeal No. 768 of 1936, Decided on 20th September 1938, from decision of Sub-Judge, Second Court, Patna, D/- 12th June 1936.

(a) Burden of proof—Evidence—Both parties giving equally probable evidence—Question of onus does not arise — Judge has to decide issue on evidence.

The doctrine of the onus of proof is merely academic where both parties give evidence. Where the evidence of neither side is not inherently improbable, the question of onus does not arise at all and the Judge has to determine the issue between the parties on the evidence before him.

[P 108 C 2]

(b) Bond—Registered — Recitals in endorsement—Burden of proof.

The onus of proving that the transaction recited in the endorsement on the bond which was witnessed by the Registrar was untrue, is on the party who denies the truth of the statement contained in that endorsement : 23 Cal 950 (P C), *Rel. on* ; A I R 1930 P C 255, *Disting.* ; A I R 1929 Pat 579, *Ref.*

[P 108 C 2; P 109 C 1]

T. N. Sahay and Ram Ch. Prasad —
for Appellant.

Raj Kishore Pershad—*for Respondents.*

Judgment.—This appeal arises out of a suit under O. 21, Rule 63, Civil P. C. The difficulty which has arisen in this case would have been obviated had the learned Judge kept in mind the proposition which has been reiterated so many times, namely

that the doctrine of the onus of proof is merely academic where both parties give evidence. Had the learned Judge taken the evidence in this case and then come to the conclusion one way or the other, no difficulty, as I have already said, would have arisen. To develop the point I have stated, if the plaintiff and the defendant gave evidence and the defendant's evidence was not to be believed in any circumstances and the onus was upon the defendant, necessarily the plaintiff must succeed. Similarly, if the onus was on the plaintiff and the plaintiff failed to satisfy the Court, the plaintiff must fail. But where there is evidence on both sides, as appears to have been the case in the present action, and the evidence of neither side is not inherently improbable, the question of onus does not arise at all and the Judge has to determine the issue between the parties on the evidence before him. Difficulty has arisen in this case by the Judge having stated that the onus was on the plaintiff. In 23 I A 92¹ their Lordships of the Judicial Committee of the Privy Council have pointed out that the onus of proving that the transaction recited in the endorsement on the bond which was witnessed by the Registrar was untrue was on the party who denied the truth of the statement contained in that endorsement. Now, the relevance of that statement lies in the fact that the Judge in the Court below decided against the genuineness of the document because it was not proved that consideration had passed. It is true that the learned Judge proceeded also to decide whether the plaintiff was in possession, but possession did not necessarily determine the matter. Had the Judge decided that it was a genuine document and for consideration, the question whether the plaintiff was in possession or not would not have affected the decision as to his title. Many persons are not in possession of properties and yet they have a very good title to them. In great many cases, possession may be an indication as to the truth of the allegation of the plaintiff that he has a title. It is quite clear that the real point in the case is whether the plaintiff has title, that point depending, as I have already said, on the finding of the Judge in the Court below whether the money was paid or not. *Prima facie* on the decision of the Privy

1. Nawab Mirza Ali Kadar Bahadur v. Indar Parshad, (1896) 23 Cal 950=23 I A 92=7 Sar 63 (P C).

Council the fact that there was an endorsement on the bond to the effect that Rs. 79 had been paid to Haridas presumably on behalf of the vendor threw the onus on the defendant to show that the money had not been paid—neither Rs. 79 nor any other money. It is perhaps more accurate to say that once it is shown that consideration or a portion of it has passed, the onus is on the defendant to prove that it has not.

Reliance in such cases is always placed upon the decision of the Privy Council in 35 C W N 324² where their Lordships are supposed to have laid down the proposition that the onus was on the party bringing a suit under O. 21, R. 63. All that Lord Dunedin pointed out in delivering the judgment of the Privy Council was this that, as the Begam based her claim to the property as being wakf property upon the deed of gift made to her in consideration of her dower some years before and as that transaction had been held both in the Courts in India and before the Judicial Committee to be a fraudulent transaction the mention of 'wakf' had to be looked upon with great suspicion, and the onus in those circumstances was on the claimant to establish it. The judgment in 10 P L T 339,³ to which I was a party, makes reference to a decision reported in Vol. 5 of the Rangoon Reports—another decision of their Lordships of the Privy Council*—and Kulwant Sahay J. made this observation while delivering the judgment of the Court:

Therefore the circumstances upon which their Lordships of the High Court of Rangoon placed the onus upon the defendant were set out in the judgment, namely the fact that the plaintiff had proved the passing of the consideration. When the matter went before their Lordships of the Judicial Committee they observed as follows:

'Now they (meaning the plaintiffs) being the ostensible owners of the property under a duly registered deed and a deed of transfer, obviously the party claiming to attach that property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one.'

Now, on the view that I take, it is prima facie established that Rs. 79 had passed. That cuts to the root of the judgment of the learned Judge in the Court below, because it was largely on the question of

want of consideration that the Judge held that the plaintiff's claim was not established. So far as that part of the case is concerned, it was clearly on the defendant, after the prima facie proof of the plaintiff, to establish that consideration had not passed, as I have already said more than once. The decision of the learned Judge as regards possession in those circumstances becomes of very little value. That being so, the matter must go back to the learned Judge to consider the case in the light of these observations. He may yet come to the conclusion that the plaintiff was in possession, he may yet come to the conclusion that the money had not been paid, but he must do so on the whole evidence and not merely on the evidence of the plaintiff. The case is remanded to be heard and determined according to law. Costs of this appeal will abide the result of the hearing in the Court below.

N.S./R.K.

Case remanded.

A. I. R. 1939 Patna 109

AGARWALA AND VARMA JJ.

Jamuna Sonar — Plaintiff —

Appellant.

v.

Atma Ram Ojha and others —

Defendants — Respondents.

Appeal No. 380 of 1936, Decided on 25th February 1938, from appellate decree of Sub-Judge, Shahabad, Arrah, D/- 26th November 1935.

Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 24—In execution of money decree against *B* property ordered to be sold subject to charge of certificate filed by *A* against *B*—Sale proclamation issued and property purchased by *D*—*D* filing objections in certificate proceedings that *B* had no interest left in property attached—Objections rejected—Suit by *D* for declaration of title and confirmation of possession filed more than one year after his objections were rejected held barred under Art. 11, Limitation Act—Order rejecting *D*'s objections held passed under S. 24.

A filed a certificate against *B* and got it served on him. *C* who had obtained a money decree against *B* proceeded to execute that decree by attachment and sale of *B*'s property. *A* filed an objection laying his claim to the property sought to be attached and sold on the strength of the certificate. The sale was thereupon ordered to be held subject to the charge under *A*'s certificate. Sale proclamations were accordingly issued and that property was purchased by *D* subject to the charge. *D* afterwards filed objections in the certificate proceedings that *B* had no interest left in him in the property attached but the objections were rejected and some property was sold to *A* in execution of certificate proceedings. *D* afterwards filed a suit for

2. Mohammad Ali Mohammad Khan v. Mt. Bismillah Begam, (1930) 17 A I R P C 255=128 I O 647=85 C W N 324 (P O).

3. Mahadeo Missir v. Ram Prasad, (1929) 16 A I R Pat 579=119 I O 74 = 8 Pat 890 = 10 P L T 339.

* Reported in 5 Rang 852=(1927) 14 A I R P C 287 (P O).

declaration of his title and confirmation of possession of the entire property purchased in execution. But this suit was brought more than one year after the order rejecting his objections in the certificate proceedings:

Held that *D's* suit was barred under Art. 11, Limitation Act, as *D's* application raising objection was against the sale proclamation and hence the order on such application rejecting *D's* objections must be held to have been passed under S. 24, Bihar and Orissa Public Demands Recovery Act : *A I R 1923 Cal 601 and A I R 1928 P C 139, Dist.; A I R 1929 Pat 116, Ref. [P 111 C 1]*

Mahabir Prasad and P. P. Varma —
for Appellant.

D. N. Varma and T. Nath —
for Respondents.

Varma J. — This second appeal arises out of a suit which was dismissed by the Courts below on the ground that it was barred by limitation under Art. 11, Limitation Act. In the Courts below the suit was mainly contested by defendant 1, liquidator of the Friends Co-operative Society at Dumraon. This defendant filed a certificate against defendant 4 and had it served on him on 30th June 1930, under Sec. 7, Bihar and Orissa Public Demands Recovery Act, 1914. Defendants second party obtained a money decree against defendant 4 and other defendants (defendants third party) who form a joint Mitakshara family. In execution of this money decree, defendant 1 filed an objection laying claim to the property sought to be attached and sold, on the strength of the certificate under which notice was issued under S. 7 of the Act on 30th June 1930 and it was ordered that the sale in execution of the money decree would be held subject to the charge under the certificate. Execution of the money decree was levied on 8th December 1930, the sale proclamation was issued on 18th February 1931 and the plaintiff purchased the property on 8th April 1931. After this purchase the plaintiff filed an objection on 25th May 1931, in the certificate proceeding that the certificate debtor (defendant 4) had no interest left in him in the property attached, but the objection was rejected and the property specified in Sch. 2 was sold to defendant 1 on 4th June 1931, and delivery of possession was given of it on 13th September 1931. The sale held under the money decree on 8th April 1931 was confirmed, in respect of 3 out of the 4 houses involved on 5th August 1931, and a sale certificate was granted to the plaintiff on 2nd July 1932, and delivery of possession was given to the plaintiff on 24th January 1933.

Resistance was offered to the plaintiff in taking possession of the property, and on 7th March 1933 he filed a petition under O. 21, R. 97, Civil P. C. The objection was allowed and the plaintiff was directed to take out a fresh dakhaldhani in respect of 15/16ths share of the houses and to be in possession of it jointly with defendant 1, but this order of the Munsif was ultimately set aside by the High Court on 9th October 1933. The plaintiff purchaser under the money decree thus instituted the present suit for declaration of his title to and confirmation of possession over the entire property purchased by him at the execution sale on 8th April 1931, and prayed that, if it were held that defendant 1 had any interest in the property, he might be put in possession jointly with defendant 1.

The Court below has dismissed the suit of the appellant on the ground that it was barred by limitation not having been filed within one year from 25th May 1931 on which date his objection before the Certificate Officer was rejected, as contemplated by S. 25, Public Demands Recovery Act, and Art. 11, Limitation Act. Mr. Mahabir Prasad, appearing on behalf of the appellant, urges that on 8th April 1931 defendant 1 had no interest in the property involved and therefore his application to the Certificate Officer resulting in the order of 25th May 1931 was misconceived, as S. 22 of the Act requires that the claimant or objector to a certificate proceeding must adduce evidence to show that, where immovable property is concerned, at the date of the service of the notice under Sec. 7 he had some interest in, or was possessed of, the property attached. He has referred to the decision in 50 Cal 311¹ where a person in possession filed an application under O. 21, R. 100, Civil P. C., for recovery of possession of the property from one who had obtained symbolical possession of that property after purchase in execution of a decree, and the application was dismissed on the ground that his possession had not been disturbed. It was held that the application was one not within the purview of O. 21, R. 100, and that it was only when possession is actually disturbed that time begins to run against the person dispossessed, and failure to bring a suit for establishment of title and recovery of possession

1. Atarmoyi Dasi v. Ramananda Sen, (1923) 10 A I R Cal 601=84 I C 876=50 Cal 811.

within a year of the order passed on the application under O. 21, Rule 100 as contemplated by Art. 11-A, Limitation Act, did not bar the suit by limitation. I am afraid this case does not help Mr. Mahabir Prasad, because, in my opinion, what this decision lays down is that when there is no disturbance of possession an application under O. 21, R. 100 would not lie. Mr. Mahabir Prasad then refers to the decision in 55 I A 256=51 Mad 349.² There a mortgagee filed a suit after the period of limitation prescribed by Article 11. He had applied under O. 21, Rule 58 in the belief that there was an order of attachment. He filed the suit under O. 21, Rule 63 beyond the period of limitation. Their Lordships referred to Article 11, Limitation Act, and said that without attachment there could not be an application under O. 21, R. 58, and that as there was no attachment, the petition could not be considered to be a petition under O. 21, R. 58. But here we have got a sale proclamation issued by the Certificate Officer and it was on an application against that sale proclamation that the order of 25th May 1931 was filed. The sale proclamation of the Certificate Officer was issued on 20th March 1931, and the objection was filed on 2nd June 1931, and the order of 25th May 1931 was passed against the plaintiff. That order must be held to be an order under Sec. 24, Public Demands Recovery Act, and covered by Art. 11, Limitation Act.

Mr. D. N. Varma, appearing on behalf of the respondent, has drawn our attention to the case in 11 P L T 28³ where even when a petition under O. 21, R. 58 was dismissed on the ground that the petition was not maintainable under S. 170, Bengal Tenancy Act, it was held that that was an order under O. 21, R. 58 for the purpose of a suit under O. 21, R. 63, and was governed by Art. 11, Limitation Act. I would therefore hold that the order, dated 25th May 1931, was an order under S. 24, Public Demands Recovery Act, and the suit is barred by limitation as held by the Courts below. I would therefore dismiss the appeal but under the circumstances of the case without costs.

Agarwala J.—I agree.

N.S./R.K.

Appeal dismissed.

2. Muthiah Chetti v. Palaniappa Chetty, (1928) 15 A I R P C 189=109 I C 626=51 Mad 349=55 I A 256 (P O).

3. Subedar Singh v. Ramprit Pande, (1929) 16 A I R Pat 116=115 I C 703=11 P L T 28.

*** A. I. R. 1939 Patna 111**

VARMA J.

B. B. Biswas

v.

Muchiram Mahata and others.

Criminal Ref. No. 43 of 1938, Decided on 14th November 1938, made by Sess. Judge, Manbhum-Singhbhum, D. 24th September 1938.

* Criminal P. C. (1898), S. 147—Magistrate refusing to take action under S. 147 — High Court cannot order him to initiate proceedings under S. 147.

The High Court cannot order a Magistrate to initiate proceedings under Sec. 147 or under any of the preventive Sections of the Code when he has refused to take action thereunder. The Magistrate is responsible for the peace of the district and when he says that it is not a proper case under Sec. 147 and therefore no action is necessary, it is not competent for the High Court to interfere with such an order : *A I R 1918 Mad 164; A I R 1929 Cal 805; 23 W R 58 (Cr) and A I R 1921 Pat 410, Rel. on.* [P 112 C 2]

H. R. Kazimi — *for Reference.*

M. K. Mukharji—*Against the Reference.*

Order. — This is a reference by the Sessions Judge of Manbhum-Singhbhum re-commending that

the order passed by the Magistrate on 16th June 1938 should be set aside and the Magistrate directed to inquire into the allegations made in the petition of the Manager of the Sijua Colliery and to dispose of the matter according to law.

The learned Sessions Judge has summarized the facts as follows : It appears that Messrs. Tata Iron and Steel Co. Ltd., have got a colliery in mauza Sijua which is called Sijua colliery. There are inclines in the mauza for working out the colliery. One drain which brings down water from the north to the south passes between inclines Nos. 8 and 9 of the Sijua colliery and it runs into a tank called Choudhury bandh situate on plots Nos. 90 and 91 of mauza Sijua having an embankment on its southern side. The Company have got lands adjoining the Choudhuri-bandh. In 1933 a case under S. 147, Criminal P. C., was filed by the Manager of the Sijua colliery against Muchiram Mahata and others of mauza Sijua. That case was compromised and the most important term of the compromise was that the second party, that is Muchiram Mahata and others, will open a passage in the western corner of the embankment sufficiently large so as not to cause water to enter into or accumulate on the land of the colliery and that if the

water passage is closed for any reason the second party will open it and on their default the first party will get it opened through the help of the Court. On 14th May 1938, the Manager made a complaint against Muchiram Mahata and others that the flow of water through the passage mentioned in the compromise had been stopped and prayed for proceedings to be drawn up under Sec. 147, Criminal P. C. A police enquiry was directed and on receipt of the police report the learned Magistrate passed the following order on 16th June 1938 :

Report seen. The report refers to a previous compromise between the parties. The compromise petition is on record. Para. 2 of the petition deals with the obstruction of the drain which was existing at the time. Para. 3 made provision for future obstructions. This paragraph clearly shows that the petitioner can have the drain cleared only through Civil Court. This is all the more patent because no mandatory order under any of the preventive Sections can be passed. Hence, I find that this is not a proper case under S. 147, Criminal P. C., and therefore no action is necessary. The petitioner may have his grievances redressed in proper Court.

I may mention at once that the translation by the learned Magistrate of "adalat" as Civil Court seems to be erroneous because as has been observed by the learned Sessions Judge, "adalat" may be a Criminal Court also. It is against the above order of the Magistrate that the company moved the learned Sessions Judge who has made the recommendation in the terms mentioned in the beginning of this judgment. Reference has been made to the case in 10 P L T 376¹ and I am struck by the similarity of the facts of that case to those of the case in hand. But on the merits it is apparent that in the case referred to the Magistrate had taken steps under S. 147, Criminal P. C., whereas in the present case the Magistrate has refused to initiate proceedings under the Section as prayed for by the Manager of the Sijua Colliery. The question therefore is whether the view taken by the learned Magistrate that the order asked for was of a mandatory nature was correct in view of the distinction pointed out in the case reported in 10 P L T 376¹ that when a right has been given by a Court of competent jurisdiction the removal of any obstruction in the enjoyment of that right amounts to an ancillary order and does not amount to a mandatory

order. The real question however is whether the High Court can order a Magistrate to initiate proceedings under S. 147, Criminal P. C., or under any of the preventive Sections of that Code when he has refused to take action thereunder. The Magistrate is responsible for the peace of the district and when he says that it is not a proper case under Sec. 147, Criminal P. C., and therefore no action is necessary, is it competent for the High Court to interfere with such an order ?

I am of opinion that the High Court cannot order a Magistrate who has refused to take action under any of the preventive Sections of the Criminal Procedure Code to take such action. I may refer to the decisions in A I R 1918 Mad 164² and A I R 1929 Cal 805.³ This principle was laid down as early as 1875 in 23 W R 58 Cr.⁴ Mr. Kazimi, appearing in support of the reference has drawn my attention to the decision in 2 P L T 392⁵ where deprecating the practice of a District Magistrate ordering a Subordinate Magistrate to draw up proceedings under S. 145, Criminal P. C., it was held that the order of the District Magistrate directing the Subdivisional Magistrate to substitute 145 proceedings for 144 was certainly wrong, but as the Subdivisional Magistrate had already drawn up proceedings in that case it was not interfered with by this Court. In this case also the Magistrate did not draw up proceedings under Sec. 147, Criminal P. C., and this Court in view of the decision referred to above would not order that such proceedings should be initiated. If the Magistrate finds that there is an apprehension of a breach of the peace he will no doubt dispose of the matter in accordance with law. In the result the reference is discharged.

D.S./R.K.

Reference discharged.

2. In *Re Manikyam*, (1918) 5 A I R Mad 164=43 I C 95=19 Cr L J 63.
3. *Nirpendra Chandra v. Sasadhar Saha*, (1929) 16 A I R Cal 805=1929 Cr C 574=125 I C 750=31 Cr L J 923=50 C L J 287=34 C W N 82.
4. In *re Kali Prosunno Roy*, (1875) 23 W R 58 Cr.
5. *Tiloki Roy v. Emperor*, (1921) 8 A I R Pat 410=68 I C 34=2 P L T 392.

1. *Ram Dhan Puri v. Barhamadeo Lal*, (1929) 16 A I R Pat 351=1929 Cr C 153=121 I C 461=10 P L T 376.

A. I. R. 1939 Patna 113

FAZL ALI AND CHATTERJI JJ.

Parmeshwar Dayal Amist and others—
Defendants — Appellants.
 v.

Rambrichh Singh and others, Plaintiffs
and others, Defendants—Respondents.

Appeal No. 661 of 1936, Decided on 5th May 1938, from appellate decree of Addl. Dist. Judge, Gaya, D/- 4th June 1936.

Civil P. C. (1908), O. 34, R. 5 — Terms of final decree varying from those of preliminary decree—Judgment-debtor not objecting to such final decree—Execution sale held and confirmed — Judgment-debtor cannot say that the final decree or sale is not binding on him.

A Court in passing a final decree under O. 34, R. 5 has to follow the terms of the preliminary decree. If however the Court passes a final decree in variance with the terms of the preliminary decree, the Court when executing the decree will execute the final decree as it stands. It is of course open to the executing Court to interpret the final decree in the light of the preliminary decree. But where no objection is taken to the passing of the final decree in variance with the terms of the preliminary decree or to the execution of such final decree and in execution the mortgaged property is sold and the sale is confirmed the judgment-debtor will not be heard to say that the final decree or the execution sale is not binding on him or does not affect his rights under the preliminary decree. [P 114 C 2]

Sir Manmatha Nath Mukherji and Raj Kishore Prasad — *for Appellants.*

S. N. Ray — *for Respondents.*

Chatterji J.—The facts necessary for the determination of this appeal may be stated as follows: Deonarayan, Hari Charan and Kashi Singh were three brothers. They had some ancestral share in the proprietary interest in mauza Bishunpur Kashba bearing tauzi No. 338 of the Gaya Collectorate. Plaintiffs 1 and 2 are the sons of Deonarayan. The remaining plaintiffs, i. e. plaintiffs 3 to 7, are the sons and grandsons of Hari Charan. The pro forma defendants 4 to 7 are the descendants of Kashi by his wife Mungo Kuer. Defendants 8 to 10 are the sons of Mahesh Dutt deceased who had originally 1 anna 4 dams share in the said village Bishunpur. In November 1900, Mahesh Dutt mortgaged 10 dams out of the 1 anna 4 dams share to Deonarayan. Again on 8th July 1901 Mahesh mortgaged 1 anna to Debi Prashad, father of the principal defendants 1 to 3. On 9th May 1903 Mahesh sold 12 dams out of his 1 anna 4 dams to Deonarayan, Hari Charan and Munga Kuer (widow of Kashi) in equal shares for Rs. 600 out of which Rs. 119

was set off against the dues on the mortgage executed in November 1900 in favour of Deonarayan. Mahesh also sold the remaining 12 dams share to his son Rama Nand who in his turn sold that share to his nephew Rang Bahadur. In the meantime Mahesh had acquired by purchase an additional 12 dams share out of which he mortgaged 10 dams to Kashi Nath Ram. The latter in due course enforced his mortgage and purchased the 10 dams share. So out of the subsequently acquired 12 dams share 2 dams were left to Mahesh. In 1915 Debi Prashad sued to enforce his mortgage dated 8th July 1901 in respect of 1 anna share impleading, besides the sons of the mortgagor who was then dead, Deonarayan, plaintiffs 3 to 7, defendants 4 to 7 and also Rang Bahadur who were subsequent transferees. Deonarayan and plaintiffs 3 to 7 contested the suit, claiming priority on the basis of their mortgage of November 1900. A preliminary decree was passed with a direction that 14 dams out of the mortgaged 1 anna should be first sold free from encumbrance and in case the sale proceeds thereof were found insufficient then the remaining 6 dams would be sold subject to the prior encumbrance of November 1900. The decree was made final in September 1919 but the final decree directed the sale of the mortgaged 1 anna in its entirety without specifying the prior encumbrance in respect of 6 dams as mentioned in the preliminary decree. Debi Prashad executed the final decree and in execution purchased the mortgaged 1 anna share on 21st December 1920. He took delivery of possession on 4th March 1922 and then got his name mutated in the Land Registration Department in respect of the purchased share. In the D Register the shares of the plaintiffs and the pro forma defendants 4 to 7 including their ancestral share were recorded as follows :

A. d. k. b. ph. rew. rain. phen.

(1) Entry No. 14:
 Plaintiffs 3 to 7:

1. 8. 18. 6. 18. 10. 0. 0.

(2) Entry No. 15:
 Plaintiffs 1 and
 2 and Mt. Jasoda
 Kuer:

2. 5. 13. 6. 12. 13. 7. 0.

(8) Entry No. 16:
 Pro forma defen-
 dants 4 to 7:

1. 12. 0. 19. 19. 16. 13. 0.

As a result of the mutation effected in the name of Debi Prashad in respect of his

purchased 1 anna share 10 dams were taken out of the entry No. 14 in the names of plaintiffs 3 to 7 and 10 dams out of the entry No. 15 in the names of plaintiffs 1 and 2. The plaintiffs being aggrieved by this mutation brought the suit which has given rise to this appeal. Their main allegations are that the final mortgage decree and the execution sale and the mutation proceedings were all fraudulent and they came to know of the same for the first time on 2nd May 1932. They pray for a declaration of their title to the 1 anna share in respect of which Debi Prashad got his name mutated in the D Register and for confirmation or recovery of possession thereof and in the alternative for redemption of 6 dams share out of the said 1 anna share. The suit was contested by defendants 1 to 3 who are the sons of Debi Prashad, as already stated. Their substantial defence is that the suit is barred under S. 47, Civil P. C., and by *res judicata*. The learned Subordinate Judge who tried the suit dismissed it, holding that the plaintiffs failed to establish fraud and that they are bound by the final mortgage decree and by the execution sale. On appeal by the plaintiffs to the learned District Judge, he reversed the decision of the learned Subordinate Judge and decreed the suit in part, declaring the title of plaintiffs 1 and 2 to 2 annas 2 dams and odd share less two-third dam and of plaintiffs 3 to 7 to 1 anna 8 dams and odd share less two-third dam and confirming their possession in respect thereof. Hence this second appeal by defendants 1 to 3.

As will appear from the statement of facts given above, the plaintiffs' case rests mainly on the question whether the final decree was obtained by fraud and could override the preliminary decree and whether the execution proceedings were vitiated by fraud. In the appeal before the learned District Judge the finding of the learned Subordinate Judge that there was no fraud was not challenged. The learned District Judge however has held that the rights of the parties having been declared by the preliminary decree, 6 dams out of the 1 anna purchased by Debi Prashad must be subject to the prior encumbrance in favour of Deonarayan. In his view Debi Prashad had the right to follow 14 dams only out of the mortgaged 1 anna share in the hands of any of the defendants in the mortgage suit, and out of the 14 dams, 12 dams being in the possession of one Rang

Bahadur who was not a party to that suit, Debi Prashad must be held to have lost his right to the said 12 dams and therefore by his auction-purchase he acquired only 2 dams share out of the shares of the plaintiffs and the pro forma defendants 4 to 7. Accordingly the learned District Judge has reduced the claim of plaintiffs 1 and 2 by two-third dam and of plaintiffs 3 to 7 also by two-third dam. It is contended on behalf of the appellants before us that no fraud having been established with regard to the final decree and the execution proceedings, the plaintiffs must be held to be bound by the final decree and the execution sale. This contention, in my opinion, must prevail.

Indeed the question of priority of the mortgage in respect of 6 dams was declared by the preliminary decree, but for some reason or other, in all likelihood by mistake, the direction with regard to the prior mortgage was omitted from the final decree. A Court in passing a final decree under O. 34, Rule 5, Civil P. C., has to follow the terms of the preliminary decree. If however the Court passes a final decree in variance with the terms of the preliminary decree, the Court when executing the decree will execute the final decree as it stands. It is of course open to the executing Court to interpret the final decree in the light of the preliminary decree. But where no objection is taken to the passing of the final decree in variance with the terms of the preliminary decree or to the execution of such final decree and in execution the mortgaged property is sold and the sale is confirmed the judgment-debtor will not be heard to say that the final decree or the execution sale is not binding on him or does not affect his rights under the preliminary decree. In the present case the final decree directed the sale of the mortgaged 1 anna share in its entirety without any mention of the prior encumbrance in respect of the 6 dams share and in execution proceedings the 1 anna share was sold free from encumbrance, as the sale certificate shows. At the time of the final decree it was the duty of the plaintiffs or their predecessors to see that it was passed in conformity with the preliminary decree. Even assuming that the final decree as it stands is not really in conflict with the preliminary decree but is capable of being interpreted as being consistent with that decree, when in execution proceedings the 1 anna

share was brought to sale free from encumbrance it was open to the plaintiffs or their predecessors to object to the sale on the ground that it was not warranted by the terms of the decree. No such objection having been taken and the sale having been allowed to take place and to be confirmed it no longer lies in the mouth of the plaintiffs to say that their rights have not been at all affected by the sale. They must be held to be bound by the execution sale.

The question then arises as to how much of the plaintiffs' share is affected by the sale. As already stated, the plaintiffs and the pro forma defendants 4 to 7, rather their predecessors, purchased 12 dams share out of the original 1 anna 4 dams share of Mahesh Dutt. The remaining 12 dams came to the hands of Rang Bahadur by process of transfer. These transferees of the entire 1 anna 4 dams share were parties to the mortgage decree obtained by Debi Prashad. The mortgage being in respect of undivided 1 anna share out of 1 anna 4 dams would operate in the proportion of five-sixths on the 12 dams share purchased by the predecessors of the plaintiffs and the pro forma defendants 4 to 7; in other words, out of their 12 dams only 10 dams would be subject to the mortgage. So also 10 dams out of 12 dams share in the hands of Rang Bahadur would be subject to the mortgage. Out of the 12 dams purchased by the predecessors of the plaintiffs and the pro forma defendants 4 to 7 plaintiffs 1 and 2 have one-third share, plaintiffs 4 to 7 one-third and defendants 4 to 7 one-third. Consequently $3\frac{1}{3}$ dams out of the share of the plaintiffs 1 and 2, $3\frac{1}{3}$ dams out of the share of the plaintiffs 4 to 7 and $3\frac{1}{3}$ dams out of the share of the defendants 4 to 7 must be held to have been affected by the execution sale. Defendants 1 to 3, while getting their names mutated in the D Register in respect of the purchased 1 anna share took out 10 dams from the share of plaintiffs 1 and 2 and 10 dams from the share of plaintiffs 3 to 7. This was not justified. The shares recorded in the names of the plaintiffs in entries Nos. 14 and 15 included their ancestral share as well as the share purchased from Mahesh Dutt. Similarly, defendants 4 to 7 also are recorded in respect of some share which includes their ancestral share as well as the purchased share. Rang Bahadur who, as already stated, is a subsequent purchaser of 12 dams share out of the 1 anna 4 dams

share of Mahesh Dutt, is recorded in respect of that share in the D Register. Defendants 1 to 3 are entitled to get their purchased 1 anna share, so far as the entries in the D Register are concerned in the following proportions: $3\frac{1}{3}$ dams from the share of plaintiffs 1 and 2, $3\frac{1}{3}$ dams from the share of plaintiffs 3 to 7, $3\frac{1}{3}$ dams from the share of defendants 4 to 7 and 10 dams from the share of Rang Bahadur. Here it may be mentioned that the learned District Judge was in error in supposing that Rang Bahadur was not a party to the mortgage suit of 1915 brought by Debi Prashad. In fact he was defendant 4 (*vide* decrees Exs. 6 and 6a). From the judgment Ex. 5 it appears that he was impleaded as one of the heirs of the deceased mortgagor, but that does not make any difference so far as his interest is concerned.

It is contended on behalf of defendants 1 to 3 that the plaintiffs' case being based entirely on fraud, and fraud not having been established, they are not entitled to any relief in this suit. It is said that had the plaintiffs made out a case in their plaint based on any other ground apart from fraud for obtaining relief in respect of the shares which defendants 1 to 3 have got recorded in their names as a result of the mutation proceedings they might have met that case in various ways. This contention does not at all appeal to me. The plaintiffs distinctly stated in the plaint that as a result of the mutation proceedings defendants 1 to 3 have wrongfully taken the entire 1 anna share from their shares only. Defendants 1 to 3 if they liked might have put forward any defence which would justify them in retaining the benefit of the apparently erroneous order passed in mutation proceedings. The plaintiffs are, in my opinion, entitled to relief to this extent that the order passed in the mutation proceedings will not affect their shares except to the extent of $3\frac{1}{3}$ dams out of the share of plaintiffs 1 and 2 and $3\frac{1}{3}$ dams out of the share of plaintiffs 3 to 7.

In the result I would allow the appeal in part and decree the plaintiffs' suit only to this extent that out of the 1 anna share in respect of which defendants 1 to 3 have got their names mutated in the D Register out of the plaintiffs' share the title of plaintiffs 1 and 2 be declared with respect to $6\frac{2}{3}$ dams out of the 10 dams taken from their share appertaining to entry No. 15 in the D Register and the title of plaintiffs 3 to 7

be declared with respect to $6\frac{2}{3}$ dams out of 10 dams taken from their share appertaining to entry No. 14 in the D Register and they do recover their possession of the same. The parties do bear their own costs throughout.

Fazl Ali J. — I agree.

N.S./R.K. *Appeal allowed in part.*

A. I. R. 1939 Patna 116

MOHAMAD NOOR AND CHATTERJI JJ.

Ram Japan Missir — Defendant —
Appellant.

v.

Mt. Jagesara Kuer, Plaintiff and others, Defendants — Respondents.

Appeal No. 436 of 1937, Decided on 9th November 1938, from appellate decree of Sub-Judge, Chapra, D/- 26th November 1936.

Transfer of Property Act (1882), S. 43 — Daughter of deceased becoming sole life-holder — During her life maternal grandsons of deceased fraudulently representing that they were entitled to create mortgage, mortgaging estate of deceased — Suit by daughter for setting aside sale in execution of mortgage decree — During pendency of appeal daughter dying and estate of deceased devolving on maternal grandsons of deceased — Mortgage held good to extent of their shares.

It is the duty of the Court while passing a decree to take notice of the circumstances which happened since the institution of the suit and to frame the decree so as to fit in as far as practicable with the altered conditions. [P 117 C 1]

On the death of the deceased his daughter became the sole life holder of his estate. During her lifetime the maternal grandsons of the deceased fraudulently representing that they were in possession of the estate and were entitled to mortgage the same mortgaged it to a certain person. The daughter brought a suit for setting aside the sale held in execution of the mortgage decree. During the pendency of appeal from the decision of this suit the daughter who had instituted the suit died and the estate of the deceased devolved on the maternal grandsons of the deceased :

Held that under Sec. 43, the maternal grandsons could not retain their share in the mortgaged property and the mortgagee could insist that though these mortgagors were not entitled to transfer the property which they did, but as a portion of the estate had devolved upon them the transfer and sale should be held good to the extent of their shares. [P 117 C 1]

S. N. Dutt — *for Appellant.*

Ganesh Sharma — *for Respondents.*

Mohamad Noor J.—This appeal arises out of a suit instituted by one Jugeshra Kuer, (now dead) for declarations that the properties in suit are hers and were not

liable to be sold in execution of the decree of defendant 5 against defendants 1 to 3; that sale of a portion of it which had already been effected was not binding upon her, and for injunction. The properties in suit admittedly belonged to one Madho Singh who had three daughters, Bhagwati Kuer, Phuleshra Kuer and Jugeshra Kuer (the plaintiff). Bhagwati Kuer died in his life-time leaving a son Surat Singh. Phuleshra Kuer died after the death of her father and her sons are defendants 1 to 3 in the suit. Jugeshra died during the pendency of this appeal leaving a son Satnarain. It appears that defendants 1 to 3, sons of Phuleshra Kuer, executed first a simple mortgage and then a usufructuary mortgage of 1 bigha 3 cothas of land of the estate of Madho Singh which is described in Sch. A of the plaint in favour of defendant 4. Some time later, this land was sold in execution of a decree of the superior landlord and defendant 4, the mortgagee, was dispossessed. He brought a suit for enforcing the mortgage making defendants 1 to 3 and the superior landlord parties to the suit. The suit was decreed and a decree for sale of the mortgaged property was passed. Defendant 4 thereafter transferred the decree to defendant 5. He took out execution of it and brought to sale the mortgaged property and purchased it himself. Thereafter he obtained a personal decree against defendants 1 to 3 and proceeded to attach some portion of the property mentioned in Sch. B. Therefore the present suit was instituted by Jugeshra Kuer, the surviving daughter of Madho Singh, for the reliefs mentioned above.

The case of the plaintiff was that on the death of Madho Singh his properties devolved upon Phuleshra Kuer and Jugeshra Kuer and on the death of Phuleshra Kuer, she as the surviving daughter of Madho Singh was his sole heir and therefore was the owner of the entire property. Consequently, defendants 1 to 3 had no right whatsoever to create the mortgage in favour of defendant 4. She sought a declaration that the sale of the property mentioned in Sch. A in execution of the decree was not binding upon her and that other property could not be sold in execution of the decree. She asked for injunction against defendant 5 restraining him from selling these properties. The suit was resisted by the principal defendant 5 on the ground that on the death of Madho Singh by some

arrangement defendants 1 to 3 were in possession of the properties and therefore the mortgage was perfectly valid and that the sale held in execution of the decree obtained thereunder was good. The trial Court dismissed the suit; but the lower Appellate Court has decreed it and hence this second appeal.

I have said before that since the institution of the present appeal Jugeshra Kuer died and the estate of Madho Singh has now devolved upon his five maternal grandsons, namely Surat Singh, son of Bhagwati Kuer, Satnarain, son of Jugeshra Kuer (the original plaintiff) and defendants 1 to 3, sons of Phuleshra Kuer. The position therefore is that now the interest which the plaintiff represented as the life-holder of the estate of Madho Singh is now represented by these five maternal grandsons. Three of them are parties to the mortgage and as it is clear that they either fraudulently or erroneously represented to defendant 4 that they were in possession of the property and were entitled to create mortgage of a portion of it, they under S. 43, T. P. Act, cannot retain their share in the mortgaged property and defendant 5 can insist that though these defendants were not entitled to transfer the property which they did, but now as a portion of the estate had devolved upon them the transfer and sale should be held good to the extent of their shares.

Mr. Ganesh Sharma appearing on behalf of respondents 1 (a) and 1 (b) contended that the circumstances which have happened since the institution of the suit should not govern the decision. In my opinion the correct law is otherwise. It is the duty of the Court while passing a decree to take notice of the circumstances which happened since the institution of the suit and to frame the decree so as to fit in as far as practicable with the altered conditions. Mr. Sharma further contended that transfer by defendants 1 to 3 was a transfer of spes successionis and therefore entirely void. It was not so. In fact it was a transfer of an interest in the property however erroneous and fraudulent the representation may have been. Therefore the decree of the learned Subordinate Judge so far as it affects the share which has now devolved upon these three defendants (1 to 3) in the property mentioned in Sch. A of the plaint must be reversed. Regarding the other properties there is absolutely no difficulty. The

decree which defendant 5 wants to execute is a personal decree against defendants 1 to 3 and it can be executed against any property belonging to them. These defendants have now admittedly succeeded to three-fifths of the estate of their maternal grandfather. Therefore it can, without any objection, be now executed against three-fifths of the property mentioned in Sch. B.

Mr. Dutt for the appellant contended that the entire suit should be dismissed on the ground that the plaintiff not being in possession of the property mentioned in Sch. A has asked for a mere declaration. The plaintiff had stated that she was in possession of it and the question of the suit being barred under S. 42, Specific Relief Act, requires the consideration of evidence of possession and dispossession. This plea was not raised and the question was not gone into. In my opinion it cannot be raised in this second appeal. The result is that the decree of the learned Subordinate Judge will be modified to the extent that the declaration granted will be in respect of two-fifths of the properties mentioned in Schs. A and B, namely to the extent of the share which has devolved upon Surat Singh and Satnarain (respondents 1-A and 1-B) and the suit so far as three-fifths is concerned which has devolved upon defendants 1 to 3 will be dismissed. The parties will bear their own costs throughout.

Chatterji J. — I agree.

D.S./R.K.

Decree modified.

* A. I. R. 1939 Patna 117

AGARWALA J.

Suraj Prasad — Petitioner.

v.

Mt. Lukher Kuer and others —

Opposite Party.

Civil Revn. Nos. 340, 436 and 437 of 1937, Decided on 9th November 1937, against order of Sub.Judge, 3rd Court, Gaya, D/- 22nd May 1937.

* Civil P. C. (1908), Sec. 2 (11) and O. 23, R. 5 — Person intermeddling with estate of deceased cannot be brought on record when another person is found to be true legal representative of deceased's property.

Under R. 5 of O. 23, when more than one person claim to be legal representatives of a deceased's property, the Court is required to decide which of the rival claimants is in fact the legal representative. The definition in S. 2 merely means that a person who intermeddles with the estate may be treated as the legal representative. It does not

mean that a person intermeddling with the estate of the deceased is to be preferred to a person who is found to be the true legal representative of the deceased's property. [P 118 C 1, 2]

S. M. Mullick and K. N. Varma —
for Petitioner.

Rajani Kant Sinha —
for Opposite Party.

Order. — These three applications in revision arise out of three partition suits filed by one Mt. Suraj Bansi Kuer, the mother of Gobardhan, deceased. After a preliminary decree in the suits had been passed, the plaintiff died. Gobardhan's paternal grand-mother was then brought on the record in place of the original plaintiff. The substituted plaintiff also died. Lukher Kuer, a sister of Gobardhan, applied to be substituted in place of the deceased plaintiff. The application was opposed by the petitioner who claims as a reversionary heir of Gobardhan. It was the duty of the Court under R. 5, O. 23, to decide which of the rival claimants was the legal representative of the deceased plaintiff. Pending the decision of this matter, the present petitioner had his name recorded in the land registration department in respect of the disputed share. Thereafter the Civil Court held that Lukher Kuer was in law the legal representative of the deceased plaintiff and ordered her name to be entered on the record in place of that of the grand-mother of Gobardhan. Being dissatisfied with that decision, the petitioner has moved this Court in revision.

It is contended by Mr. Mullick on his behalf that he is also entitled to have his name brought on the record as a plaintiff. Reference was made to the definition of "legal representative" in Sec. 2, Cl. (11), Civil P. C., which states that legal representative includes any person who intermeddles with the estate of the deceased. It is contended that this means that a person intermeddling with the estate of the deceased is always a legal representative and must therefore be brought on the record. That argument is clearly unsustainable. Under R. 5, O. 23, when more than one person claim to be the legal representative of a deceased's property, the Court is required to decide which of the rival claimants is in fact the legal representative. The definition in S. 2 merely means a person who intermeddles with the estate may be treated as the legal representative. It does not mean that a person intermeddling with the estate of the deceased is to be

preferred to a person who is found to be the true legal representative of the deceased's property. There is no substance in these applications and they are dismissed with costs. One hearing-fee one gold mohur in all the cases.

D.S./R.K. Applications dismissed.

A. I. R. 1939 Patna 118

COURTNEY TERRELL C. J. AND
MOHAMAD NOOR J.

Secretary of State and another —
Defendants — Appellants.
v.

Surendra Mohan Lahiri and another —
Plaintiffs — Respondents.

Appeal No. 1 of 1935, Decided on 20th December 1937, from original decree of Addl. Sub-Judge, Cuttack, D/- 30th September 1934.

Civil P. C. (1908), Sch. 2, Para. 18 — Contract between parties to refer dispute to arbitration—One party backing out and filing suit in disregard of contract—Other party not applying for stay of suit—Court has jurisdiction to pass judgment.

Once a machinery by which the parties can have their dispute settled by arbitrators is provided, the choice to have the dispute so settled is to be left to them. If any party who has contracted to settle such dispute by arbitration backs out of it and institutes a suit in disregard of the contract the Court has been given discretion at the instance of the other party to have the suit stayed provided the other party wishing to bind the suing party to the contract, applies to the Court before the settlement of issues for stay of the suit. But if neither party wishes to have recourse to arbitration, the ordinary tribunals established by law will have jurisdiction to pronounce judgment upon the matters in dispute : *A I R 1921 Cal 770 and A I R 1918 Mad 719, Rel. on.* [P 120 C 2]

C. M. Acharyya — for Appellants.

B. K. Ray and A. Dutta —
for Respondents.

Mohamad Noor J.—This appeal arises out of a suit instituted by the plaintiffs-respondents against the Secretary of State and his officer (defendant 2) for recovery of Rs. 7916 odd as damages for breach of a contract for building an inspection bungalow at Brahmagiri in the interior of the district of Puri. The contract of the work was given to the plaintiffs on 29th September 1928. They were required to finish it within eighteen months, time being of the essence of the contract. The plaintiffs finished the manufacture of bricks before March 1929, but the construction of the building was

not commenced till some time in January 1930. There was a payment on account of Rs. 1500 before March 1929 which included Rs. 711 for the price of the bricks stacked at the site. In March 1930 difference arose between the Executive Engineer (defendant 2) and the plaintiffs about the quality of the bricks to be used in the construction. It is not disputed that the plaintiffs had burnt about 300,000 bricks in the locality though the quantity actually required was only about 150,000. They had prepared more bricks to be on the safe side so that only good bricks might be used. On 16th March 1930, when the foundation wall had reached the plinth level, defendant 2 visited the site and was of opinion that the bricks stacked and used till then in the construction were bad and under-burnt. It is clear from his letter to the Superintending Engineer, dated 28th March 1930 (Ex. Z-8) that the defects in the bricks were to some extent due to the nature of the local soil itself. He asked the contractors to use better bricks. Correspondence ensued between the plaintiffs and the Department and I shall refer to some of them later. On 28th August 1930, as directed by the Superintending Engineer, the plaintiffs produced six bricks before the Executive Engineer (defendant 2) as samples of good bricks and expressed their readiness to complete the work with bricks of the samples produced by them. The Executive Engineer approved four of the bricks, kept two of those four with him, gave the other two to the plaintiffs, and rejected the remaining two as not being according to the standard required. There is nothing on the record to show the quality of the two bricks rejected and why they were found below the standard. Be that as it may, the plaintiffs were ordered to sort out the bricks according to the samples approved. It is clear from the correspondence that the plaintiffs did not agree to this proposal and were only willing to complete the work if all the six samples of bricks were approved and not only with the class of bricks selected by the Executive Engineer.

The plaintiffs' case, as their petitions show, was that the Executive Engineer selected only first class bricks and the contract did not provide that only first class bricks were to be used. The objections of the plaintiffs were rejected and they were repeatedly asked to sort out bricks according to the samples given to them. This

they admittedly failed to do with the result that the contract was rescinded on 13th December 1930. Afterwards the amount of work which had been completed was measured and after giving credit for Rs. 1500 which had already been paid to the plaintiffs, the Department offered them Rs. 559, obviously forfeiting their security deposit of Rs. 650. The plaintiffs refused to accept the sum and instituted the present suit claiming the amount stated above, which includes the Rs. 650, the security deposit, and their estimated profit in the work. The defendants pleaded that the suit was not maintainable and justified the cancellation of the contract. The learned Subordinate Judge has passed a modified decree for a sum of Rs. 4960. This includes Rs. 1957-8-0 the price of 135,000 bricks which the defendants were allowed to take away according to their own selection within six months from the date of the decree. It was provided that in case the defendants failed to exercise this option it would be open to the plaintiffs to select 135,000 bricks, leave them for the defendants and to dispose of the remainder as they thought fit. The defendants have preferred this appeal, and there is a cross-appeal on behalf of the plaintiffs against the reduction of the amount claimed by them.

The first point raised on behalf of the appellants is about the maintainability of the suit on the basis of cl. 30 of the agreement. This clause provided that in case of dispute between the parties the matter was to be referred to arbitrators one to be selected by each party. It is contended that as the plaintiffs did not seek to have the dispute settled by arbitrators the suit was barred. In my opinion this objection is untenable. The position has been clearly stated by Mulla in his commentary on Para. 18, Sch. 2, Civil P. C. The position as explained by him is this : By S. 28, Contract Act, agreements in restraint of legal proceedings are declared void. To that Section there was a proviso that if the parties agreed to refer their dispute to arbitration, the existence of the agreement would be a bar to seeking redress in the ordinary Courts, and that a party had a right to sue for specific performance of the agreement to refer the dispute to arbitration. Then came the Specific Relief Act of 1877 which by S. 21 superseded the proviso to S. 28, Contract Act, and in those territories where the Specific Relief Act is in

force though a contract to refer disputes to arbitration barred suits in ordinary Courts, but the right to sue for specific performance of such a contract was taken away. The relevant provision of Section 21, Specific Relief Act, ran as follows :

And, save as provided by the Civil Procedure Code, no contract to refer a controversy to arbitration shall be specifically enforced, but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

Then came the present Civil Procedure Code in the year 1908 in which a separate schedule (Sch. 2) was added in connexion with the settlement of matters by arbitration. Most of the procedures therein mentioned were taken from the old Civil Procedure Code but some were new. There are procedures for referring a matter pending before a Court for decision by arbitrators and for decree on the basis of the award given, for getting a matter settled out of Court and then having a decree on the basis of the award given and for applying to the Court for forcing the other party to refer a matter in dispute to arbitration if there is a contract between them to that effect. By para. 18 the Court has been given power to stay a suit brought by a party to an agreement to refer the dispute to an arbitration or by his representative if either party apply for the same at the earliest possible opportunity and in all cases where issues are settled before the settlement of issues, and if the party applying is ready and willing to do all that is necessary for the proper conduct of the arbitration. Thus, there is a complete machinery for enforcing the agreement of parties to refer a matter in dispute between them to arbitration and consequently that portion of S. 21, Specific Relief Act, which barred suits when there was an agreement to refer a dispute to arbitration was repealed by Para. 22. The last 37 words of Section 21, Specific Relief Act, which now do not apply to any agreement to refer to arbitration or to any award to which Sch. 2, Civil P. C., applies are these :

But if any person who has made such a contract (that is, a contract to refer to arbitration) and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

As has been pointed out by Mulla, these 37 words have been omitted in view of the provisions of para. 18 referred to above. The policy of the Legislature seems to me

to be this. Once a machinery by which the parties can have their dispute settled by arbitrators is provided, the choice to have the dispute so settled is to be left to them. If any party who has contracted to settle such dispute by arbitration backs out of it and institutes a suit in disregard of the contract the Court has been given discretion at the instance of the other party to have the suit stayed. But if neither party wishes to have recourse to arbitration, the ordinary tribunals established by law will have jurisdiction to pronounce judgment upon the matters in dispute. I am fortified in this view by the fact that when the Arbitration Act of 1919 was passed, which in the first instance applied to Presidency towns only, these last 37 words of Sec. 21, Specific Relief Act, mentioned above, were repealed in those places where the Act applied. When the Civil Procedure Code provided procedure for stay of the suit the bar to the institution of the suit was removed. Para. 18 of Sch. 2 of the Code is practically a copy of S. 19, Arbitration Act of 1919. I am therefore clearly of opinion that the suit is maintainable. If the defendants wanted to bind the plaintiffs to their contract for having the matter settled by arbitration, it was open to them to apply to the Court before the settlement of issues to stay the suit. This seems to be the view taken in 47 Cal 752¹ and 41 Mad 115.²

Coming to the merits of the case, the simple question involved is whether the contract was legally rescinded. The Public Works Department of Government relied upon cl. 3 of the contract, which in turn refers to cl. 14 thereof. Cl. 14 provides among other things that if it appears to the Engineer in charge or to any of his subordinates that the contractor is proceeding with the works with materials of any inferior description or that any material or article provided by him is unsound or of an inferior quality or otherwise not in accordance with the contract the contractor shall, on demand in writing from the Engineer, notwithstanding the material having been inadvertently approved before, change the material. If he does not do so, he is liable to pay a penalty of Re. 1 per cent. on the estimated amount of work per day for a period not exceeding ten days.

1. Ram Prosad v. Mohan Lal, (1921) 8 A I R Cal 770=60 I C 895=47 Cal 752=38 C L J 67.

2. Appavu Rowther v. Seeni Rowther, (1918) 5 A I R Mad 719=42 I C 514=41 Mad 115=33 M L J 177.

Cl. 3 says that when the penalty imposed exceeds or becomes equal to the amount of security given by the contractor the department has the option of rescinding the contract altogether. Now in this case it is said that as the contractor failed to sort out bricks according to the order of the Executive Engineer he rendered himself liable to a penalty of Rs. 130 per day, the estimated cost of the work being Rupees 13,000 and as ten times that amount would be Rupees 1300, i. e. much in excess of the security given by the plaintiffs they rendered themselves liable to be turned out. It was contended on behalf of the plaintiffs that out of the 300,000 bricks which they had admittedly prepared for the construction of the building sufficient bricks were available according to the standard prescribed in the contract and that the Department was not justified in asking them to select bricks according to the sample of only four bricks given to them. Their case was that very small quantity of bricks could come up to that standard as all the four bricks were first class and therefore they were not able to finish the work. Their case is that the Department was not justified in insisting upon all the bricks being of first class which was against the terms of the contract. Now the contract provided for bricks of local make and clamp burnt. The plaintiffs admitted that very large number of bricks were not of first class because the local clay was sandy. They refuted the charge of the bricks being underburnt. The learned Subordinate Judge on going into the evidence found as a fact that more coal was used by the plaintiffs than was ordinarily required and that the demand of the Department was beyond the contract, and we have no reason to differ from him.

Now the learned advocate for the appellants contended that according to cl. 25 of the contract the decision of the Superintending Engineer about the quality of the bricks was final, but unfortunately the Superintending Engineer never decided the matter as required by that clause. I have stated before that six bricks were produced before the Executive Engineer, four of them were selected by him and two were rejected and the plaintiffs were asked to sort out the bricks according to the sample of those four bricks, two of which were kept in the office of the Engineer and the other two were given to the contractors.

The two bricks which were rejected were given back to the contractor. There is not one word on the evidence of this case that the Superintending Engineer ever saw these two rejected bricks and decided that they were not according to the standard of bricks provided in the contract. When the contract made the Superintending Engineer the sole judge in case of a dispute between his subordinates and the contractor, it was the duty of the Superintending Engineer to decide it. In their protest the plaintiff definitely stated that the Executive Engineer was wrong in insisting that the building should be completed with bricks which should be according to the sample of the four bricks selected by him, which were all first class and the contract did not provide for the use of first class bricks only. The evidence of the Superintending Engineer Mr. Bery (D. W. 3) is this :

It is possible to find out $1\frac{1}{2}$ lacs of bricks according to the two bricks selected. The proportion of good bricks to bad ones will depend upon the moulding and the burning of the bricks by a contractor. In clamps 80-85 per cent. may be good bricks. In good clamps we may get 80-85 per cent. well burnt bricks, call them first class or second class . . . These 80 or 85 per cent. can be divisible into two classes, first and second.

It is clear from this evidence that according to the witness both first and second class bricks were available in the clamps burnt by the plaintiffs and could be used according to the contract. As I have said, the plaintiffs' grievance was that the Executive Engineer (defendant 2) insisted on having first class bricks only. Therefore it was obviously for the Superintending Engineer to decide whether the bricks which were rejected by the Executive Engineer were second class bricks within the standard of the contract or whether they were inferior bricks which could not come up to the required standard. The matter has not been decided and therefore the suit was not barred according to the contract, and it is open to the Civil Court to enter into the question whether the demand of the Executive Engineer was just or otherwise. The learned Subordinate Judge has gone into the matter very carefully and has examined every material fact and the correspondence and has come to the conclusion that the bricks which were available on the spot came up to the reasonable standard of the contract, and this finding is according to the evidence of the Superintending Engineer. Under these circumstances it cannot be said that the

rescission of the contract was justified and the contractor was not justified in refusing to sort out the bricks according to the samples of the bricks which were given to them by the Executive Engineer. Therefore, in my opinion, the suit has been rightly decreed. Though the contract has not been rescinded on the ground of delay on the part of the plaintiffs in the completion of the work, the defendants have referred to it. Here also I agree with the learned Subordinate Judge and hold that there was no delay. Though the contract was given in September 1928 the defendants' officers did not lay out the foundation on the site till November 1929. They themselves took fourteen months. Within four months of laying out of the foundation the work had to be stopped owing to the dispute about the quality of the bricks.

There is one matter which is likely to create some confusion and it is this: As I have said the learned Subordinate Judge has allowed the plaintiffs Rs. 1900 odd as the price of the bricks which would have been used in the construction of the building and he has given the defendants option to select 135,000 bricks from those which have been prepared by the plaintiffs and on the defendants failing to exercise this option within six months, the plaintiffs are authorized to leave 135,000 bricks and to dispose of the rest. An objection was raised on behalf of the appellants that the cost of sorting is to be met by the plaintiffs. In my opinion this objection is justified, but the parties could not come to terms as to what the cost of that sorting is likely to be. The learned advocate for the plaintiffs-respondents has however agreed that the defendants may take away the entire stock of bricks which has been manufactured by the plaintiffs and are in the clamps. The question of sorting therefore does not arise. I would therefore modify the decree of the learned Subordinate Judge to this extent, that there will be no sorting of bricks and the entire bricks which were manufactured, i. e. all the bricks at the site or at the clamps, will be taken away by the defendants. With this modification the appeal is dismissed with costs. The cross-appeal is not pressed and it is dismissed but without costs.

Courtney-Terrell C. J.—I agree.

N.S./R.K.

Order accordingly.

A. I. R. 1939 Patna 122

HARRIES C. J. AND AGARWALA J.

Shaikh Reyasat and others—Defendants
— Appellants.

v.

Gopi Nath Missir and others —

Plaintiffs — Respondents.

Appeal No. 906 of 1936, Decided on 22nd November 1938, from appellate decree of Addl. District Judge, Gaya, D/- 26th August 1936.

(a) **Limitation — Amending Act shortening period of limitation but allowing period between passing of the Act and its coming into force to bring suits affected by new Act—Such suits if not brought within such period are barred.**

Where in an Act amending and shortening a period of limitation, a period of time is given between the passing of the Act and the date upon which it is intended that it should come into force, such an Act must be given a retrospective effect. The Legislature have given all persons affected by the Amending Act a period of time to bring their suits whose cause of action accrued before the Amending Act came into force and which would otherwise be barred under the Amending Act. If the suits are not brought within such period, then the amending statute must be held to bar them : *A I R 1937 Pat 311, Approved ; A I R 1937 Pat 605, Discussed ; Case law discussed.*

[P 125 C 2]

(b) **Limitation — Institution of suit — Statute of limitation applicable is that in force while suit is instituted and not one in force when cause of action accrues.**

The law of limitation being a branch of the adjectival law, the statute of limitation applicable to a particular suit or legal remedy is that which is in force at the date when the suit is instituted or the remedy is sought and not the statute which was in force at the time of the transaction or vesting of the cause of action on which the suit or remedy is based : *35 All 227 (P C), Rel. on.*

[P 125 C 2]

Saiyid Naqui Imam, M. Rahman and
S. M. Siddique — *for Appellants.*

Sarjoo Prasad — *for Respondents.*

Harries C. J. — This is a defendants' second appeal against concurrent decrees of the Courts below decreeing the plaintiffs' claim for arrears of bhaoli rent due for the years 1339 to 1342-F. It was contended inter alia on behalf of the defendants that the claim was barred by limitation. Both the lower Courts however came to the conclusion that the suit was not barred and accordingly decreed the plaintiffs' claim in full. Before us it has been contended by the appellants that the claim for rent with respect to the years 1339 and 1340 F is barred by time, though it is conceded that no such defence can apply

to the claim for rent due for the years 1341 and 1342F. Previous to the year 1934, a landlord had three years in which to bring his suit. The matter was governed by S. 184 and Sch. III, 2 (b) (ii) Bihar Tenancy Act. In the year 1934, an Amending Act was passed and this period of three years was reduced to one year. The time from which the period began to run was the same in both these Acts, namely the last day of the agricultural year in which the arrear fell due. The Amending Act of 1934 received the assent of the Governor-General on 14th November 1934, and it was provided that it should come into force at such time as was provided by an order to be made under the provisions of the Act. By an order made under the Act this provision relating to limitation came into force on 10th June 1935. It is clear therefore that all persons in this province were given a period from 14th November 1934 to 10th June 1935 to bring their suits, which, if not brought within that period, would be barred by the Amending Act.

It has been argued by Mr. Naqui Imam on behalf of the defendant-appellants that this Amending Act applied to all suits instituted after 10th June 1935, whether the cause of action had accrued or not before that date. On behalf of the respondents it has been contended that this Amending Act of 1934 cannot have the effect of taking away rights which had accrued before that Act came into force. This case came first before a single Judge, who has referred it to a Bench, because there is a conflict of opinion concerning the matter in this Court. In 18 P L T 193¹ Rowland J. held that where a statute introduces a shorter period of limitation, suits instituted after the amendment in respect of cause of action accruing before such amendment will be governed by the amending law, the rule ordinarily applicable being the law which is in force at the time of the institution of the suit, and this principle will apply especially where there is an interval of time between the passing of the new Act and its coming into force. Consequently the shorter period of limitation of one year will apply to a suit for produce rent, the cause of action for which accrued before the passing of the 1934 Act

amending the Bihar Tenancy Act. This is a case upon the statute with which we are now concerned. Rowland J. stresses the fact that there was an interval of time between the passing of this Amending Act and the date upon which it came into force. In 18 P L T 731,² another case on the effect of this Amending Act, Courtney-Terrell C. J. came to a different conclusion. He held that a new law ought to be construed so as to interfere as little as possible with vested rights, and a statute is therefore not to be construed with greater retrospective operation than its language rendered necessary. Accordingly he held that the shorter period of limitation of one year as embodied in the new Bihar Tenancy Act was not applicable to a suit for produce rent, the cause of action for which had accrued before the passing of the new Amending Act. There can be no question whatsoever that this case is in direct conflict with the case decided by Rowland J. It is clear however from Courtney-Terrell C. J.'s judgment that it was not present to his mind that there was an interval of time between the passing of the Bihar Tenancy Amending Act of 1934 and the date upon which it came into force, namely 10th June 1935. At page 734 he observes:

Applying these principles of construction to the Bihar Tenancy Act and to the facts of this case, it becomes manifest that the period of limitation prescribed has not affected the vested right of the plaintiff who formally proceeded to sue in respect of the year 1340; and indeed upon general principles of justice this view has the further justification that by the time the Act was published, that is to say on 14th November 1934, the period of limitation which the Judge has held to be applicable would have already expired, with the result that the plaintiff's right of action would have been destroyed without notice to him.

In short, it is clear that the late learned Chief Justice was of opinion that the Amending Act of 1934 put an end to landlords' rights the moment it was passed, though clearly this was not so. In my judgment, this case, (18 P L T 731²) is no authority on the facts of the present case, because the learned Chief Justice wrongly assumed that the Amending Tenancy Act came into force on the day upon which it was passed. The point under consideration was considered at considerable length in 17 C W N 889.³ In that case the statute which

1. Rameshwar Prasad Singh v. Manger Kahar, (1937) 24 A I R Pat 311 = 169 I C 78 = 18 P L T 193.

2. Badri Narayan Singh v. Ganga Singh, (1937) 24 A I R Pat 605 = 171 I C 953 = 18 P L T 731.

3. Manjhoori Bibi v. Akel Mahumed, (1918) 17 O W N 889 = 19 I C 793 = 17 O L J 316.

amended the law of limitation came into force immediately. The learned Judges of the Calcutta High Court held that such a statute had no retrospective effect and could not affect rights which had become vested before it was enacted. Mookerjee J. observed:

In my opinion, the cardinal and fundamental point in the case before me is that the Eastern Bengal and Assam Tenancy Amendment Act of 1908 came into operation the very moment it became law: consequently, if it were taken to affect pre-existing causes of action, the effect would be absolutely to bar at once all actions where the cause of action had accrued more than the limited time before the statute was passed.

A little later in his judgment he observed:

On the other hand where a new statute of limitation reduces the time previously allowed for commencement of the suit, but does not come into operation forthwith and allows a reasonable time for the enforcement of existing causes of action the Court will not hesitate to hold that the statute may affect causes of action already accrued in the same manner as those accruing after its passage.

It is clear from these last observations that the learned Judge recognized that there was a great difference between a case where a statute amending the law of limitation came into force immediately and the case where a period of time was given between the passing of the Act and the date upon which it came into force during which suits could be brought which would otherwise be barred by the Amending Act. This distinction has long been recognized in England and there appears to be no difference between the English law and Indian law upon this point. In (1852) 21 L J M C 193,⁴ a Bench consisting of Lord Campbell C. J., Wightman, Erle and Crompton JJ., had to consider the point which is now before us. A statute which did not come into operation until six weeks after the date upon which it was passed provided that where no time was limited for making complaints or laying informations under Acts of Parliament, such complaint should be made and such information should be laid within six calendar months from the time when the matter of such complaint or information arose. The Bench held that this Act had a retrospective operation and invalidated such an order where the complaint was not made within six calendar months from the time when the damage complained of occurred,

although the act complained of was committed before the Act came into force. At page 195 Lord Campbell C. J. observed:

There is no doubt that if the subject-matter of complaint in this case had arisen subsequently to the passing of the 11 and 12 Vict. c., 43, the provision contained in Sec. 11 would have applied. Then comes the question, whether the act has a retrospective operation. If the act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention on the part of the Legislature not to give it a retrospective operation; but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the Legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal. Had the time allowed been six months, instead of six weeks, it could hardly have been said that the act would not have applied to all cases happening before the Act was passed, and we cannot measure the intention of the Legislature by the quantum of the time allowed. A certain time was allowed before the Act was to come into operation and that removes all difficulty.

Wightman, Erle and Crompton JJ. agreed with this view. It may be observed that this case was overruled on another point in (1885) 53 L J M C 149,⁵ but there can be no question that the statement of law relating to the effect of an amending statute remained unaffected. In this case the construction placed upon the statute though fatal to the enforcement of a vested right by shortening the time for enforcing it, did not in terms take away any such right. The Court appears to have thought that the general rule of construction against giving a statute a retrospective effect had only a limited application to cases such as the one before us. The question of the effect of law amending period of limitation was also considered by their Lordships of the Privy Council in 35 All 227.⁶ A suit was brought by the appellant on 4th March 1907, against the respondents for the redemption of a mortgage, dated 2nd January 1842, made between the respective predecessors-in-title of the parties and in which no date for redemption was specified. Acknowledgments of the mortgagor's right had been made by the widow and daughter of a former mortgagee, a predecessor in title of the respondents, which, the appellant contended, extended the period of limitation. Their Lordships held that the law of limitation applicable to the

5. *R. v. Edwards*, (1885) 13 Q B D 586 = 53 L J M C 149 = 51 L T 586.

6. *Soni Ram v. Kanhaiya Lal*, (1913) 35 All 227 = 19 I C 291 = 40 I A 74 = 11 A L J 389 (P C).

4. *Queen v. Leeds and Bradford Ry. Co.*, (1852) 21 L J M C 193 = 16 Jur 817.

case was not Act 14 of 1859, the law in force at the date of the acknowledgements, but Act 15 of 1877, which was in force at the time of the institution of the suit. This case is not precisely in point; but it is important because it recognizes that amendments of statutes dealing with limitation may well have a retrospective effect, though giving the statute such an effect would affect accrued rights. The point before us was considered by a Full Bench of the Calcutta High Court in 41 Cal 1125.⁷ The Full Bench held that where the application of the provisions of an Amending Act makes it impossible to exercise a vested right of suit, the Act should be construed as not being applicable to such cases. It was however recognized that where a period of time elapsed between the passing of the Act and the date upon which it came into force different considerations would arise. At p. 1141 it is stated :

Here the plaintiff at the time when the Amending Act was passed had a vested right of suit, and we see nothing in the Act as amended that demands the construction that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the Amending Act. It is not (in our opinion) even a fair reading of S. 184 and Sch. 3, Bengal Tenancy Act, as amended, to hold that it was intended to impose an impossible condition under pain of the forfeiture of a vested right, and we can only construe the amendment as not applying to cases where its provisions cannot be obeyed. The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot (in our opinion) govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate. There are thus two positions: where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application.

In the present case a suit, such as the present, could well have been brought after the Amending Act came into force. In fact, landlords were given eight months in which to bring suits which would otherwise be barred by shortening the period of limitation. On behalf of the respondents reliance is placed upon the case in 8 P L T 397⁸ in which it was held that Sec. 139-A, Chota Nagpur Tenancy Act, does not bar the institution of a suit by a tenant against his landlord for possession in a Civil Court where the cause of action has arisen before

the introduction of the said Section by the Amending Act of 1920 and the result of applying the new provisions would be to deprive the plaintiff of his right of action altogether. This case is no authority for the respondents. In the course of the judgment there is nothing to suggest that the learned Judges considered the effect of a period of time being given between the passing of an Amending Act and the date upon which it was to come into force. The Bench which decided this case, emphasised the rule that an Act should not be given a retrospective effect unless its terms are clear. Accrued rights must be protected unless it was clearly the intention of the Legislature that such rights should be interfered with. There can be no doubt that such is a correct statement of the law; but where it is clear that the Legislature intended to take away accrued rights, then such an effect must be given to the statute. In my view where in an act amending and shortening a period of limitation, a period of time is given between the passing of the Act and the date upon which it is intended that it should come into force, such an act must be given a retrospective effect. The Legislature have given all persons affected by the Amending Act a period of time to bring their suits. If suits are not brought within such period, then the amending statute must be held to bar them. Such is the view held in English Courts and such is the effect of authorities in Courts in India.

For the reasons which I had given, I hold that the plaintiffs' claim in the case for rent due for 1339 and 1340 F was barred by limitation. I would therefore allow this appeal in part and modify the decree of the Court below which must be a decree for rent due in 1341 and 1342 F only. The damages must be calculated upon the rent due for those two years only. In all other respects the decree will remain unaffected. Each party will bear their own costs of this appeal and of the proceedings in both the Courts below.

Agarwala J.—I agree. The law of limitation being a branch of the adjectival law, the statute of limitation applicable to a particular suit or legal remedy is that which is in force at the date when the suit is instituted or the remedy is sought and not the statute which was in force at the time of the transaction or vesting of the cause of action on which the suit or remedy

7. Gopeshwar Pal v. Jiban Chandra Chandra, (1914) 1 A I R Cal 806=24 I O 87=41 Cal 1125=18 O W N 804=19 O L J 549 (F B).

8. Chota Lal Nandkishore v. Tula Singh, (1926) 18 A I R Pat 561=97 I O 608=8 P L T 897.

is based. If authority is required for that proposition, it will be found in the decision of the Privy Council in 35 All 227.⁶ That was a suit instituted in 1907 for redemption of a mortgage. The plaintiff sought to meet the defence of limitation by setting up certain acknowledgments and relied on the fact that they had been given when the Limitation Act of 1859 was in force. The defendants, on the other hand, contended that the suit was governed by the Limitation Act of 1877. Their Lordships of the Privy Council affirmed the view of the High Court of Allahabad that the law of limitation applicable to a suit or proceeding is the law in force at the date of institution of the suit or proceeding, unless there is a distinct provision to the contrary. A difficulty suggests itself when as in the present case, the period of limitation is shortened after the cause of action has arisen and before a suit on that cause has become barred under the unamended law. Such a case, which involved the construction of the statute with which we are concerned in the present appeal, came before the late Chief Justice sitting singly in 18 P L T 731,² in which his Lordship held that the longer period of limitation applied, that is to say, that the amendment with which we are concerned is not retrospective. A different view was taken by Rowland J. in 18 P L T 193¹ where the distinction was referred to between a case where an Amending Act comes into force on the day on which it is passed and a case where there is an interval of time between the date on which the Act is passed and the date on which it comes into operation. In the case which came before the late Chief Justice the opposite party was not represented and his Lordship appears not to have noticed that the Amending Act did not come into operation immediately. In 41 Cal 1125⁷ a Special Bench considering an amendment of the period of limitation provided in the Bengal Tenancy Act, which came into force as soon as it was enacted, observed at p. 1141:

The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot (in our opinion) govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate. There are thus two positions: where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application.

That appears to be in consonance with

the law as stated in England by Lord Campbell C. J. in (1852) 21 L J M C 193.⁴ The facts of that case were that two Justices acting under statute 8 & 9 Vict., c. 18 had awarded a sum of money to one Edmondson as compensation for damage done to his land by the construction of the defendants' railway. The damage in respect of which the compensation had been awarded was done in 1846 and 1847. The complaint was made in 1850. In the meanwhile the statute 11 & 12 Vict, c. 43 had been enacted, Sec. 11 of which provides that where no time is limited for making complaints or laying informations under Acts of Parliament, such complaint shall be made and such information laid within six months from the time when the matter of such complaint or information arose. This statute did not come into operation until six weeks after it had been passed, that is to say until 2nd October 1848. The question therefore arose whether the six months period of limitation prescribed by the latter Act operated to bar the claim made by Edmondson on the basis of the former Act. Lord Campbell C. J. held that the Act was retrospective, in language which has been quoted in the judgment of my Lord the Chief Justice.

N.S./R.K.

Decree modified.

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WORT AND AGARWALA JJ.

Rama Prasad Gupta and others

— Appellants.

v.

Collector of Shahabad — Respondent.

Appeal No. 91 of 1937 and Civil Revn. No. 257 of 1937, Decided on 29th March 1938, from original order of Dist. Judge, Shahabad, D/- 14th April 1937.

Court-fees Act (1870), Sch. 3, Annexure B — Application for letters of administration to estate of deceased member of joint family — Property consisting of money at Banks belonging to joint family not being trust property held not exempt from duty.

A cosharer member of a joint family interested to the extent of an undivided share in the whole of the property of the joint family is not a trustee for the other cosharers. [P 129 C 1]

Upon the death of a member of a joint family, other members applied for letters of administration to the estate of the deceased member. The property comprised in the application consisted of money at the banks, Government loans and shares in companies belonging to the joint family of which the applicants were members:

Held that the property could not be treated as trust property and was not therefore exempt from court-fee: 29 Bom 161; 23 Cal 980 and A I R 1915 Bom 18, Ref.; A I R 1935 All 449, Rel. on. [P 129 C 1]

S. M. Mullick and S. N. Bose

— *for Appellants.*

Advocate-General and Govt. Pleader

— *for Respondent.*

Wort J.—This appeal is directed against the order of the District Judge of Shahabad, dated 14th April 1937, in which he has held that the appellants, who were the petitioners before him for letters of administration of the estate of one Amir Chandra were liable to pay court-fee on the total value of the properties, the subject-matter of the application. The property consisted of Government loans to the value of Rupees 2,19,400, money in deposit with the Bank Rs. 1,00,000 and shares in limited companies valued at Rs. 79,785. The actual figures are not in dispute and are immaterial for the purposes of decision of the point in issue.

The contention in the Court below, and indeed the contention in this Court is that, as these properties were the properties of the joint family of which the applicants were members, the properties must be treated as trust properties and therefore not liable to the ad valorem court-fee demanded by the order of the Judge. Reliance was placed upon Sch. 3, Court-fees Act, which it is contended by implication provides that the property of the description which I have stated, that is to say property of the joint family, is not liable for court-fees. The form Annexure A provided under Sch. 3 sets out various items of property the description of which is to be given in an application for letters of administration. Annexure B is headed "Schedule of Debts etc." and not only includes debts owing by the estate of the deceased, the funeral expenses and mortgage encumbrances, but also property held in trust not beneficially or with general power to confer a beneficial interest and other property not subject to duty.

It seems to me clear if I were to decide the matter, although I do not decide it, that the total of items in Annexure B is to be deducted from the total of Annexure A: that much is clear, the duty being payable on the balance. S. 19-I provides that the Court must be satisfied that the fees payable under No 11 of Sch. 1 are paid before entertaining an application for letters of administration so far as the actual valua-

tion is concerned. The provision made in S. 19-H gives jurisdiction to the Collector to decide these matters finally, but it seems to be perfectly clear from the provision of Sec. 19-I to which I have already referred that the Judge had jurisdiction to enter into the question which he determined by his order and which is the subject-matter of this appeal.

Reliance is placed upon the decision of the Bombay High Court in 29 Bom 161¹—a decision of Sir L. H. Jenkins C. J. and Batty J.—upon this question so far as regards the actual point which comes before us for determination, that is to say, whether Amir Chandra was a trustee for the other members of the joint family, the learned Chief Justice was of the opinion that the matter had been decided, (23 Cal 980²), the main point of decision being the question whether, although the notification which the Local Government was entitled to make under the Court-fees Act had been under Sec. 35 of the Act of 1870, rescinded, the trust property was still exempt from duty. The learned Chief Justice came to the conclusion that in spite of the fact that the notification had been rescinded by reason of the provisions amending the Probate and Administration Act the trust property was still exempt. It seems to me that once the matter is decided that this is trust property, it necessarily follows by reason of the form in Sch. 3 to which I have referred that the property is held in trust not beneficially or with general power to confer a beneficial interest and is exempt from duty. In this connexion, although the Section does not deal actually with the point to which I am referring, reference might be made to S. 250 of the present Succession Act. The decision upon which the Bombay High Court relied for the proposition that the joint family property in the circumstances with which the learned Chief Justice was dealing was the trust property, was the case which I have already named and which is reported as I have said in 23 Cal 980.² It is just possible, although I do not propose to come to that conclusion, that the case reported in 23 Cal 980² can be distinguished by reason of the facts of that case. There four members of a joint family had purchased a property as tenants in

1. Collector of Kaira v. Chunilal Hari Lal, (1905) 29 Bom 161 = 6 Bom L R 652.

2. In the goods of Pokurmull Augurwallah, (1896) 23 Cal 980 = 1 C W N 31.

common, at least according to the report of the case the conveyance purported to convey to the brothers as tenants-in-common not only for themselves but for other members of the family, and in those circumstances Ameer Ali J., as he then was, held :

That the property, though conveyed to the brothers as tenants in common, vested in them as trustees for the benefit of all the coparceners and consequently was not liable to duty.

Whatever view might be taken of the authority of that case, it could not be said, having regard to the facts to which I have referred, to apply to the facts of this case. Here there is no question of conveyance to Amir Chandra on behalf of the other members of the family. It was a property at the Bank which, according to the facts which do not seem to be disputed, was a property of the joint family. Incidentally I might mention that the Bank would not recognize the property as the property of any person other than Amir Chandra and therefore would not recognize any trust.

I propose briefly to refer to other cases, one of which was the case in 39 Bom 245.³ The head-note in the case correctly states the decision at which Beaman J. arrived. It was an application for probate of will of a person who was admittedly a member of a joint Hindu family and the decision was:

Where the matter in question was probate, the parties claiming under the will could not go behind its terms, or claim any exemption whatsoever upon allegations utterly inconsistent not only with the fact of the will itself, but with the express statements made therein and that the executors must pay full probate duty upon the will.

The decision may be shortly stated in these words — as the duty to be paid was the duty on the property included in the will and as the property was included in the will, there could be no question whether it was trust property, nor could the fact of any allegation that it was joint family property affect the incidence of the duty. There is a decision of this Court of Coutts J. in the case in 5 Pat L J 510⁴ where a Hindu by a will left the residue of his property to his son and the executors. It was held that, although in applying for probate of the will the son claimed the property as by survivorship, "they were

not entitled to the exemption," the basis of the decision being similar to that of the decision of the Bombay High Court to which I have just referred reported in 39 Bom 245.³ A decision of the Full Bench of the Bombay High Court in an application for administration by each of the sons of a joint family limited to their shares in the joint family held that no court-fee should be levied on limited letters of administration sought by the sons as to the shares belonging to the joint family. The case however which is directly in point is the decision of the Allahabad High Court in 57 All 881.⁵ Before referring to that case in detail I would like to observe that it is possible so far as this fact is concerned in the cases to which I have already referred to distinguish at least some of them on the ground that they were applications for probate of the will. For the reasons stated in two of the cases to which I have referred, it might be said that the applicant could not go behind the terms of the will, and that the principle applicable to those cases in which the application was for letters of administration might be different. The case to which I am now referring deals with an application for letters of administration and the decision by Sir Shah Muhammad Sulaiman C. J. and Ganga Nath J. is to the effect that :

Where a person chooses to apply for letters of administration, whether absolutely necessary or not, and they are granted, he must pay the proper court-fee according to Sec. 6 or Art. 11 of Sch. I, Court-fees Act. Sec. 19-D of that Act does not in any way exempt from payment of court-fee letters of administration obtained by a member of a joint Hindu family in respect of property which he gets by survivorship and not by inheritance as an heir.

I do not propose to refer to the reasoning of the learned Chief Justice in that case—reasoning with which I entirely agree. It is, as the learned Chief Justice points out, not a question for the High Court whether it was necessary to apply for letters of administration merely because the Bank demanded it. But when once the application was made, for the reasons therein stated exemption could not be had. In connexion with the point as to the necessity of applying for letters of administration, I would in passing refer to S. 212, Succession Act, which provides :

No right to any part of the property of a person who had died intestate can be established in any

3. Kashinath Parsharam v. Gourabai, (1915) 2 A I R Bom 18=28 I C 473=39 Bom 245=17 Bom L R 169.

4. In re Ram Kumar Prasad, (1920) 7 A I R Pat 53=58 I C 1007=5 Pat L J 510=1 P L T 710.

5. In the Goods of Lal Madho Prasad, (1935) 22 A I R All 449=154 I C 722=57 All 881=1935 A L J 391.

Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction.

but it also provides that this Section shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Indian Christian.

As I said at the commencement of my observation, the only point to be determined in this case was whether Amir Chandra was a trustee for his coparceners. In my judgment, with great respect to the decision of some of the learned Judges to which I have referred it seems to me impossible to contend that a cosharer member of a joint family interested to the extent of an undivided share in the whole of the property of the joint family is a trustee for the other cosharers. I repeat, it is impossible to hold that view. In the circumstances whether an application for letters of administration was necessary or not, it is a matter not to be determined in this Court, when once an application has been made in order to obtain letters it is necessary in my judgment to pay the duty according to the provisions of the Act. In my view therefore the decision of the learned Judge was right and must be affirmed and the appeal must be dismissed with costs.

Agarwala J.—I agree.

N.S./R.K. *Appeal dismissed.*

* A. I. R. 1939 Patna 129

HARRIES C. J. AND AGARWALA J.

Haramohan Patnaik — Petitioner
v.

Emperor.

Criminal Revn. No. 4 of 1938, Decided on 11th November 1938, from order of Town Magistrate, Cuttack, D/. 24th September 1938.

* (a) Criminal P. C. (1898), S. 83—District Magistrate of Dhenkanal State cannot under S. 83 issue warrant to Railway police in charge of railway lands in that State to arrest accused alleged to have committed offence in that State—But he has such jurisdiction by virtue of Notification No. 34 I. B. of 14th January 1937.

Dhenkanal Garh Railway Station is within the State of Dhenkanal; but the Dhenkanal State authorities have no jurisdiction within the limits of railway land in that State. The laws in force in the district of Cuttack shall be in force in the railway lands situate in the State of Dhenkanal and the Local Government and officers subordinate to it exercising executive authority in the Cuttack District shall exercise similar authority within the railway land situate in Dhenkanal

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State. A Magistrate of a Native State cannot issue a warrant directing the police or officials in British India to arrest a person accused of committing a crime within a Native State. Hence even if the Code of Criminal Procedure has been adopted by the Dhenkanal State authorities that would not give the Dhenkanal State authorities a right to issue a warrant to the Railway Police and obtain the arrest of a person alleged to have committed offence in that State in the manner directed by S. 83, Criminal P. C. The effect of the adoption of the Code of Criminal Procedure by the Dhenkanal State authorities is to make the provisions of that Code part of the law of Dhenkanal State. It is still a State wholly outside British India, and therefore the provisions of S. 83 of the Code cannot apply to the State in its relation with British India. Hence the arrest of the accused under such circumstances cannot be justified under the provisions of Sec. 83. But the arrest is justified by virtue of Notification No. 34 I. B. of 14th January 1937 : *A I R 1938 Sind 46, Rel. on.* [P 130 C 2 ; P 131 C 1, 2 ; P 132 C 2]

(b) Jurisdiction—Dhenkanal State—Notification No. 34 I. B. of 14th January 1937—Notification contemplates that after person is arrested on railway lands by police in execution of warrant issued by Magistrate of Native State he must be produced before Magistrate having jurisdiction over such railway land who will then decide whether such person should be detained.

The Notification No. 34 I. B. of 14th January 1937 contemplates that there should be some inquiry as to whether the person arrested is or is not a subject of the State which has issued the warrant. Clearly such an inquiry cannot be left to the railway police, and the only course which the railway police can follow in executing a warrant issued by a Magistrate in a Native State, is to produce the arrested man before a Magistrate having jurisdiction over railway lands. Such Magistrate can then make the necessary inquiry and order detention of the arrested man until arrangements are made for taking him to the Native State.

[P 132 C 1]

* (c) Jurisdiction—Native States—Notifications dated 28th March 1912 and 14th January 1937 are not ultra vires.

The notification dated 28th March 1912 by which railway lands within a Native State are placed under the jurisdiction of certain Magistrates and officers in British India and the notification of 14th January 1937 cannot possibly be said to be ultra vires.

[P 133 C 1]

* (d) Criminal P. C. (1898), Sec. 54 (1), Para. 7—"Reasonable complaint" explained—To justify arrest there must be in existence as fact, as opposed to belief, warrant issued under Extradition Act.

What is a reasonable complaint and suspicion depends on the circumstances of each case but it must be founded on some definite fact or some tangible proof which is sufficient to establish in the mind of a reasonable police officer the reasonableness or credibility of the charge, information or suspicion : *A I R 1925 Cal 278, Rel. on.*

[P 133 C 2]

Further, to justify an arrest under Sec. 54 (1) Para. 7, there must be in existence as a fact, as opposed to any belief which may be entertained by any person, a warrant which has been issued

under the Extradition Act : *A I R 1925 Cal 278*
and *A I R 1933 Lah 159, Rel. on.* [P 133 C 2]

H. Mahapatra and G. C. Das —
for Petitioner.

Advocate-General and Public Prosecutor
for Orissa — for the Crown.

Harries C. J.—This is an application by one Haramohan Patnaik under S. 491 (1) (b), Criminal P. C. On 28th September 1938 the petitioner presented an application to this Court praying that an order passed by a learned Magistrate of the first class at Cuttack directing that the petitioner be sent to Dhenkanal State was illegal and that he should be released from custody forthwith. Notice of this application was served upon the local authorities concerned in Cuttack who have appeared to show cause why this Court should not interfere with the orders which have been passed in this case. The petitioner Haramohan Patnaik is a subject of Dhenkanal State, which is a Native State bordering upon the Province of Orissa. On 23rd September 1938 the petitioner was arrested on the platform of the Dhenkanal Garh Railway Station by the Government Railway Police, who purported to act under a warrant issued by the District Magistrate of Dhenkanal. After arrest the petitioner was brought to Cuttack and produced before the City Magistrate, Mr. Ganesh Chandra Chandra, on 24th September 1938. On inquiry the petitioner admitted that he was a subject of Dhenkanal State, and the learned Magistrate ordered that he should be detained in custody until the Dhenkanal State authorities made arrangements to convey him to Dhenkanal. The warrant of arrest issued by the District Magistrate of Dhenkanal showed that the petitioner was alleged to have committed, within that State, an offence under S. 124-A, I. P. C. It is to be observed that there is no allegation in this case that the petitioner has committed any offence within British India.

On behalf of the petitioner it has been contended that his arrest at the Dhenkanal Garh Railway Station was illegal and that as such vitiates all proceedings taken thereafter. Dhenkanal Garh Railway Station is within the State of Dhenkanal; but it is clear that the Dhenkanal State authorities have no jurisdiction within the limits of railway land in that State. The position with regard to railway lands in the State of Dhenkanal is defined by a Notification No. 754 I. B., dated 28th March 1912,

issued by the Governor-General in Council in exercise of the powers conferred upon him by the Indian (Foreign Jurisdiction) Order in Council 1902, and of all other powers enabling him in that behalf. The order of 28th March 1912 provides :

(1) Subject to the modification specified in col. 4 of the schedule thereto annexed all laws for the time being in force in the districts or areas specified in col. 3 of the said schedule shall be in force in the lands lying within the states specified in the corresponding entry in column 2 which are occupied by the portions of the railways specified in the corresponding entry in col. 1 thereof.

(2) The Local Government and all Officers subordinate to it for the time being exercising executive authority within the said districts or areas shall exercise the like authority within the said lands, except in connexion with the administration of police which shall be vested in the officer for the time being in charge of Railway Police under the said Local Government.

(3) All Courts having for the time being jurisdiction within the said districts or areas shall have the like jurisdiction within the said lands.

From a reference to the schedule annexed to this Order, it will be seen that the laws in force in the District of Cuttack shall be in force in the railway lands situate in the State of Dhenkanal and further that the Local Government and officers subordinate to it exercising executive authority in the Cuttack District shall exercise similar authority within the railway lands situate in Dhenkanal State. Further, the police administration within the railway lands situate in Dhenkanal State is vested in the Officer for the time being in charge of the Railway Police. The effect of this order is to place the railway lands in Dhenkanal State within the jurisdiction of the local authorities at Cuttack and accordingly it is argued that the District Magistrate of Dhenkanal has no jurisdiction whatsoever over the land upon which the Dhenkanal Garh Railway Station is situate. It is contended therefore that any warrant issued by the District Magistrate of Dhenkanal could not be directed either to the district authorities exercising jurisdiction over these railway lands or to the Railway Police who were responsible for maintenance of law and order within these railway lands. The warrant for the arrest of the petitioner was direct to the Officer-in-Charge of the Railway Police at Dhenkanal Garh Railway Station, and it directed him to arrest the petitioner who was alleged to have committed within the State an offence under S. 124-A, I. P. C.

In my view it is clear that a Magistrate of a Native State cannot issue a warrant

directing the Police or Officials in British India to arrest a person accused of committing a crime within a Native State. This has been clearly laid down in a recent decision, *A I R 1938 Sind 46*.¹ In that case a Magistrate of Nasirbad, which is outside British India, issued a warrant under S. 83, Criminal P. C., for the arrest of a person residing in British India. It was held that such a warrant could not be executed by a Magistrate in British India and that proceedings taken in pursuance of such warrant were illegal and could be quashed by the Court under S. 491, Criminal P. C. S. 83, Criminal P. C., lays down the procedure to be followed when a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same; but this Section, in my view, can have no application to a case such as the present. S. 83, Criminal P. C., contemplates cases where a Magistrate in British India issues a warrant for the arrest of a person in some place in British India outside his jurisdiction. It is said that the Criminal Procedure Code has been adopted by the Dhenkanal State authorities; but even so, that would not give the Dhenkanal State authorities a right to issue a warrant and obtain the arrest of a person in the manner directed by Sec. 83, Criminal P. C. If the Dhenkanal State authorities have adopted the Criminal Procedure Code, it cannot be said that the same law is applicable to both the State and British India. The effect of the adoption of the Criminal Procedure Code by the Dhenkanal State authorities is to make the provisions of that Code part of the law of Dhenkanal State. It is still a state wholly outside British India and therefore the provisions of Sec. 83, Criminal P. C., cannot apply to the State in its relation with British India. In my judgment therefore it is clear that the arrest of the petitioner cannot be justified under the provisions of S. 83, Criminal Procedure Code.

It was further argued on behalf of the petitioner that assuming Sec. 83, Criminal P. C., applied, the production of the petitioner at Cuttack and the subsequent order for detention passed by the Magistrate were wholly illegal. Cuttack is more than thirty miles from the Dhenkanal Garh Railway Station and accordingly it was

contended that Sec. 85, Criminal P. C., applied. It was contended on behalf of the petitioner that if the arrest was legal, then by reason of the provisions of Sec. 85, Criminal P. C., the petitioner should have been produced before the District Magistrate of Dhenkanal State. In my view, it is unnecessary to consider this aspect of the case, because the arrest cannot be justified under the terms of S. 83, Criminal P. C.

By Notification No. 34 I. B., dated 14th January 1937, the Governor-General-in-Council in exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, and of all other powers enabling him in that behalf, directed that all criminal processes issued in a manner similar to that prescribed by the Criminal Procedure Code, 1898, by a Magistrate having jurisdiction in any State in India shall be acted upon and executed in railway lands lying within such State by all Magistrates and police officers having jurisdiction in such railway lands under the same conditions and in the same manner as if such processes had been issued by a Magistrate having jurisdiction in such railway lands :

Provided further that nothing herein before contained shall require a Magistrate or police officer having jurisdiction in such railway lands to execute any process so issued against any person who is not a subject of the State by the Court of which the process has been issued or be construed as authorizing him to execute any such process against any subject or servant of His Majesty.

The Advocate-General of Orissa who appeared on behalf of the local authorities has contended that the arrest of the petitioner was perfectly legal by reason of this notification. He did not contend that the arrest and subsequent proceedings could be justified under Secs. 83 and 85, Criminal P. C. The Advocate-General argued that the effect of this notification of 14th January 1937, is that all Magistrates and police officers having jurisdiction in the railway lands in the Dhenkanal State must execute a warrant issued by a Magistrate of that State under the same conditions and in the same manner as if such warrant had been issued by a Magistrate having jurisdiction over such railway lands. In other words, he contended that the railway police at Dhenkanal Garh Railway Station were bound to execute the warrant issued by the District Magistrate of Dhenkanal in precisely the same manner as if it has been issued by the District Magistrate of Cuttack who, by the notification of 28th March 1912, has sole jurisdiction over railway lands in the State. In my judgment, the terms of this notification of 14th January 1937, are clear and in the present case the

1. *Tahilram Kanchand v. Emperor*, (1938) 25 A I R Sind 46=178 I C 322=39 Or L J 298=32 S L R 134.

police at Dhenkanal Garh Railway Station had no alternative but to act upon the warrant issued by the District Magistrate of Dhenkanal and to arrest the petitioner. After arresting the petitioner, the police produced him on the following day before a Magistrate of the First Class in Cuttack and the latter, after ascertaining that the petitioner was a subject of Dhenkanal State, remanded him in custody in order to enable the Dhenkanal authorities to make arrangements for conveying him to the State. It has been strongly contended on behalf of the petitioner that even if the arrest was justified under the notification of 14th January 1937, the subsequent proceedings were wholly illegal. It was contended that the police had no right whatsoever to take the petitioner to Cuttack and to produce him before a Magistrate. It was urged that the police should have handed the petitioner over then and there to the Dhenkanal State authorities and as they did not do so, he could no longer be detained at Cuttack.

The last Proviso to the notification of 14th January 1937, makes it clear that a Magistrate or police officer having jurisdiction over railway lands can only execute a warrant issued by a Magistrate in a native state against a person who is a subject of that State. Such Magistrates or police officers are not to execute such warrants against persons not subjects of the State or to execute any warrant against any subject or servant of His Majesty. Before a person arrested by the railway police upon a warrant issued by a Magistrate of a native state is handed over to the State authorities, it must first be ascertained whether the person arrested is or is not a subject of that State. If he is, he must be handed over to the State authorities; but if he is not a subject of the native state, then he cannot be handed over. The notification contemplates that there should be some inquiry as to whether the person arrested is or is not a subject of the State which has issued the warrant. Clearly, such an inquiry cannot be left to the railway police, and in my view the only course which the railway police can follow in executing a warrant issued by a Magistrate in a native State, is to produce the arrested man before a Magistrate having jurisdiction over railway lands. Such Magistrate can then make the necessary inquiry and order detention of the arrested man until arrangements are

made for taking him to the native State. Any other construction of this notification should leave the arrested man entirely at the mercy of police officer who might frequently be of junior rank. It is to be observed that the notification of 14th January 1937, directs all Magistrates and police officers to execute the warrant issued by a Magistrate in a native State, and in my view this contemplates that after a person is arrested on railway lands by the police he must be produced before a Magistrate having jurisdiction over such railway lands who will then decide whether such arrested person should be detained and handed over to the native State authorities.

It was contended on behalf of the petitioner that this notification of 14th January 1937 was ultra vires the Indian (Foreign Jurisdiction) Order in Council, 1902. The limits of the Indian (Foreign Jurisdiction) Order in Council 1902 are defined by Cl. 2 of that order. Those limits are the territories of India outside British India, and any other territories which may be declared by His Majesty in Council to be territories in which jurisdiction is exercised by or on behalf of His Majesty through the Governor-General of India in Council, or some authority subordinate to him, including the territorial waters of any such territories.

Clause 3 of the Order enables the Governor-General of India in Council on His Majesty's behalf to exercise any power or jurisdiction which His Majesty or the Governor-General of India in Council for the time being has within the limits of the Order and to delegate any such power or jurisdiction to any servant of the British Indian Government in such manner, and to such extent, as the Governor-General in Council from time to time thinks fit. Cl. 4 of the order provides that the Governor-General in Council may make such rules and orders as may seem expedient for carrying the order into effect, and in particular,

(a) for determining the law and procedure to be observed, whether by applying with or without modifications all or any of the provisions of any enactment in force elsewhere, or otherwise;

(b) for determining the persons who are to exercise jurisdiction, either generally or in particular classes of cases, and the powers to be exercised by them;

(c) for determining the Courts, authorities, Judges, and Magistrates, by whom, and for regulating the manner in which any jurisdiction auxiliary or incidental to or consequential on the jurisdiction exercised under this order, is to be exercised in British India;

(d) for regulating the amount, collection, and application of fees.

In my judgment the notification dated 28th March 1912, by which railway lands within a native State are placed under the jurisdiction of certain Magistrates and officers in British India, is *intra vires* the Order of 1902. The Order of 1902 contemplates such provisions as are contained in the notification of 28th March 1912. Further, there is nothing in the notification of 14th January 1937 which can possibly be said to be outside the powers conferred upon the Governor-General in Council by the Indian (Foreign Jurisdiction) Order in Council, 1902. In my judgment, these two notifications cannot possibly be said to be *ultra vires*, and the arrest and subsequent production of the petitioner before the Magistrate at Cuttack are amply justified under the terms of these notifications. Further, the detention of the petitioner by order of the learned Magistrate at Cuttack is legal by reason of the combined effect of these two notifications.

It was also contended by the Advocate-General that the arrest and detention of petitioner could be justified under the provisions of S. 54 (1), Para. 7, Criminal P. C. This Section permits police officers in certain cases to arrest without an order from a Magistrate and without a warrant. Para. 7 to Sec. 54 (1), Criminal P. C., permits the arrest without a Magistrate's order or a warrant of a person against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in an act committed outside British India which if committed in British India would have been punishable as an offence or for which he is under any law relating to extradition or under the Fugitive Offenders Act 1881 or otherwise liable to be apprehended or detained in custody in British India. The petitioner's act, it is contended, namely, section (sic), is punishable as an offence in British India and the petitioner could be apprehended and detained in custody under the extradition laws. Therefore, it is said he could be arrested without a warrant. Assuming the warrant issued by the District Magistrate of Dhenkanal to be illegal, that it is urged is immaterial because he could be arrested without any warrant at all. In my view the arrest and detention of the petitioner cannot be justified under these provisions. The only information which the Railway Police had in this case was the warrant

issued by the District Magistrate, Dhenkanal State. Such can hardly be said to be a reasonable complaint or to amount to credible information or to create reasonable suspicion. What is a reasonable complaint or suspicion depends on the circumstances of each case but it must be founded on some definite fact or some tangible proof which is sufficient to establish in the mind of a reasonable police officer the reasonableness or credibility of the charge, information or suspicion : see 52 Cal 319.² Further, it has been held that to justify an arrest under Sec. 54 (1), Para. 7, Criminal P. C., there must be in existence as a fact, as opposed to any belief which may be entertained by any person, a warrant which has been issued under the Extradition Act : see 52 Cal 319² and A I R 1933 Lah 159.³ There was no such warrant in existence in this case.

However, as I have stated, the arrest of the petitioner and the subsequent proceedings were in accordance with the terms of the Notification 34 I. B., dated 14th January 1937 and therefore legal. I would therefore discharge the rule.

Agarwala J.—I agree.

D.S./R.K.

Rule discharged.

2. Subodh Chandra Roy v. Emperor, (1925) 12 A I R Cal 278=85 I C 913=26 Cr L J 625=29 C W N 98=52 Cal 319=40 C L J 489.
3. Emperor v. Kalu, (1933) 20 A I R Lah 159 = 144 I C 67=1933 Cr C 304=34 Cr L J 679.

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COURTNEY-TERRELL C. J. AND
MOHAMAD NOOR J.

*Najmunnissa Begum — Plaintiff —
Appellant.*

v.

*Sirajuddin Ahmad Khan and another
— Defendants — Respondents.*

Appeal No. 7 of 1934, Decided on 21st December 1937, from original decree of Addl. Sub-Judge, Cuttack, D/- 27th February 1934.

Mahomedan Law—Dower — Relinquishment — Document relinquishing part of dower and changing its character, executed when minor according to Majority Act is not valid and binding.

Once a marriage has been performed and the dower has been settled, the dower becomes a property of the wife like her property. The dower is a debt payable to the wife and any transfer of this debt, or forgoing it altogether or a portion of it

are not matters in any way connected with marriage and such acts must be governed by the ordinary law of land. [P 134 C 2]

Where therefore a Mahomedan lady who is minor according to the Majority Act but major according to the Mahomedan law executes an ekrarnama relinquishing a part of her dower fixed at the time of her marriage and also changes the character of the dower from prompt to deferred, the ekrarnama is not valid and binding on her as the case does not fall within the exception to S. 2 of the Majority Act : *A I R 1932 All 649 and A I R 1925 Cal 322, Disting.; A I R 1918 Mad 319, Rel. on.* [P 135 C 2]

G. P. Das and H. P. Bhagat —
for Appellant.

A. S. Khan and H. Mohapatra —
for Respondents.

Mohamad Noor J. — The suit out of which this appeal has arisen was instituted by a Mahomedan lady, the appellant before us, for recovery from the defendants of Rs. 5015, the amount of her prompt dower fixed at the time of her marriage with defendant 1 on 8th October 1925. She also sued for recovery of certain properties belonging to her which were kept back from her by her husband and his father, defendant 2. The defence was that though the dower was fixed at Rs. 5000 and one gold mohur prompt it was not an unconditional dower. The defendants alleged that the dower was fixed on the condition that the paternal and maternal relations of the lady would give her jewellery worth Rs. 2000 and also to defendant 1 presents worth Rs. 1000, but that the Marriage Registrar, who happened to be a maternal grandfather of the lady, did not enter these terms in the register on the pretext that there was no column for such entry and that those terms were independent contracts. They further alleged that as the lady's relations did not carry out the promise they had made at the time of the marriage, relations between them and defendant 1 became somewhat estranged and consequently the plaintiff of her own free will executed an ekrarnama, dated 19th July 1926 whereby she surrendered Rs. 3000 out of the Rs. 5000 odd of the prompt dower fixed at the time of the marriage, and made it a deferred dower instead of a prompt one. The learned Subordinate Judge has held that though there was some promise about giving jewellery to the lady and some presents to defendant 1 non-fulfilment of those promises did not affect the amount of the dower fixed at the marriage but he dismissed the suit for dower

giving effect to the terms of the ekrarnama of 1926 relied upon by the defendants. He gave the plaintiff a decree for the value of some articles claimed by her.

Now the ekrarnama relied upon by the defendants was challenged on behalf of the plaintiff among others on the ground that at the time of its execution she was below 18 years of age and had not attained majority under the Majority Act. In reply to this the defendants relied on Sec. 2 of the Act and contended that for purposes of relinquishing a part of the dower the age of majority would be according to the personal law of the lady and not according to the Majority Act. This contention of the defendants prevailed in the lower Court. The plaintiff has therefore preferred this appeal. The learned advocate for the respondents has not challenged the finding of the lower Court that the age of the plaintiff on the date of the ekrarnama was 17 years and 2 months, and it must be taken that at the time she was a minor under the Majority Act. The only question which remains to be decided is whether the ekrarnama of 1926 by which the plaintiff purported to relinquish her claim for dower is valid or whether it is void.

Now Sec. 2, Majority Act, while fixing the age of majority at 18 years in ordinary cases and at 21 years where a guardian of the person or property of the minor has been appointed, or his estate has been taken charge of by the Court of Wards, provides that nothing herein contained shall affect the capacity of any person to act in the following matters (namely) marriage, dower, divorce and adoption.

The question is whether the relinquishment of a part of dower fixed at the time of the marriage, or changing its character from prompt into deferred, falls within this exception. In my opinion it does not. The provisions of the Section govern only the performance of marriage or effecting of divorce by persons who though not major according to the Act are so according to their personal law. But once a marriage has been performed and the dower has been settled, the dower becomes a property of the wife like her any other property. The dower is a debt payable to the wife and any transfer of this debt, or forgoing it altogether or a portion of it are not matters in any way connected with marriage and such acts must be governed by the ordinary law of the land. The Majority

Act in making this provision purports to leave intact the personal law of a community in the specified matters. We are not authorized to extend the operation of the Section beyond what is specified therein. In other cases the territorial law enacted by the Legislature unless specially excepted must be applied.

The lower Court has relied upon two decisions. One of them is A I R 1932 All 649.¹ He appears to have missed an important passage in the judgment of Sulaiman C. J. in that case. There the wife who was not a major under the Majority Act obtained a divorce in the khula form and in consideration of it she surrendered her dower to the husband. The question arose whether she could do so. The learned Chief Justice observed as follows :

This agreement to pay a certain amount of dower is a part of the contract of marriage, and there is no reason to suppose that although a person, who is a minor under the Majority Act, but a major under the Mahomedan law, is capable of entering into a contract of marriage, he is incapable of fixing the amount of the dower. We think that on the same ground an individual who is a major under the personal law is capable of relinquishing the dower as consideration for obtaining khula. Khula is form of divorce recognized by the Mahomedan law and comes within the exception.

It is obvious that the reason why the learned Judges held the surrender of dower in that case to be valid, was that the surrender of the dower was a consideration for obtaining the divorce, and divorce is specifically excepted by the Act. In this particular case the surrender is not in consideration of any divorce but is a gratuitous surrender, which is in no way different from the surrender or giving away of a right in any other property. The other case relied upon by the learned Subordinate Judge has also no application to the case before us. That was A I R 1925 Cal 322.² There the question was whether a minor according to the Majority Act but not so under his personal law, could fix the amount of dower at the time of his marriage. It was held that he could. It is obvious that marriage being excepted by the Act, it could not be performed under the Mahomedan law without there being a promise of dower and therefore as a necessary element to the performance of the

marriage he could fix the amount of the dower.

On the other hand, there is a clear decision of the Madras High Court in 41 Mad 1026.³ The facts of the case are almost on all fours with the present case, and it was held there that a wife who was a minor under the Majority Act could not relinquish her dower. The learned Judges relied upon a passage from Abdur Rahim's Principles of Mahomedan Law (p. 241 of the book) that minors cannot perform even benevolent acts to their detriment. Therefore in my opinion the ekrarnama of 1926 is not binding upon the plaintiff and cannot operate either to reduce the amount of the dower or change its character. On this finding it is not necessary to go into the question whether the ekrarnama was obtained under coercion or that the lady was not a willing executant of it. The appeal succeeds and I would allow it. There will be a decree for dower claimed by the plaintiffs with costs throughout against defendant 1 only. The decree of the learned Subordinate Judge in respect of the properties against both the defendants will stand. The costs in respect of them will be paid by the defendants according to the value of the properties as decreed by the lower Court.

Courtney-Terrell C. J. — I agree.

N.S./R.K.

Appeal allowed.

3. *Abi Dhunimsa Bibi v. Mahammad Fathi Udini*, (1918) 5 A I R Mad 319=44 I O 293=41 Mad 1026 = 35 M L J 468.

A. I. R. 1939 Patna 135

WORT AG. C. J.

Kameshar Singh Bahadur —

Defendant — Appellant.
v.

Kusheshwar Mahto, Plaintiff and others, Defendants — Respondents.

Appeal No. 787 of 1936, Decided on 2nd September 1938, from appellate decree of Dist. Judge, Darbhanga, D/- 5th February 1936.

Limitation Act (1908), S. 12 (2) — Time requisite for obtaining copy—Period between date of judgment and date on which decree is signed should be excluded from computing limitation even if copy of decree not applied for during limitation.

In computing the period of limitation for an appeal the period between the date on which the judgment is delivered and the date on which the

1. *Qasim Hussain v. Kaniz Sakina*, (1932) 19 A I R All 649 = 139 I O 871 = 54 All 806 = 1932 A L J 781.

2. *Mozharul Islam v. Abdul Gani Ala*, (1925) 12 A I R Cal 322 = 80 I O 914.

decree is signed should also be excluded, treating it as a time requisite for obtaining copy of the decree, that time not being within the control of the appellant. This exclusion can be claimed even if application for copy of decree is not made within the period of limitation: *A I R 1936 Pat 45 (FB)*, *Foll.*; *A I R 1921 Pat 175 (FB)*, *Not foll.*; *AIR 1922 P C 352, Ref.* [P 136 C 2 ; P 137 C 1]

Murari Prasad and S. P. Srivastava —
for Appellant.

A. C. Roy — for Respondents.

Judgment. — This is an appeal against the decision of the District Judge of Darbhanga who decided that the appeal before him was barred by limitation. The judgment of the Munsif who tried the suit in the first instance was delivered on 6th November 1935 and the decree was signed by him on 15th November 1935. The appeal was preferred to the lower Appellate Court on 13th December 1935. In the meantime the appellant, of course, had applied for a copy of the decree on 9th December 1935 and obtained it on the 12th. It will be seen that from 6th November when the trial Judge delivered his judgment till 13th December when the appeal was presented before the lower Appellate Court a period of thirty-seven days had elapsed and the appellant was at least seven days out of time on those dates. S. 12, Limitation Act, excludes the first day which in this case was 6th November 1935 and that is why I have given the total period between the date of judgment and the date of filing the appeal as thirty-seven days. Under sub-s. (2), S. 12, the time requisite for obtaining a copy of the decree is to be excluded. In this case that time was four days including the date of the application, i. e. from 9th to 12th December. Taking that period as three days it is to be excluded from the period of limitation when that period comes to be computed. The words in the Act are 'in computing the period of limitation' and it seems to me quite clear therefore that when you take the thirty-seven days, you must deduct or exclude those days which were requisite for obtaining a copy of the decree. Three days thus being deducted the total period comes down to thirty-four days. But the Full Bench decision to which a reference has been made in the decision of the District Judge in 16 P L T 849¹ has decided that the period between the date of the judgment and the date when the decree is

prepared, that being the time not within the control of the appellant, is also to be excluded: in other words, that period should be included in the period requisite for taking a copy of the decree. That makes the period at least ten or twelve days. Even if we take the first period alone (which is nine days) and subtract that from thirty-seven days, it will bring the appeal within time and the decision of the learned District Judge is erroneous.

Mr. A. C. Roy on behalf of the respondents contends that the period between 6th November, when the judgment was delivered, and 15th November, when the decree was signed, cannot be excluded if the appellant did not apply for a copy of the decree within the period of limitation. That argument in my judgment has no foundation under the authority. The case relied upon is the Full Bench decision in 2 P L T 361.² But it is to be remembered that the Full Bench decision stated that in so far as the earlier Full Bench decided that the period between the date of the judgment and the date of the application for the copy of the decree can in no case be excluded, it was wrongly decided. But it must not be understood that the Full Bench decision to which I was a party meant that the earlier Full Bench decision was otherwise correct or that it decided any other question. The words used by the learned Judges including myself in the Full Bench decision were guarded words to prevent the Full Bench decision from being held to decide anything other than the particular question that was before it. When we came to look at the earlier Full Bench decision we could see what the learned Judges in that case decided. The question which was connected with the point which was argued before us was in this form:

Whether where the appellant does not apply for the copy of the decree necessary to be filed until the expiration of six months, the period between the delivery of the judgment and the preparation and the signing of the decree is to be excluded?

The Full Bench decision to which I was a party decided that the answer of that question in the negative was erroneous and it seems to me on a plain reading of the statute itself that there is no other possible conclusion to be arrived at in this case. I would refer incidentally to the decision of their Lordships of the Judicial Committee

1. *Gabriel Christian v. Chandra Mohan*, (1936) 23 A I R Pat 45=160 I C 447=15 Pat 284=16 P L T 849 (F B).

2. *Jyotindra Nath v. Lodna Colliery Co. Ltd.*, (1921) 8 A I R Pat 175=62 I C 649=6 Pat L J 350=2 P L T 361 (F B).

of the Privy Council in 49 I A 307³ merely for the purpose of pointing out that their Lordships there decided that the advantage of S. 12 could be taken by an appellant even in those cases where the filing of the copy of the decree by the rules of Court was unnecessary. As I said a moment ago, the matter seems to be plain when you take the words of the Section itself and the words are 'in computing the period of limitation' or to put it colloquially 'in counting the days of limitation.' In this case it is found that the appellant has taken thirty-seven days from which the period requisite for taking the copy of the decree including of course the period in the office to prepare the decree is deducted. That being done it is clearly shown that the filing of the appeal was within time. The appeal is accordingly allowed and the decision of the learned Judge set aside with costs. The case will now go back to be heard and determined by the learned Judge in the Court below. Leave to appeal is refused.

N.S./R.K.

Appeal allowed.

3. Pramatha Nath Roy v. W. A. Lee, (1922) 9 A I R P C 352=68 I C 900=49 Cal 999=49 I A 307 (P C).

A. I. R. 1939 Patna 137

WORT AND AGARWALA JJ.

Sarjug Prasad Sahu and others —

Plaintiffs — Appellants.

v.

Surendrapat Tewari and others —

Defendants — Respondents.

Appeal No. 217 of 1936, Decided on 13th October 1938, from appellate decree of Dist. Judge, Saran, D/- 1st November 1935.

Civil P. C. (1908), O. 7, R. 11 — O. 7, R. 11 applies to appeal also — Appellant should be given opportunity of making good deficiency in court-fee.

The provisions of O. 7, R. 11, are applicable to appeals also and that being so, where the memorandum of appeal is insufficiently stamped, the Court must afford the appellant an opportunity of making good the deficiency in the court-fee payable on the memorandum of appeal: *A I R 1939 Pat 83* and *A I R 1914 Bom 249, Rel. on.* [P 187 O 2]

Mahabir Prasad and Jaleshwar Prasad — for Appellants.

Mehdi Imam, A. S. S. Sinha and S. Niamul Huq — for Respondents.

Wort J.—In the litigation out of which this second appeal has arisen, judgment was delivered against the plaintiffs on 23rd

August 1935. The decree was signed on 31st August. The appellants applied for copies of judgment and decree and obtained the same on 5th September. The Civil Courts were closed from 27th September to 30th October on account of the annual vacation. On the 31st day, on which the Courts re-opened, the appellants presented a memorandum of appeal which the District Judge directed to be registered. The memorandum, however, was insufficiently stamped. It bore a stamp of Re. 1-8-0 instead of stamps worth Rs. 300. At the time of presenting the plaint, the appellants filed a petition stating that they had been unable to obtain the requisite court-fee stamps at the Treasury because the Treasury Officer said that it was not a Treasury-day. The next day the District Judge dismissed the appeal for insufficiency of court-fee. This appeal has therefore been preferred by the plaintiffs. The question that has been raised is whether the matter is governed by O. 7, R. 11, Civil P. C., which empowers a Court to reject a plaint

where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so.

On the interpretation of this clause which has been adopted in the High Courts of India, the Court must afford the plaintiff time to supply the deficiency in court-fees where the relief is properly valued. The question whether the rule applies to appeals has been debated in the Courts, and, so far as this Court is concerned, it was recently decided in Second Appeal No. 289 of 1937¹ in which the decision of the Bombay High Court in 38 Bom 41² was followed. The Bombay High Court held that the effect of sub.s. 2 of S. 107, Civil P. C., was to make the provisions of O. 7, R. 11, applicable to appeals. That being the case, in the present instance the Court below having registered the appeal should have afforded the appellants an opportunity of making good the deficiency in the court-fee payable on the memorandum of appeal. The order of the Court below is therefore set aside and the appeal is remanded to it to be disposed of in accordance with law. The parties will pay their own costs in this appeal. Under Sec. 13, Court-fees Act, the

1. *Bahuria Ram Sawari Kuer v. Dulhin Motiraj Kuer, Reported in* (1939) 26 A I R Pat 83=178 I O 150=17 Pat 687=19 P L T 885.
2. *Achut v. Nagappa, (1914) 1 A I R Bom 249=21 I O 837=38 Bom 41=15 Bom L R 902.*

appellants are authorized to receive from the Collector of Patna, the amount of court-fees which they have paid on the memorandum of appeal in this Court.

Agarwala J.—I agree.

D.S./R.K.

Appeal remanded.

A. I. R. 1939 Patna 138

FAZL ALI AND AGARWALA JJ.

Mt. Bas Kuar — Defendant —

Appellant.

v.

Gaya Municipality, Plaintiffs and others, Defendants — Respondents.

Appeal No. 981 of 1936, Decided on 28th April 1938, from appellate decree of Dist. Judge, Gaya, D/- 26th August 1936.

(a) Civil P. C. (1908), O. 21, Rr. 58 and 63 — Suit under O. 21, R. 63 is mere continuation of claim proceedings under O. 21, R. 58— Purchaser of property from claimant after order has been passed in his favour but before institution of suit under O. 21, Rule 63 is not necessary party to suit — If necessary parties are impleaded within one year, he cannot raise plea of limitation.

A suit brought under O. 21, Rule 63 is a mere continuation of the proceedings in a claim petition. A purchaser of the property from a claimant after an order has been passed in his (claimant's) favour but before a suit under O. 21, R. 63, was instituted, is an alienee pendente lite and is therefore not a necessary party to the suit; and if the necessary parties had been brought on the record within one year, the alienee cannot advance the plea of limitation as Sec. 22 (2), Limitation Act, expressly excludes the operation of Cl. 1 in such cases : *A I R 1915 Mad 495, Rel. on; A I R 1921 Cal 101, Dissent.* [P 139 C 1]

(b) Limitation —Plea of — No relief claimed against party brought on record out of time — Question of limitation does not arise.

As limitation merely bars the remedy by suit, the only parties to a suit between whom a question of limitation can possibly arise are those who seek relief and those against whom it is necessary to seek relief. Therefore when a party is brought on record out of time, the question of limitation does not arise when there is no relief claimed against that party : *6 C L J 558, Rel. on.* [P 139 C 2]

(c) Civil P. C. (1908), O. 21, Rr. 58 and 63 — Creditor whose attachment is raised on claim under O. 21, R. 58, and who avails himself of right given by O. 21, R. 63 can sue on his behalf alone for getting alienation declared void — He need not sue on behalf of all creditors.

A creditor whose attachment has been raised at the instance of a claimant under O. 21, R. 58, and who avails himself of the right given by O. 21, R. 63, can sue on his own behalf alone for having the alienation in favour of the claimant declared void without mentioning any other creditors or

their debts. The necessity for the plaintiff to bring a suit under O. 21, Rule 63 arises by reason of a summary decision under O. 21, R. 58, passed in execution of his own decree and there is no reason why he should be compelled to sue on behalf of other creditors also : *A I R 1934 Rang 332 and A I R 1934 Rang 200, Rel. on.* [P 139 C 2]

Sarjoo Prasad — *for Appellant.*

Rajkishore Prasad — *for Respondents.*

Fazl Ali J. — This second appeal arises out of a suit brought by the Municipal commissioners of Gaya Municipality under O. 21, R. 63, Civil P. C., in the following circumstances : The plaintiffs having obtained a money decree against defendant 5 on 23rd April 1932 proceeded to attach in execution of their decree a house in Gaya which according to them belonged to the judgment-debtor. Thereupon defendants 1 to 4 (sons of one Bullak Ram) preferred a claim under O. 21, R. 58, alleging that the house in question had been purchased by their father from defendant 5 for a sum of Rs. 1000. This claim was allowed on 20th November 1933 and the house was released from attachment. On 11th September 1934 defendants 1 to 4 executed a conveyance in respect of the house in favour of defendant 6 for a sum of Rs. 1500. Thereafter on 6th October 1934 the plaintiffs brought the present suit for a declaration that the deed set up by defendants 1 to 4 was a fraudulent one executed by defendant 5 in the name of a near relative without any consideration and as such it was illegal and defendants 1 to 4 did not derive any title thereunder.

Defendant 6 was made a party to the suit on 15th May 1935. The trial Court dismissed the suit but it was decreed by the District Judge of Gaya who has held that the conveyance executed by defendant 5 in favour of the father of defendants 1 to 4 as well as that executed by defendants 1 to 4 in favour of defendant 6 were without consideration and never intended to pass any title and they did not confer any title upon the transferees. In this appeal, which has been preferred by defendant 6, the findings of fact arrived at by the learned District Judge have not been questioned but his decree is attacked on three grounds. The first ground, which is the only serious ground, is that the suit is barred by limitation against defendant 6 who was made a party to the suit more than a year after the decision of the case under O. 21, R. 58, Civil P. C.

The appellant's contention is undoubtedly supported by the decision of the Calcutta

High Court in 25 C W N 544,¹ but with great respect to the learned Judges who decided that case I am not prepared to accept their view on the question of limitation. It has been held in a number of cases that a suit brought under O. 21, R. 63 is a mere continuation of the proceedings in a claim petition. Relying on this principle, the Madras High Court has held in 38 Mad 535² that a purchaser of property from a claimant after an order has been passed in his (claimant's) favour but before a suit under O. 21, R. 63 was instituted, is an alienee pendente lite and is therefore not a necessary party to the suit; and if the necessary parties had been brought on the record within one year, the alienee could not advance the plea of limitation as Sec. 22 (2), Limitation Act, expressly excludes the operation of Cl. (1) in such cases. With this view I am inclined to agree because it can also be supported by a reference to Sec. 64, Civil P. C., as will appear from the following head-note of the decision of the Calcutta High Court already quoted :

The order for release from attachment does not put an end to the attachment so as to leave the claimant free to deal with the property as he likes. If a suit is brought by the decree-holder to establish his right to attach the property and a decree is passed in his favour, the effect of the decree is to set aside the order of release and to maintain uninterrupted the attachment originally made. Therefore in such a case any private transfer of the property by the claimant though made after an order under R. 60 releasing the property from attachment, would be void under Sec. 64, Civil Procedure Code.

Now if the transfer is void under S. 64, it is liable to be ignored by the plaintiff and the person in whose favour the transfer is made is not a necessary party to the suit under O. 21, R. 63. But so far as the present case goes the matter does not rest there. The learned District Judge has found that in fact there was no transfer either in favour of defendants 1 to 4 or in favour of defendant 6 and they did not derive any title under the deeds of transfer relied on by them respectively. If there was no real transfer and defendant 6 was not a transferee in the proper sense of the term, she was also not a necessary party. It has been pointed out in a number of cases that as

limitation merely bars the remedy by a suit, the only parties in a suit between whom a question of limitation can possibly arise are those who seek relief and those against whom it is necessary to seek relief: see 6 C L J 558.³ Therefore when a party is brought on the record out of time, the question of limitation does not arise when there is no relief claimed against that party. In the present case it was not necessary for the plaintiff to claim any relief against defendant 6 and in fact no relief has been claimed against her. The question of limitation therefore does not arise and cannot affect the decree passed by the Court below.

The next question raised on behalf of the appellant was that the suit instituted by the plaintiff-respondent was essentially a suit under S. 53, T. P. Act, and inasmuch as the plaintiffs did not sue in a representative capacity on behalf of all the creditors, their suit is not properly framed and therefore not maintainable. Now it has been held by the Rangoon High Court in at least two cases that a creditor whose attachment has been raised at the instance of a claimant under O. 21, R. 58 and who avails himself of the right given by O. 21, R. 63 can sue on his own behalf alone for having the alienation in favour of the claimant declared void without mentioning any other creditors or their debts : see 12 Rang 670⁴ and A I R 1934 Rang 200.⁵ The necessity for the plaintiff to bring a suit under O. 21, Rule 63 arises by reason of a summary decision under O. 21, R. 58 passed in execution of his own decree and there is no reason why he should be compelled to sue on behalf of other creditors also. But even if it is held that it was incumbent on him to do so, the point cannot arise in this case, because there is nothing on the record to show that defendant 5 had any other creditors excepting the plaintiffs. In my opinion therefore the second objection also must fail.

The last objection is that the plaintiffs are estopped from challenging the appellant's title in this suit because her name and the names of her vendors have been mutated in the Municipal registers and the plaintiffs have accepted taxes from them.

1. Protap Chandra v. Sarat Chandra, (1921) 8 A I R Cal 101 = 62 I O 348 = 33 C L J 201 = 25 C W N 544.

2. Krishnappa Chetty v. Abdul Khader Sahib, (1915) 2 A I R Mad 495 = 25 I O 11 = 38 Mad 535 = 26 M L J 449.

3. Mohamed Ishaq v. Akramul Haq, (1907) 6 C L J 558 = 12 C W N 84.

4. Maung Tun Thein v. Maung Sin, (1934) 21 A I R Rang 392 = 153 I O 942 = 12 Rang 670.

5. U Maung Ngo v. P. L. S. P. Chettiar Firm, (1934) 21 A I R Rang 200 = 152 I O 506.

In order however that estoppel may arise, it must be shown that the person against whom estoppel is set up has intentionally caused or permitted any person to believe anything to be true which is not true and to act upon such belief. In the present case it is not alleged in the pleading or evidence that the plaintiffs caused the defendants to believe something to be true which is not true and they acted upon such belief. On the other hand on the findings arrived at by the learned District Judge the defendants must be held to have been fully aware of the fact that defendant 5 had never parted with his title in the house which is the subject-matter of the present suit. There can therefore be no estoppel in the present case. As no other points were urged in this appeal we must uphold the decision of the learned Judge and dismiss this appeal with costs.

Agarwala J.—I agree.

R.M./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 140

JAMES J.

Firm Kani Ram-Hazari Mall —

Petitioner.

v.

Sitaram Agarwala — Opposite Party.

Civil Revn. No. 267 of 1938, Decided on 20th October 1938, from order of Addl. Sub-Judge, Gaya, D/- 12th April 1938.

Principal and Agent — Contract of selling agency entered into in Calcutta whereby agent disposed of at Calcutta goods belonging to principal residing in Nabinagar — Payment to be made in Calcutta — Principal's suit against agent must be instituted at Calcutta.

A contract of selling agency by which the selling agent received and disposed of the principal's goods in Calcutta was entered into in Calcutta. The accounting was done in Calcutta and payment was made by hundi which would be honoured in Calcutta. The principal resided in Nabinagar. On two occasions however the agent sent money to Nabinagar :

Held that these casual variations from the rule that payment was to be made by hundi which was to be cashed in Calcutta could not be taken as implying that the original contract was something different than that agreed upon. The principal must therefore institute his suit against the agent at Calcutta : *A I R 1924 All 530, Rel. on.*

[P 140 C 2]

Khurshed Husnain and D. N. Varma —
for Petitioner.

N. K. Prasad II — *for Opposite Party.*

Order. — The suit with which we are here concerned, arises out of a dal-selling agency by which the defendant received and disposed of the plaintiff's goods in Calcutta. The plaintiff who lives in Nabinagar instituted his suit in Aurangabad ; but the Munsif after examining the parties came to the conclusion that he had no jurisdiction to try the suit which should be instituted in Calcutta. The plaintiff appealed to the Subordinate Judge who found that there was an agreement to make payment at Nabinagar.

Mr. Khurshed Husnain on behalf of the defendant argues that the finding of the learned Subordinate Judge that payment was to be made at Nabinagar is on the face of it based on inadequate material. The contract was entered into in Calcutta, the accounting was done in Calcutta and payment was made by hundi which would be honoured in Calcutta ; but on one occasion, the defendant's mukhtar-am had sent some silver to Sitaram at Nabinagar after deducting its value from the amount that was to be sent to Sitaram ; and on another occasion he had sent Rs. 448 to Sitaram at Nabinagar by money order. The learned Subordinate Judge inferred from this that there was an implied undertaking to make the payment of the plaintiff's dues at Nabinagar. These questions of fact, which go to the root of the jurisdiction of the Munsif and the Subordinate Judge, cannot be treated as finally determined by the appellate decision of the learned Subordinate Judge, and the finding must be treated as subject to scrutiny before we can declare that the Munsif of Aurangabad has jurisdiction. I consider that the argument of Mr. Khurshed Husnain must prevail. The plaintiff by his own witnesses proved that the contract was to be completely carried out in Calcutta and these casual variations from the rule, that payment was to be made by hundi which was to be cashed in Calcutta, cannot be taken as implying that the original contract was something more than the plaintiff himself makes out. The case bears some resemblance to that in 46 All 465;¹ and for the same reasons that Tikaram of Budaun had to institute his suit in Bombay, I consider that the plaintiff of Nabinagar must institute his suit in Calcutta.

1. *Tikaram v. Daulat Ram*, (1924) 11 A I R All 530=80 I C 661=46 All 465 = 22 A L J 591.

I therefore set aside the order of the Subordinate Judge, restore the order of the Munsif and direct that the plaint be returned to the plaintiff for presentation to the proper Court. This application is allowed with costs.

D.S./R.K.

Application allowed.

A. I. R. 1939 Patna 141

MANOHAR LALL J.

Dharichhan Singh and others

Petitioners

v.

Emperor.

Criminal Revn. No. 473 of 1938, Decided on 31st August 1938, against order of Dist. Magistrate, Shahabad, D/- 28th July 1938.

(a) Criminal Trial — Practice — Magistrate should not send record of judicial character to police for opinion — What is proper course stated.

A Magistrate has no right to send the record of the proceedings, which are of a judicial character, before him to the police authorities for taking their opinion. The proper course for him is to ask the prosecuting inspector to take his instructions from the District Magistrate or the Superintendent of Police as to the attitude of the Crown towards the proceedings. [P 141 C 2; P 142 C 1]

(b) Criminal Trial—Compromise—Parties filing compromise for offences compoundable without Court's permission—Accused must be acquitted forthwith—Complainant cannot resile and insist on case being proceeded with.

In law a composition once arrived at between the parties is complete as soon as it is made and the Magistrate is in duty bound to order an acquittal on the filing of the compromise petition signed by both parties in Court for an offence for which no leave of the Court is required, and the complainant cannot by a subsequent withdrawal of the petition before any order is passed on it, insist upon the case being proceeded with : *A I R 1921 Cal 403, Foll.* [P 142 C 1, 2]

S. Safdar Imam and S. M. Siddique —
for Petitioners.

Harinandan Singh for Asst. Advocate.
General — *for the Crown.*

Order.—This is an application on behalf of three petitioners. It can be disposed of on a very narrow point. The petitioners were convicted as follows : Dharichhan was convicted for the offence under Sec. 325, I. P. C., and sentenced to four months' rigorous imprisonment and to a fine of Rs. 50. The other two petitioners, Ramgati and Lal Bahadur were convicted, the former under S. 323, I. P. C., and sentenced to two months rigorous imprisonment and

fine of Rs. 50, and the latter under Secs. 323/109, I. P. C., and sentenced to one month's rigorous imprisonment and a fine of Rs. 25. The occurrence, which took place undoubtedly on 7th March 1938 at about 9 or 10 A. M., was in connexion with a right to put a wall which had been constructed by the complainant three days before on the ridge between the field of the complainant and that of the accused. The wall was said to have been put by the complainant to protect his onion crop. As a result of an altercation the complainant was assaulted with a lathi causing the fracture of his right forearm. Some other assault also took place upon a man called Ramgach who got a bleeding injury on the head. The accused accordingly were put on trial as a result of a police investigation and the case proceeded before Mr. H. K. Khan, a Second Class Magistrate at Arrah.

On 6th May 1938 the parties, who are admittedly relations, put in a petition of compromise before the learned Magistrate and they desired the compromise to be recorded and the case to be disposed of without decision on the merits. It should be remembered that so far as two accused are concerned they were only accused for offences under Sec. 323, I. P. C., which is compoundable without the permission of the Court by the person stated in the third column of the table under S. 345 (1), Criminal P. C., i. e. the person to whom the hurt is caused. The learned Magistrate thereafter had no jurisdiction whatsoever to proceed with the cases of these two accused. The offence under S. 325, I. P. C., was also compoundable by the person to whom hurt was caused but with the permission of the Court. The order sheet of the learned Magistrate on this petition of compromise runs as follows :

Parties are relations and have arrived at terms and compromised the case. They file a joint compromise petition and another petition praying for permission to compromise the case. I have no reason to reject the compromise but as the Crown has also become a party to the proceedings the record is sent to S. P. through the C. S. I. to inquire if he has any objection.

In my opinion the learned Magistrate had no right to send the record of the proceedings, which were of a judicial character, before him to the Superintendent of Police for taking his opinion. The proper course for him was to ask the Prosecuting Inspector to take his instructions from the District Magistrate, or may be from the Superintendent of Police, as to the attitude

of the Crown towards the proposed compromise. However, this was done and the Superintendent of Police sent a note to the effect that in view of the grievous nature of the injury and the increasing resort to violence in the district he was opposed to the compromise. This note is at page 14 (bottom) of the record, and also contains notes from his junior officers. Now, the fact that the injury was grievous was obvious to the Magistrate himself, because he had to decide whether the case fell within S. 325 or under any other Section of the Penal Code, and he had also the injury report before him as well as the oral evidence of the person injured, showing the circumstances under which this particular assault took place. On a perusal of this note on 21st May 1938, the Magistrate for want of time postponed the case to 26th May. On that date the complainant, or the injured person, for some reason or other, which it is not necessary to state here, resiled from the compromise, and the Magistrate passed the following order :

Heard the parties. Perused the note of the Superintendent of Police. The complainant wants to revoke the compromise and proceed with the case as he and his companions had been badly injured and were not adequately compensated as agreed upon. In the circumstances I allow the case to proceed.

It is to be noticed that the Magistrate does not say in this order that he insisted upon the case to proceed because of the note of the Superintendent of Police. It seems to me that the Magistrate was influenced mainly by the fact that the parties had resiled from the compromise. If the learned Magistrate had known that in law a composition once arrived at between the parties is complete as soon as it is made, and that it has the effect of acquittal even though one of the parties later on resiles from the compromise, he would not have passed the order of 26th May. The case law on this point is reviewed in 33 C L J 226,¹ where the leading Calcutta and Madras cases on the point have been considered, and it was held in circumstances such as the present that the Magistrate was in duty bound to order an acquittal on the filing of the compromise petition signed by both parties in Court for an offence for which no leave of the Court was required, and the complainant cannot

by a subsequent withdrawal of the petition before any order is passed on it, insist upon the case being proceeded with.

In the present case I construe the order of the Magistrate of 6th May as having granted permission to all the accused and the complainant to compromise their case, and I ignore entirely his proceedings by which he sent the records of the case to the Superintendent of Police and obtained a note from him. The case was not of a character involving a serious breach of the peace, but it was merely a dispute between two neighbours about the erection of a wall. If I were satisfied that the learned Magistrate passed the order of 26th May withholding his sanction because of the note of the Superintendent of Police, I might have passed a different order ; but it seems to me that the Magistrate was influenced only by the fact that the parties had withdrawn from the compromise and could be allowed to do so, which was an erroneous view of the law, as I have shown above. I therefore am of opinion that the case ought not to have been allowed to proceed after 6th May 1938, and the subsequent proceedings must therefore be set aside, with the result that the accused are entitled to be acquitted by reason of the compromise which they arrived at between themselves and the complainant, which was evidenced by a petition of 6th May 1938, and which must be held to have been accepted by the Court. The fines, if paid, will be refunded. The petitioner Dharichhan is directed to be set at liberty, and the other petitioners will be discharged from bail.

N.S./R.K.

Accused acquitted.

A. I. R. 1939 Patna 142

WORT AG. C. J.

Sheikh Budhu — Defendant —

Appellant.

v.

*Sital Singh and others — Plaintiffs —
Respondents.*

Appeal No. 968 of 1936, Decided on 12th September 1938, from appellate decree of Sub-Judge, Second Court, Gaya, D/- 14th May 1936.

(a) Evidence Act (1872), S. 92 (1) — Usufructuary mortgage of holding providing under ijara that mortgagee should pay rent — Subsequent oral agreement that mortgagor should pay it is inadmissible.

1. Hem Chandra v. Girindra Chandra, (1921) 8 A I R Cal 403=60 I C 797=22 Cr L J 301=33 C L J 226.

Where a person who has a holding grants it by way of usufructuary mortgage to another person and the ijara provides that the ijaradar mortgagee should pay rent, a subsequent oral agreement to the effect that the mortgagor had agreed to pay the rent is inadmissible as it varies the terms of the written agreement. [P 143 C 1, 2]

(b) **Set-off—Sum, unless liquidated, is irrecoverable by way of set-off—To plead set-off it should be within period of limitation.**

The set-off known to the law in India is the one laid down in and provided for by the Civil Procedure Code. It is wrong to say that unless a sum is unliquidated, it is irrecoverable by way of set-off. It is just the very reverse. A person can only recover by way of set-off if the amount is legally recoverable. In order that a set-off might be pleaded, it would have to be within the period of limitation at the time the action of the plaintiffs was brought: (1950) 15 Q B 1046, *Rel. on*; 14 C W N 170, *Ref.* [P 143 C 2 ; P 144 C 1]

Golam Mohammad — *for Appellant.*

A. N. Lal — *for Respondents.*

Judgment. — In my judgment Sec. 92, Evidence Act, clearly disposes of this case. The short facts are that the plaintiffs with another person had a holding which they granted by way of usufructuary mortgage to the defendant, who is the appellant before me. Under the ijara the defendant ijaradar was liable for rent. The ijara was of the year 1336 corresponding to 21st August 1928. The plaintiffs brought this action stating that they had been sued by the landlords for the years 1337 and 1338, that is 1929 and 1930, the years following the year in which the ijara transaction was entered into. They therefore sought to recover the rent they were made liable to pay for the defendant. The defendant set up this defence in substance :

You may have paid for the years 1337 and 1338, but you cannot recover from me. By an agreement made subsequent to the ijara transaction you had agreed to pay rent for those years and I in consideration of that had agreed to pay the arrears (which you were already liable for) for the years 1334 and 1335.

If that oral agreement had been established, the only sum which the plaintiffs could have claimed on the terms of the agreement (and I might add in parenthesis that the learned Judge in the Court below sets out these terms) was the balance between the sum that they paid and that which the defendant paid. This is of course under the oral agreement. But the plaintiffs contend that such a contract was not made and they say further that in any event Sec. 92, Evidence Act, makes an oral agreement of that kind inadmissible in evidence. Now, this is a registered document and therefore quite clearly comes within

the mischief of sub-s. 1 of Sec. 92 and Proviso (4) to the Section which runs thus:

The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing.

It is obvious that even if Proviso (4) does not apply as referring to immovable property and this subsequent oral agreement refers to the payment of rent, yet, it would come under sub-s. (1), because it is a contract which varies, adds to or subtracts from the terms of the written agreement. It varies the terms by reason of the fact that, whereas under the written agreement the defendant was liable, under the oral agreement the plaintiffs were liable. That being so, the plaintiffs could prove the facts which established their cause of action without being successfully met by the defence which was set up by the defendant.

The question is what are the rights of the defendant? The learned Judge in the Court below has entirely misconceived the law and I fail to discover where he got the proposition which he purported to lay down. He seems to be under a complete misapprehension and states that unless a sum is unliquidated, it is irrecoverable by way of set-off. It is just the very reverse, and the learned Judge was confusing the old jurisdiction of the Court of Chancery with the principles which apply in the present day. Under the jurisdiction of the old Court of Chancery in some cases although a sum was unliquidated, it might be dealt with by way of set-off. What is the position of the defendant if the agreement which he set up had been proved? It would not be a question of set-off at all. A similar case is, 14 C W N 170,¹ which by the bye is not an authority for the statement that there are set-offs other than statutory ones. The set-off known to the law in India is the one laid down in and provided for by the Civil Procedure Code. If the oral agreement goes, then the defendant in any attempt to recover money from the plaintiff is limited to his rights apart from the agreement; and what are they? He says (and this part of the agreement may be proved: I am assuming in his favour), "at the request of the plaintiff I paid these arrears of 1334 and 1335; I therefore seek to recover them." Apart

1. *Edward Dalgirish v. Ramdin Singh*, (1909) 14 C W N 170=5 I O 67.

from the agreement, of course, the rights of the defendant are such as he would not be entitled to anything as a set-off, because as I say and repeat the oral agreement is gone. He can only recover by way of set-off if the amount is legally recoverable. As far back as 1850 in (1850) 15 Q B 1046² it was decided that in order that a set-off might be pleaded, it would have to be within the period of limitation at the time the action of the plaintiff was brought. It really is immaterial in this case because whether we take the latter period, that is to say the date of the defence or the written statement, or the former, namely the time the action was brought by the plaintiff, in any event it was barred by limitation. In those circumstances unfortunately for the defendant he was not entitled to recover the sum either by way of set-off or under the agreement for the reasons which I have stated.

The appeal of the defendant therefore fails and is dismissed with costs. Leave to appeal is refused.

D.S./R.K.

Appeal dismissed.

2. Walker v. Clements, (1850) 15 Q B 1046=81 R R 882=117 E R 755.

A. I. R. 1939 Patna 144

FAZL ALI AND AGARWALA JJ.

Dwarkadas Gobindram Firm —

Decree-holder — Appellant.

v.

Saligram Rekhranj Firm —

Judgment-debtor — Respondent.

Appeal No. 307 of 1937, Decided on 5th May 1938, from appellate order of Sub-Judge, Chaibassa, D/- 10th September 1937.

(a) Civil P. C. (1908), S. 42 — Court transferring decree for execution to another Court is entitled to re-call it if decree has not been executed — Application by decree-holder to Court transferring decree for re-calling it is step-in-aid of execution made in accordance with law before proper Court and can save limitation under Art. 11, Limitation Act.

A Court transferring a decree for execution to another Court does not thereby altogether lose control over the decree but may still pass certain orders in connexion with execution. It has, among other powers, the power to re-call the execution proceedings from the Court to which the decree has been transferred for execution, if the decree has not been already executed. Such power must exist because if the Court can transfer the decree it must also have the power to re-call it. This being so, an application by the decree-holder made to the Court transferring a decree for execution to

another Court for re-calling the decree from that Court, so that it might be executed by the transferring Court, is a step-in-aid of execution made in accordance with law before a proper Court and is competent to save limitation under Art. 11, Limitation Act : A I R 1926 Bom 271 ; 20 All 129 ; A I R 1932 Pat 286 and A I R 1935 Lah 465, Rel. on. [P 145 C 1, 2]

(b) Limitation Act (1908), Art. 182, Expl. 2 — "Proper Court" does not include Court which has already transferred decree for execution to another Court.

The definition of "proper Court" as given in Expl. 2 to Art. 182 is not wide enough to include a Court which has already transferred a decree for execution to another Court. [P 145 C 2]

B. C. De and N. N. Roy —

for Appellant.

B. N. Mitter and Ajit Kumar Mitter —

for Respondent.

Fazl Ali J. — This is an appeal by a decree-holder from an order passed by the Subordinate Judge of Chaibassa, dismissing his petition for execution on the ground of limitation. The decree which is sought to be executed was passed by the Subordinate Judge of Wardha on 21st January 1932. On 1st March 1932, the appellant applied to the Subordinate Judge to transfer the decree to Jamshedpur for execution and his application was granted on 14th March 1932. The appellant however took no steps at Jamshedpur and so the decree could not be executed. On 4th March 1935, he made a second application to the Subordinate Judge at Wardha in which he asked him to re-call the proceedings from Jamshedpur so that the decree might be executed at Wardha. The Subordinate Judge however before passing any final order on the petition wanted to be satisfied that the decree had not been executed at Jamshedpur and the decree-holder filed an affidavit to this effect on 5th March 1935. Thereupon the Subordinate Judge of Wardha issued a warrant of arrest against the judgment-debtor as was prayed for by the decree-holder. The judgment-debtor, however, could not be arrested and the execution proceedings were struck off on 3rd May 1935. On 9th November 1935 the decree-holder made a third application to the Subordinate Judge at Wardha asking him to transfer the decree once more to Jamshedpur. This application was granted and the decree was transferred on 21st November 1935. On 9th July 1936 the present application for execution was filed at Jamshedpur but it was opposed by the judgment-debtor on the ground of limitation.

His contention was that the application made by the decree-holder on 4th March 1935 before the Subordinate Judge at Wardha asking him to re-call the execution proceedings from Jamshedpur was not an application made to the "proper Court" and therefore did not save limitation under Art. 11, Limitation Act. This contention has been upheld by both the Courts below and hence this appeal.

The Courts below have relied mainly on the well-known case in 43 I A 238,¹ in which it was held by the Privy Council that when a decree passed by a District Court had been sent to the Court of a Munsif for execution and had not been returned to that Court, an application for execution made in the first Court was not an application to the proper Court and therefore did not save limitation. This case has been much discussed in recent times and while some of the Courts have rigidly followed it and held that until the Court to which a decree is transferred for execution sends to the transferring Court the certificate under Sec. 41, Civil P. C., the latter Court cannot entertain an application for execution; it has been laid down in certain cases that even after the decree has been transferred to another Court, the Court which passed the decree is not precluded from entertaining an application for execution under certain circumstances, as for instance, when the decree-holder proposes a different mode of execution or wishes to proceed against a different property. It has also been pointed out in some cases that the point on which the Privy Council rested their decision in 43 I A 238¹ was that the decree-holder wished to sell in that case certain land which was within the jurisdiction not of the District Court but within the jurisdiction of the Munsif to whom the decree had already been sent for execution: *see* 39 C W N 129² and 53 Bom 844.³ In my opinion it is unnecessary for the purpose of deciding this appeal to discuss the divergent views which have been expressed with reference to 43 I A 238.¹ The point on which all the Courts

are agreed is that the Court when it transfers the decree for execution does not thereby altogether lose control over the decree, but may still pass certain orders in connexion with execution. For instance, it has power to stay execution, to make an order for simultaneous execution by another Court and to decide an objection as to limitation if referred to it by the Court to which the decree has been transferred for execution. Again, if after a decree has been transferred for execution the judgment-debtor dies, the Court which passed the decree is, by S. 50, Civil P. C., the proper Court to order that execution should proceed against the legal representative. These being admittedly the powers of the transferring Court, the question as to whether it has the power to re-call the execution proceedings from the Court to which the decree has been transferred for execution admits of one answer only and it is that *prima facie* such power must exist, because if the Court can transfer the decree it must also have the power to bring it back. The point seems to have been directly raised in 50 Bom 439⁴ and was answered by Macleod C. J. in the following words:

It is true that under S. 41 of the Code a Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution or where the former Court fails to execute the same, the circumstances attending such failure. But it cannot possibly be deduced from the provision of that Section that once the Court which originally passed the decree has sent it for execution to another Court, it has no power to order that the decree be returned.

The same view is strongly suggested by the decision of the Allahabad High Court in 20 All 129⁵ and of this Court in 11 Pat 513⁶ and the observations made by Skemp J. in A I R 1935 Lah 465.⁷ Now, once it is held that the Court which has transferred the decree to another Court has the power to re-call the execution proceedings from that Court, the application made by the decree-holder on 4th March 1935 must be held to be a step-in-aid of execution made in accordance with law before the proper Court. The expression "proper Court" has been somewhat loosely defined in Expl. 2

1. *Maharaja of Bobbili v. Narasaru Peddali Balaru*, (1916) 3 A I R P O 16 = 36 I O 682 = 39 Mad 640 = 43 I A 238 (P O).
2. *Rajani Kanta v. Golam Mahiuddin*, (1935) 22 A I R Cal 99 = 154 I O 731 = 60 O L J 461 = 39 C W N 129.
3. *Fatechand Rampratap v. Jitmal Rupchand*, (1929) 16 A I R Bom 418 = 123 I O 507 = 53 Bom 844 = 81 Bom L R 1105.
1939 P/19 & 20

4. *Chandu Lal Hathchand v. Mulchand Ratanchand*, (1926) 13 A I R Bom 271 = 94 I O 146 = 50 Bom 439 = 28 Bom L R 881.
5. *Abda Begam v. Muzaffar Husen Khan*, (1898) 20 All 129 = 1897 A W N 218.
6. *Sheshaiyer Rajamanner v. Madan Mohan*, (1932) 19 A I R Pat 286 = 139 I O 843 = 11 Pat 513 = 13 P L T 623.
7. *Kanti Narain v. Madan Gopal*, (1935) 22 A I R Lah 465 = 157 I O 488 = 37 P L R 636 (F B).

of Art. 182 "as the Court whose duty it is to execute the decree." It was contended before us on behalf of the appellant that this definition was wide enough to include a Court which has already transferred a decree for execution to another Court. In view however of the authorities on the subject, it appears to me to be not permissible to give to this expression the wide meaning attributed to it on behalf of the appellant. But if the Court which has transferred the decree has the power to execute it after it has been re-called, it must be held that the Court at Wardha was the "proper Court" for dealing with the application which was made by the decree-holder in this case on 4th March 1932. In my opinion the application of the decree-holder dated 4th March 1932 was made to a proper Court and so it saves limitation. I would therefore allow this appeal, set aside the orders of the Courts below and direct that the execution may be proceeded with. The appellant decree-holder will be entitled to his costs in this Court as well as in the Courts below.

Agarwala J. — I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1939 Patna 146

COURTNEY-TERRELL C. J. AND
FAZL ALI J.

Raja Shiva Prasad Singh —

Plaintiff — Appellant.

v.

Tom Smith and others —

Defendants — Respondents.

Appeal No. 80 of 1935, Decided on 18th February 1938, from decision of Sub-Judge, Dhanbad, D/- 6th December 1934.

(a) Transfer of Property Act (1882), S. 58 (e) — English mortgage contemplates absolute transfer to mortgagee—English mortgage of interest of lessee in lease—Mortgagee is liable by privity of contract to pay rent. (*But see A I R 1939 P C 14 which impliedly overrules this case.*)

Section 58 (e) expressly contemplates by the words "and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor" the recognition of the principle of complete transfer. Hence a lessee mortgaging his interest by an English mortgage passes the whole of his interest to the mortgagee and the mortgagee is liable by privity of contract between him and the lessor landlord to pay rent reserved by the lease. The fact that the lessee mortgagor was bound both to the lessor and the mortgagee to pay rent has

nothing to do with the liability of the mortgagee to the lessor: *A I R 1932 Cal 775, Dissent.*; *A I R 1927 Cal 725, Approved*; (1819) 1 Brod & B 238, Ref.; 34 All 63 (P C), Disting.; *A I R 1923 P C 54, Expl.* [P 148 C 1,2]

(b) Transfer of Property Act (1882), S. 58 (e) — Mortgage by absolute transfer may be effective even though it does not comply with all terms of English mortgage.

Section 58 does not purport to enumerate a complete catalogue of permissible mortgages. Nor does it enact that a mortgage by absolute transfer shall not be effective unless it complies with all the terms of an English mortgage. [P 148 C 1,2]

P. R. Das, B. C. De and N. N. Ray —

for Appellant.

S. N. Rose and J. C. Sinha —

for Respondents.

Courtney-Terrell C. J.—On 24th April 1907, Raja Durga Prasad Singh, ancestor of the plaintiff, granted to Mr. C. J. Smith a coal mining lease of land in his zamindari of Jharia for nine hundred and ninety-nine years at a royalty of 2 annas 6 pies per ton on the quantity of coal raised every year with a minimum of Rs. 975 per annum. The tenant was to pay Government cesses. Cls. 8, 9 and 13 were as follows :

Cl. 8. That for the amount of royalty the leasehold land and the machineries and (here follows an illegible word) remain wholly hypothecated. If I make default in payment of royalty, you will be competent to realize the same by selling the leasehold land. In regard to the same I or my heirs or successors-in-interest shall have no objection.

Cl. 9. That I shall be competent to transfer the leasehold land by gift, sale or otherwise, according to my wish. But thereby there will be no obstacle to the priority of dues, i.e. the transferee will remain wholly bound to pay the amount of royalty.

Cl. 13. That I as well as my heirs and successors-in-interest remain wholly bound by the aforesaid terms.

On 4th February 1920, Mr. C. J. Smith mortgaged his interest to the Jagadamba Loan Company Limited, and their assigns. After reciting that the mortgagor was seised and possessed of the lands, hereditaments and premises subject to the payment of rents and royalties and after reciting the lease under which the mortgagor had obtained the same and after reciting that the mortgagor had requested the Company for a loan on cash credit basis of three lakhs of rupees the indenture witnessed that the mortgagor covenanted to pay on 4th February 1923, the full amount of the floating balance for the time being owing by the mortgagor to the company on the cash credit loan account together with interest and the indenture further witnessed that in further pursuance of the agreement

be the mortgagor doth hereby grant, convey and transfer to the company all those, the mines, beds and seams of coal lying and under the lands hereditaments and premises described together with all collieries open and unopened and all erections therein and thereunto belonging or appertaining therewith usually held and enjoyed or occupied and also all estate, right, title and interest, use trust property inheritance possession claim and demand whatsoever of law and in equity of him the mortgagor of into out of and upon the said premises and every part or parcel thereof including all rents and royalties payable to the mortgagor from the tenants of the same premises together with all deeds, pattas, muniments and writings and evidences of title whatsoever in any-wise relating to or concerning the lands, tenements, buildings and premises or any part thereof which now are or thereafter shall or may be in possession or lawful power or control of the mortgagor or any other person or persons from whom he can procure the same without action or suit at law or in equity to have and to hold the same mines and premises hereinbefore expressed to be hereby granted, conveyed pattas or leases granted by the mortgagor as aforesaid and transferred unto the Company according to the nature and tenure thereof respectively subject nevertheless to the proviso for redemption hereinafter contained.

Then follows a proviso that upon repayment of the money lent the Company shall at any time thereafter upon the request and cost of the mortgagor reconvey the said lands, hereditaments and premises hereinbefore expressed to be hereby granted, conveyed and transferred unto the mortgagor as he shall direct.

Later on followed a clause by which the mortgagor covenanted with the Company that

he, the mortgagor, will during the subsistence of their security pay all rents, royalties, taxes, rates and imposition that are now payable or may hereinafter be payable in respect of the mortgaged premises and shall also perform and observe the terms and conditions contained in the several head leases or pattas under which they are respectively held thereof.

The mortgagor then covenanted for good title to grant, convey and transfer the mortgaged premises to the Company and further that if defaults were made by the mortgagor in paying the rents, royalties and taxes in respect of the mortgaged premises and that if the mortgagor committed any breach of any of the covenants and conditions the Company might either take proceedings to realize the money secured or to enter into possession of the mortgaged premises without being responsible or accountable as a mortgagee in possession and thenceforth to hold and enjoy and receive the rents, issues and profits without any interruption, claim and demand by the mortgagor. Lastly there was a clause, provided always and it is hereby agreed and declared that notwithstanding anything hereinbefore

contained, the mortgagor shall be at liberty at any time hereafter to pay off the amount hereby secured and to obtain a reconveyance of the premises hereby mortgaged.

The mortgagee, Jagadamba Loan Company Limited, entered into possession and remained in possession for some years. On 20th April 1928 a suit was brought by the receiver of the Jharia Raj estate against Mr. C. J. Smith, lessee of the property, the New Jinagora Coal Company and the Jagadamba Loan Company Limited, for recovery of the royalty commission. Mr. C. J. Smith having died during the pendency of the suit, his son and widow were substituted in his place. A preliminary decree was passed against all the defendants. A final mortgage decree was passed on 30th August 1930 for a sum of about Rs. 2,90,000. The decree was put into execution and the charged property was sold for a sum of Rs. 1,00,000 on 25th June 1931. The receiver of the Jharia Raj was discharged and Raja Shiva Prasad Singh of Jharia who succeeded to the estate and is the present plaintiff, filed an application under O. 34, R. 6, Civil P. C., for a personal decree against the defendants for recovery of the unrecovered balance of the decretal amount.

The Subordinate Judge granted a personal decree against the Smiths but refused it as to the Jagadamba Loan Company Limited, and this appeal is directed against that refusal. In the opinion of the learned Subordinate Judge the Company was not liable for the payment of the royalty either by privity of contract or by privity of estate and he held that the mortgage deed by Mr. Smith to the Jagadamba Loan Company was not an absolute assignment of Smith's interest in the leasehold properties and that the mortgage deed was not an "English mortgage" within the meaning of S. 58 (e), T. P. Act. The whole argument is based upon the theory that under the Indian law, as expressed in the Transfer of Property Act, a mortgage by assignment always leaves some interest in the mortgagor and that consequently there cannot be an absolute assignment of the whole of the mortgagor's interest. In support of this principle reference has been made to a decision of Mukerji and Guha JJ. in 59 Cal 1314¹ at p. 1329. In this decision the learned Judges referred to an earlier deci-

1. *Falakrist Pal v. Jagannath Marwari*, (1932) 19 A I R Cal 775=140 I C 788=59 Cal 1314=56 C L J 187=36 C W N 709.

sion of Rankin C. J. in 54 Cal 813² in which the learned Chief Justice had decided that in India a lessee mortgaging his interest by an English mortgage passed the whole of the interest to the mortgagee and that the latter became liable for the rent. Mukerji J. expressed the view that this view could not be accepted in its entirety and that an English mortgage in India could not properly be regarded as the transfer of the entire estate of the mortgagor to the mortgagee. He arrived at this opinion by arguing that S. 58, Cl. (e), must be read subject to the definition of a mortgage as given in Cl. (a). I am unable to agree with the opinion expressed by Mukerji J., for Sec. 58 (e) expressly contemplates by the words "and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor" the recognition of the principle of complete transfer, and no terms will be clearer than the terms set forth in the mortgage now under consideration. There certainly could not be a "reconveyance" of that which had not previously been conveyed. I prefer the opinion expressed by Rankin C. J. that a mortgagee by assignment (certainly when in possession as in the case before us) is liable for the rent reserved by the lease.

An argument was addressed to us that the Transfer of Property Act was amended by Act 20 of 1929 in which the right of a mortgagee being strictly limited to a right to sue for the mortgage money or for sale of the mortgaged property, it was clear that the effectiveness of a transfer as contemplated by an English mortgage was effectually abolished and could no longer be regarded as an absolute transfer. But it may be observed that the Legislature took no steps to amend S. 58 (e); nor did it, as it might have done, repeal S. 58 (e) and the Act continues to contemplate an absolute transfer of the mortgaged property. It was further suggested that by reason of the fact that this mortgage does not bind the mortgagor to pay the mortgage money on a specific date but entitles him to have a reconveyance on payment "at any time hereafter" that the mortgage in question is not within the strict definition of an "English mortgage". But S. 58 does not purport to enumerate a complete catalogue of per-

missible mortgages. Nor does it enact that a mortgage by absolute transfer shall not be effective unless it complies with all the terms of an English mortgage. There is nothing in this point.

Some argument has been raised upon the fact that the mortgagor covenanted to pay the rent reserved under the lease, and it is certainly true that the lessee mortgagor could not release himself from the obligation to pay the rent. He was bound both to the landlord and to the mortgagee to fulfil this obligation. This however has nothing whatever to do with the liability of the mortgagee to the landlord. In my opinion this case is one of privity of contract between the mortgagee and the landlord. Mr. Smith covenanted on behalf of himself and his assigns to pay the rent to the landlord, and the mortgagees took possession of the land under the mortgage with the express knowledge of their mortgagor's covenant. Whether or not the mortgagor covenanted to pay rent to the landlord and whether or not for a period of time he actually paid the rent is immaterial. Dallas C. J. delivering the judgment of ten Judges in (1819) 1 Brod & B 238=129 E R 714³ at page 723 said :

There is privity of estate if legal possession, that is acceptance of the thing assigned by acceptance of the assignment, be equivalent to actual entry which it is, if there be justness in the observations already made ; and even as to privity of contract there is such privity also for the contract of the lessor is with the lessee and his assigns, and the defendants here are the assigns of the lessee ; it is therefore a contract between the lessor and the assignee, that is in this case between the plaintiff and the defendants.

There is therefore no need to discuss at length the vexed question as to whether the English conception of privity of estate exists or not in Indian law. The doctrine of privity of contract is certainly a part of Indian law. On behalf of the respondents reliance was placed upon the decision of the Judicial Committee of the Privy Council in 39 I A 7.⁴ But this has no application for there was certainly no covenant between the original mortgagor and the original mortgagee. They also relied on the Privy Council decision in 26 C W N 771⁵ and the question for determination was

3. Williams v. Bosanquet, (1819) 1 Brod & B 238 = 3 Moore 500 = 21 R R 585 = 129 E R 714.

4. Jamna Das v. Ram Autar, (1912) 34 All 63 = 13 I C 304 = 39 I A 7 = 9 A L J 37 (P C).

5. Nanku Prasad v. Kamta Prasad, (1928) 10 A I R P C 54 = 95 I C 970 = 26 C W N 771 (P C).

2. Bengal National Bank, Ltd. v. Janaki Nath, (1927) 14 A I R Cal 725 = 104 I C 484 = 54 Cal 813 = 31 C W N 973.

whether the purchaser of a mortgaged property from the mortgagor became by retaining part of the purchase price to enable him to pay off the mortgage, personally liable to discharge the mortgage debt. In this case there was certainly no privity of contract between the purchasers of the equity of redemption and the mortgagee. I agree with the argument of Mr. Das that this is a case in which the mortgagee has become a party to the original lease, and he has come in voluntarily and not by operation of law. The landlord is not seeking to make the mortgagee liable on the terms of the mortgage but to make him liable on the terms as of the lease and consequently he is liable to a personal decree when the exercise of the charge by hypothecation has failed to satisfy the amount of the mortgage decree.

For these reasons I am of opinion that the refusal of such decree by the Subordinate Judge was erroneous and I would reverse his decision and pass a decree against the Jagadamba Loan Company Limited, for the dues in respect of the six years preceding the institution of the suit with costs throughout to be paid by the Jagadamba Loan Company Limited.

Fazl Ali J.—I agree.

D.S./R.K.

Decision reversed.

A. I. R. 1939 Patna 149

WORT AG. C. J.

Surja Gorain — Defendant 1
Appellant

v.

Gnanendra Nath Banerji and others,
Plaintiffs and others, Defendants 2, 3
and 4 — Respondents.

Appeal No. 1026 of 1936, Decided on 20th September 1938, from appellate decree of Judicial Commissioner, Chota Nagpur (Purulia), D/. 2nd July 1936.

(a) Chota Nagpur Tenancy Act (6 of 1908), S. 69—Scope—Misuse by sub-tenant to whom lands transferred by tenant — Misuse held capable of remedy.

The misuse does not become incapable of remedy by reason of the tenant parting with the land, because it is the nature of the misuse to which S. 69 is directed and not to the person who is guilty of the misuse. [P 149 C 2; P 150 C 1]

Where a sub-tenant, to whom the lands had been transferred by the tenant, built a house on a portion of the land in breach of the terms of tenancy :

Held that the misuse was capable of remedy :
A I R 1919 Cal 722; A I R 1935 Pat 122 and
(1827) 4 Russ 1, Disting. [P 150 C 1]

(b) Limitation Act (1908), Art. 115 — Continuing breach—Starting point — Building house contrary to terms of tenancy—Limitation commences when house is finally erected.

In the case of continuing breach of contract or continuing wrong independent of contract, fresh period of limitation begins to run from the moment the breach or the wrong continues. [P 150 C 2]

Where a house is being built upon lands contrary to the terms of tenancy, the building of the house is a continuing wrong and limitation commences to run against the landlord when the house is finally erected. [P 150 C 2]

B. C. De and N. N. Roy —

for Appellant.

S. N. Bose and B. N. Rai —

for Respondents.

Judgment. — This appeal is by the tenant defendant in an action in which the plaintiffs claimed compensation and ejectment by reason of misuse by the defendant of the land in the holding. It appears that on a small portion of the holding, a house had been built by a person to whom the land had been transferred by the tenant-defendant. The case came under Sec. 22, Chota Nagpur Tenancy Act; for the purposes of decision of this case, I need refer to one other Section, namely S. 69. The trial Court gave a decree for Rs. 100 compensation and ejectment within six months if that amount was not paid. On appeal the learned Judicial Commissioner came to the conclusion that the misuse was capable of remedy and therefore confirmed the decree of the trial Court for Rs. 100 and also gave a decree for the remedy of the misuse, on failure of which, the plaintiffs were entitled to eject the defendant-tenant.

Now, from what I have already stated, it would appear that the tenant could remedy the misuse only by forcing his sub-tenant to do so : to put it in the language of Mr. De, the remedy of the misuse is within the power of the sub-tenant and not within the power of the tenant, his client. A number of authorities have been relied upon from which I am asked to draw an inference that the correct view of the law is that when a tenant has transferred his holding, whatever the nature of the use or misuse of it is, it becomes incapable of being remedied : in other words, when it is beyond the tenant's own power, sub-s. (3) of S. 69 does not apply. I must say that I cannot construe that Section in that manner. It is rather the nature of the misuse to which

the Section is directed and not to the person who is guilty of the misuse (in this case it was the sub-tenant who erected a house on the land in question). 29 C L J 40¹ is a case relied upon for this contention. The decision however in that case did not relate to this point. The learned Judge who delivered the judgment of the Court stated in the course of his judgment that the Subordinate Judge, while agreeing that the breach of the contract was not capable of remedy, set aside the decree of the Munsif and directed that the plaintiff should get khas possession of the tenure by ejecting the defendant.

The judgment then proceeded to discuss the application of S. 155, Ben. Ten. Act, to the facts of the case. It was not a case in which it was decided that the tenant had parted with the land and that the misuse by parting became ipso facto incapable of remedy. Similar state of affairs exists in 14 Pat 279;² the proposition was not argued and certainly not decided by this Court. Even if the learned Judge of the trial Court had come to the conclusion that the house was capable of being pulled down, the removal of the house would only have placed the land in the position it was before the acts complained of. In my judgment the only possible construction to be placed on S. 69 is that the misuse did not become incapable of remedy by reason of the tenant parting with the land. It is not for me to say how the tenant, if this decree was passed against him, would perform what he is ordered by the Court to perform : it is sufficient for me to decide whether the decree should be passed.

Mr. De in support of this part of his argument referred to two English decisions in actions for specific performance, one (1827) 4 Russ 1,³ in which before the action was heard, the deeds of title had been burnt in an accidental fire at the Solicitor's office and the other in which the defendant had deliberately burnt his title deed. In both cases although the plaintiff got his remedy, he was refused an order for specific performance (if I may say so with respect to the learned Judges who decided those cases) for very obvious reasons. In the stronger case, namely where the defendant had burnt his own title deed and therefore was to some extent pleading his own wrong, the

Court refused to make a decree or to give a judgment for the disobedience of which the defendant could be sent to prison. He was bound to disobey; he could not avoid disobeying the decree of the Court for the simple reason that it was beyond his power to obey. That, of course, would not dispose of the action, and in all such cases in England the plaintiff would be entitled to compensation.

The next question for determination is whether the action was barred by limitation. There seems to have been some dispute in the trial Court as to when the house was built : there was also a dispute whether limitation ran from the date the building was commenced or from the date on which it was completed. S. 23, Limitation Act, is referred to. That is a Section which in my judgment gives no assistance to the defendant-appellant. In the case of continuing breach of contract or continuing wrong independent of contract, fresh period of limitation begins to run from the moment the breach or the wrong continues. It is the contention of Mr. De, as I have already indicated, that limitation ran from the date of the commencement of the building; in other words, from the very moment the first act of the building commenced. It may be an exaggerated way to put the point; but the moment it is put in that way, it will be seen how unsustainable the argument is. When the person commenced the foundation of the building the plaintiff could have no knowledge whether the land was being used contrary to the terms of the tenancy or contrary to the purposes for which the land was let out. The knowledge came as the building progressed. It is impossible therefore to say that limitation was running against the plaintiff from the moment the first operation of the building was commenced. In my judgment, quite clearly, the building of the house was a continuing wrong and, when it was finally erected, limitation did commence definitely against the plaintiff. In that view of the matter it is clear that the action was not barred by limitation.

For those reasons I would hold that the decision of the learned Judge in the Court below was right and the appeal therefore fails and must be dismissed with costs. Leave to appeal is refused.

N.S./R.K.

Appeal dismissed.

1. Afizaddi v. Satis Chandra Banerjee, (1919) 6 A I R Cal 722=34 I C 497=29 C L J 40.

2. Mt. Sadia Bibi v. Dukhi Gope, (1935) 22 A I R Pat 422=159 I C 163=14 Pat 279=16 P L T 830.

3. Bryant v. Busk, (1827) 4 Russ 1=28 R R 1.

A. I. R. 1939 Patna 151

MOHAMAD NOOR J.

Rajendra Narayan Bhanja Deo

v.

Chaudhuri Chintamani Mahapatra

Criminal Ref. No. 2 (Orissa) of 1938, Decided on 25th April 1938, made by Sess. Judge, Cuttack, Sambalpur, D/- 14th February 1938.

(a) Criminal P. C. (1898), Ss. 107 and 145—Delivery of possession by Civil Court—Proceedings under Criminal P. C. can be started either under S. 107 or S. 145—When Magistrate should proceed under either Section stated—Judgment-debtor regaining possession and peacefully enjoying it when proceedings started—Inference to be drawn by Magistrate and presumption to start with mentioned—Decree-holder getting symbolical possession of judgment-debtor's zamindari property—Possession interfered with by judgment-debtor—Decree-holder starting proceedings under S. 145—Magistrate cannot refuse to entertain proceedings on ground that actual possession was not given to decree-holder.

A Magistrate in spite of delivery of possession by the Civil Court, has jurisdiction to start a case under S. 145. But no hard and fast rule can be laid down. A Magistrate has discretion when there is an apprehension of a breach of the peace to choose either S. 145 or S. 107. It must be left to his discretion which particular Section he chooses. Generally speaking, if the dispute arises immediately after the delivery of possession by the Civil Court and is between the parties to that delivery of possession, the more appropriate step will be to bind down under Sec. 107 the party who has been dispossessed by the Court. But if the delivery of possession is an old one or the dispute is between a man who has been given possession and a man who was not dispossessed by the Court, a proceeding under S. 145 will be more suitable. [P 152 C 2; P 153 C 1]

Where symbolical possession of the judgment-debtor's zamindari property is given to the decree-holder who afterwards finds that his possession is being interfered with by the judgment-debtor and initiates proceedings under Sec. 145 for retaining possession, the Magistrate cannot refuse to entertain the proceedings on the ground that the decree-holder had not got actual possession from the Civil Court. [P 153 C 1]

If however circumstances show that the decree-holder or auction-purchaser has slept over his right and has allowed the judgment-debtor to regain possession of the property and he is at the time of the proceeding in peaceful possession of it, the matter stands on a quite different footing. But in such cases the Magistrates must take it as an indisputable fact, once delivery of possession is proved, that on the day of the delivery of possession the party to whom possession was given was in possession as against the man who was party to that delivery of possession and was bound by the writ. He must start with the presumption that the state of things which existed on that day continued to exist thereafter unless the contrary is

established. The judgment-debtor can only succeed if he establishes beyond doubt that he had completely ousted the man who was put in possession by the Court and was in peaceful possession of the property in dispute. [P 154 C 1,2]

(b) Possession — Nature of — Actual and symbolical possession—Distinction—Delivery of possession under Civil P. C. differs according to nature of possession and property—Legal effect of possession in any manner is same as against judgment-debtor—Delivery of possession of zamindari property by proclamation is actual delivery and not symbolical.

The distinction between 'actual possession' and 'symbolical possession' is a distinction without difference, when the question arises between the parties to the delivery of possession and this distinction has absolutely no place in the Code of Civil Procedure. The Code prescribes two kinds of delivery of possession according to the nature of the possession of the judgment-debtor: one is under O. 21, R. 35 or R. 95 and the other is under O. 21, R. 36 or R. 96. Thus the manner of the delivery of possession is according to the nature of the possession of the man who is to be dispossessed and not that its effect in law is different as against the judgment-debtor. But even if the property is in direct possession of the judgment-debtor the mode of delivery will naturally vary according to the nature of the property as mode of possession of different properties vary. If the property is in actual physical occupation of the judgment-debtor, for instance, if the property is a house and the judgment-debtor is residing in it he must be dispossessed of it by being bodily removed from it and by putting the decree-holder or auction-purchaser in physical occupation of it. But if the property is zamindari or a tank or mineral rights in indirect possession of the judgment-debtor, though the delivery of possession will be by ousting the judgment-debtor from it, it is obvious that the judgment-debtor cannot be physically removed from it and the decree-holder or auction-purchaser put in physical occupation of it. The delivery of possession in such case is by proclaiming that decree-holder has been put into possession. This delivery of possession is not symbolical but actual and is as effective against the judgment-debtor as his physical removal from a house: *A I R 1932 Pat 145 and A I R 1934 Pat 565, Ref.*

[P 153 C 1,2]

Regarding third party, the matter stands on a different footing. If he is rightly or wrongly physically removed from the property (that is, if he is dispossessed), and if he does not take proper remedy in time, he will lose his right. But if the delivery of possession is purely formal in the sense that nobody has been physically ousted but that there has been a proclamation to that effect, he, if actually in possession, cannot be said to have been dispossessed. [P 153 C 2]

Advocate-General and P. Mahanty —
for Reference.

M. Subba Rao — against Reference.

Mohamad Noor J.—This is a reference by the Sessions Judge of Cuttack recommending that an order of a learned Magistrate of Cuttack under Sec. 145, Criminal P. C., declaring the first party of a proceed.

ing under that Section to be in possession of the property in dispute, namely a stone quarry, be set aside.

The facts are that the Raja Bahadur of Kanika held a mortgage of two estates of the opposite party. He sued on that mortgage for sale of those estates and before a preliminary decree could be passed, the estate fell into arrears of Government revenue. The Raja Bahadur applied to the Court where the mortgage suit was pending for an order to put him in possession of the property under O. 39, R. 9, Civil P. C., on the ground that on account of the default of the mortgagor in the payment of Government revenue the mortgaged properties were to be sold. The Court passed an order under that rule and a writ of delivery of possession of the properties in favour of the Raja was admittedly served on the locality from 16th October to 18th October 1936. It appears from the papers that the possession of the Kachari of the estate was also given to him, and that certain moveables which were lying there were taken away by the men of the first party. After this delivery of possession commenced the usual struggle of the judgment-debtor to retain the property in spite of the possession given by the Court, and I regret that the Magistrates acted in a manner which if left unnoticed will encourage defiance of the decrees of the Civil Court and paralyze the administration of justice.

The subject-matter of the present proceeding is a stone quarry situated in one of the two estates possession of which was given by the Court to the second party. In February 1937, the servant of the Raja Bahadur approached the Magistrate with a complaint that his possession of the quarry was being interfered with by the men of the first party who were ousted by the order of the Court. At that time certain proceeding was pending before the learned Subordinate Judge before whom the mortgage suit was being tried. The learned Magistrate thought that as the Raja Bahadur had complained to the Civil Court against the obstruction by the defendant of the suit (first party) who had also asked the Court to recall the delivery of possession the Criminal Courts were not called upon to interfere. He observed that the Raja had not been able to obtain "actual" possession. In my opinion the view taken by the learned Magistrate was not correct; though I can appreciate his remarks that

the Criminal Court should not interfere at a time when questions about delivery of possession were pending before the Civil Court. Be that as it may, the learned Magistrate dismissed the complaint. The complainant then moved the learned Sessions Judge of Cuttack who dismissed the application. There are certain observations in his order, which, in my opinion, show absolute misappreciation of the position of the delivery of possession by the Civil Court and as to what actual possession means and I shall deal with it later.

The complainant however moved this Court but did not press the application which was rejected. Afterwards the present proceeding has been started, and the first party who was dispossessed by the Civil Court has been found to be in possession. The learned Sessions Judge (successor of the learned Judge who dealt with the complaint) has recommended that the order of the learned Magistrate be set aside on the ground that in view of the order of the Civil Court he had no jurisdiction to start a proceeding under S. 145, Criminal P. C. No doubt there are a number of decisions to this effect and there are also my own observations in some cases that once there has been a delivery of possession by the Civil Court the Magistrate has no jurisdiction to start a case under S. 145, Criminal P. C. This view however has not been accepted by the Full Bench of the Calcutta High Court in 56 Cal 290¹ where the majority of the learned Judges held that the Magistrate in spite of delivery of possession by the Civil Court, has jurisdiction to start a case under Sec. 145, Criminal P. C., and this view has been adopted in some later decisions of this Court. In my opinion no hard and fast rule can be laid down. A Magistrate has discretion when there is an apprehension of a breach of the peace to choose either S. 145 or S. 107. It must be left to his discretion which particular Section he chooses. Generally speaking, if the dispute arises immediately after the delivery of possession by the Civil Court and is between the parties to that delivery of possession, the more appropriate step will be to bind down under Sec. 107, Criminal P. C., the party who has been dispossessed by the Court. But if the delivery of posses-

1. Agni Kumar Das v. Mantazaddin, (1928) 15 A I R Cal 610=113 I C 181=30 Cr L J 69 = 56 Cal 290 = 48 C L J 193=32 C W N 1173 (F B).

sion is an old one or the dispute is between a man who has been given possession and a man who was not dispossessed by the Court, a proceeding under S. 145, Criminal P. C., will be more suitable. Therefore I do not think that the ground of the want of jurisdiction which has been taken up by the learned Sessions Judge can be supported. But I think the order of the learned Magistrate cannot stand on a quite independent and stronger ground. The learned Magistrate, in my opinion, has approached the case from a wrong point of view, and has committed an error which is not very uncommon of drawing a distinction between actual possession and symbolical possession, a distinction without difference when the question arises between the parties to the delivery of possession and which distinction has absolutely no place in the Code of Civil Procedure. Being of opinion that the delivery of possession to the second party was symbolical he expected him to prove that he got actual possession. Then having held that his actual possession was not proved and that the first party had collected some royalties, he declared him to be in possession.

Now the Code prescribes two kinds of delivery of possession according to the nature of the possession of the judgment-debtor. If the property is in his direct possession, the delivery of possession of it to the decree-holder or auction-purchaser is to be under O. 21, R. 35 or O. 21, R. 95. If on the other hand, some tenants or other persons are in possession of the property on behalf of the judgment-debtor, and they are not liable to be dispossessed under the writ, the delivery of possession is to be under O. 21, R. 36 and R. 96. It will be noticed that the manner of the delivery of possession is according to the nature of the possession of the man who is to be dispossessed and not that its effect in law is different as against the judgment-debtor. But even if the property is in direct possession of the judgment-debtor the mode of delivery will naturally vary according to the nature of the property as mode of possession of different properties vary. If the property is in actual physical occupation of the judgment-debtor, for instance, if the property is a house and the judgment-debtor is residing in it he must be dispossessed of it by being bodily removed from it and by putting the decree-holder or auction-purchaser in physical occupation of

it. But if the property is zamindari or a tank or mineral rights in direct possession of the judgment-debtor, though the delivery of possession will be by ousting the judgment-debtor from it, it is obvious that the judgment-debtor cannot be physically removed from it and the decree-holder or auction-purchaser put in physical occupation of it. What the bailiff who is entrusted with giving possession can do is to go to the property and proclaim in the name of the Court that so and so has been dispossessed and so and so has been put in possession of it. This delivery of possession is not symbolical but actual and is as effective against the judgment-debtor as his physical removal from a house. Such a possession may be called formal in the sense that there is no physical ousting of any individual but not symbolical. Even when the delivery of possession is under O. 21, R. 36 or R. 96, i. e. when the property is in possession of some one on behalf of the judgment-debtor who is not liable to be dispossessed under the writ, the service of the writ effectively dispossesses the judgment-debtor and he cannot interfere with the man who has been given possession. I explained this at great length in the judgments which I gave in 13 P L T 121² and A I R 1934 Pat 565.³

Regarding third party, the matter stands on a different footing. If he is rightly or wrongly physically removed from the property (that is, if he is dispossessed) and if he does not take proper remedy in time, he will lose his right. But if the delivery of possession is purely formal in the sense that nobody has been physically ousted but that there has been a proclamation to that effect, he, if actually in possession, cannot be said to have been dispossessed. The learned Magistrate committed the same mistake which was committed by the learned Sessions Judge when rejecting the revision application of a servant of the Raja Bahadur whose complaint was dismissed. He had observed that the Raja Bahadur in spite of getting symbolical dakhil dahan did not succeed in getting actual possession. Such observation and making a distinction of actual and symbolical delivery of possession as against a man whom a Court has

2. Ram Prasad Ojha v. Bindeswari Prasad, (1932) 19 A I R Pat 145=142 I O 246=11 Pat 165=13 P L T 121.

3. Mahabir Singh v. Emperor, (1934) 21 A I R Pat 565=1934 Cr O 1218=152 I O 591=36 Cr L J 146=15 P L T 819.

ordered to be dispossessed has been, in my opinion, responsible for injustice in a number of cases. Some Courts having read the word symbolical possession in some decisions have used it without properly appreciating it. The Court gave the Raja actual possession and ousted the first party. The view taken by the learned Sessions Judge if analyzed comes to this. If a Court gives possession by proclamation the possession is symbolical. The Criminal Court will not help him till he by his own resources obtains actual possession. He must obtain actual possession by his own force (as I do not know how the Court can give actual possession of a zamindari except by proclamation). If this view be accepted it will not be possible to maintain the administration of civil justice and a law abiding and peacefully living decree-holder who has got possession from the Court will be entirely at the mercy of his opponent, who believes more in the power of the sword than in the power of the pen. What is the remedy of a man who after having been given possession by the Court's peon, the nature of which I have dealt with, finds that his opponent relying upon his physical strength is obstructing him? How can he retain possession? He runs to the Criminal Court and asks for help in order to retain the possession. The Criminal Court says: "Well, I shall help you only if you obtain actual possession. Court's delivery of possession was symbolical. Go and obtain possession first, and then I will help you."

He finds that he is dispossessed. He goes to Civil Court again, gets a decree and again delivery of possession in the same form (as no other mode is possible in cases of zamindaries, etc.) and again the same thing will be repeated and the game will be played *ad infinitum*.

In this case the Court ordered the Raja Bahadur to be put in possession under O. 39, R. 9. The order being against the first party, it must be taken to be as his effective dispossession as it is admitted that the writ was served. In these zamindari properties a man can only get formal possession by proclamation and afterwards it is for the Criminal Court to help him in retaining possession.

Now if, however, circumstances show that the decree-holder or auction-purchaser has slept over his right and has allowed the judgment-debtor to regain possession of the property and he is at the time of the

proceeding in peaceful possession of it, the matter stands on a quite different footing. But in such cases the Magistrates must take it as an indisputable fact, once delivery of possession is proved, that on the day of the delivery of possession the party to whom possession was given was in possession as against the man who was party to that delivery of possession and was bound by the writ. He must start with the presumption that the state of things which existed on that day continued to exist thereafter unless the contrary is established. The judgment-debtor can only succeed if he establishes beyond doubt that he had completely ousted the man who was put in possession by the Court and was in peaceful possession of the property in dispute.

In this case it is impossible to hold on the finding of the learned Magistrate that the first party was able to completely oust the second party who was put in possession by the Court. The interval between the proceeding and the delivery of possession was about ten months. The whole of this time may be called a period of struggle for regaining possession by the first party. The second party cannot be expected to prove that after he was put in possession of a strange estate, he at once brought every inch of it under his control in the face of the usual opposition of the man who has been ousted and of those of his tenants who stick to him for some reason or other. The finding of the learned Magistrate is that in spite of delivery of possession the first party had been able to collect some royalty. Reliance is placed upon the fact that there was obstruction in February and March, and the Magistrate did not give help to the complainant who was a servant of the Raja Bahadur. I think neither of these facts constitutes a complete ouster of possession given by the Court; and if these facts be allowed to prevail, no decree-holder or auction-purchaser will ever be able to remain in possession of the property given to him by the Court. There are very few cases in which there had not been a struggle by the man who has been ousted by the Court to retain the possession with the help of lathials or the tenantry who for reasons want to continue loyal to him. Spasmodic interference with the possession of a man does not constitute his dispossession. The circumstances under which the Criminal Court can go beyond the delivery

of possession by the Civil Court are absolutely absent. I therefore set aside the order of the learned Magistrate, declare the second party to be in possession of the disputed property and forbid any interference of such possession till the order of a competent Court.

N.S./R.K.

Order set aside.

A. I. R. 1939 Patna 155

AGARWALA J.

Gaya Sahu — Plaintiff — Appellant.

v.

Debarchan Bhokta — Defendant — Respondent.

Appeal No. 179 of 1933, Decided on 16th April 1937, from appellate decree of Sub-Judge, Sambalpur, D/- 29th August 1933.

(a) Landlord and Tenant—Custom in Gaontiai village of Sambalpur district—Custom requiring consent of punchas to allocation of house site applies even to site on which house is standing and which is abandoned.

The custom in Gaontiai village of Sambalpur district requiring the consent of the punchas for the allocation of the house site to a particular person applies not only to new sites and new villages but also to a site on which a house stands and which has been abandoned. Hence, whether the site be a new one or an abandoned one on which a house is standing, the punchas must be consulted before it can be allotted to a cultivator.

[P 156 C 1]

(b) Landlord and Tenant—Tenant occupying house site as monthly tenant—On his ejection he is not entitled to compensation for improvements of site.

Where a tenant goes into occupation of a house site on conditions which do not entitle him to look upon himself as anything but a monthly tenant and spends money on the improvement of the site, he does so at his own risk and on his ejection from the house site he is not entitled to compensation.

[P 156 C 1]

B. Mohapatra for A. Dutt —

for Appellant.

P. C. Chatterji — *for Respondent.*

Judgment.—This appeal relates to a house site in a Gaontiai village in the district of Sambalpur. One Ramchandra, a raiyat of the village, surrendered his raiyati land and homestead and abandoned them. Thereupon by arrangement with the zamindar the defendant took possession of the homestead. About six months later the zamindar settled the raiyati land with the plaintiff and with the consent of the punchas allotted the house site also to the plaintiff. The plaintiff now seeks to eject

the defendant from the house site. The latter however set up a permanent tenancy in the site. He says that on the abandonment of the land by Ramchandra the zamindar settled the site with him permanently by a patta. The zamindar on the other hand, who has deposed in the case, states that he allowed the defendant to occupy the land on a monthly rental of 8 annas and that when the raiyati land was settled with the plaintiff in January 1931, the defendant promised to vacate the house site by the end of Chait of that year but that he has failed to do so. The first Court disbelieved the defendant's story that a patta had been granted to him or had been lost. He decreed the plaintiff's suit on a finding that the house site had been allotted to him by the zamindar with the consent of the punchas. The defendant appealed and succeeded before the Appellate Court which found that the site had been permanently settled with the defendant. The Appellate Court did not upset the finding of the first Court that the defendant had failed to prove the loss of the patta on which he bases his claim but contented itself with reciting that the defendant had stated that the patta was missing. The trial Court had examined the evidence with regard to this alleged loss and has come to the conclusion that that evidence did not support defendant's case that the patta had been granted or was missing. In the absence of reliable evidence that the patta was missing, secondary evidence of its contents is not admissible, so that in effect there is no evidence of the permanent nature of the tenancy which, it was open to the Appellate Court to accept unless it first came to a finding reversing the decision of the trial Court that the patta had not been lost.

Another question arises however, namely whether the settlement of the house site by the landlord with the plaintiff is valid. In Mr. Hamid's Final Report of the Land Revenue Settlement of the Sambalpur District, Appn. O. P. 30, relating to the wajib-ul-arz for Gaontiai villages of the district, it is noted that there is a village custom that the allocation of house sites will be done by the lambardar and punchas. The custom is stated to be that every cultivator is entitled to a site for his house free of rent. If he abandons his holding he loses his right to the house site but he is entitled to remove the building materials within

one month of the site being given away to another. It was held by the Appellate Court that the custom requiring the consent of the punchas for the allocation of the house site to a particular person does not apply to a site on which a house stands and which has been abandoned, but only to new sites and new villages. That interpretation of the custom is not borne out by the statement in the settlement report. After setting out that a cultivator is entitled to a house site and the consequence of his abandoning his holding the report goes on to state that he is entitled to dispose as he pleases of the material of any structure he may have erected on the site provided he does so "within one month of the site being allotted to another person." Reading the word 'allotted' in that Section with the remainder of the paragraph which states that the allocation of house sites will be done by the lambardar and punchas, it appears to me that whether the site be a new one or an abandoned one on which a house is standing, the punchas must be consulted before it can be allotted to a cultivator. The decision of the Court below therefore is, in my view, wrong on this point and must be reversed and the suit decreed.

The learned advocate for the respondent states that the defendant had erected structures on this land and that he is entitled to compensation, but does not refer to any authority on this or point out any Section of the statute which entitles him to compensation in a case where a tenant goes into occupation of a house site on conditions which do not entitle him to look upon himself as anything but a monthly tenant. In those circumstances if the occupier spends money on the improvement of the site, he does so at his own risk. The appellant is entitled to his costs throughout.

D.S./R.K.

*Suit decreed.***A. I. R. 1939 Patna 156**

MANOHAR LALL J.

Ram Das Sahu and others —

Appellants,

v.

Sukhdeo Ram — Respondent.

Appeal No. 813 of 1936, Decided on 2nd September 1938, from appellate decree of Addl. Dist. Judge, Gaya, D/- 3rd August 1936.

Civil P. C. (1908), O. 21, R. 2 — Suit for damages—Creditor receiving payment towards decree but not certifying it—In execution taken out by him judgment-debtor paying decretal amount over again—Judgment-debtor's suit for recovery of damages for breach of contract held maintainable — Cause of action when accrues stated.

If A executes a decree, notwithstanding a payment made by a judgment-debtor B, the latter can maintain a suit against A to recover damages for breach of contract represented by this adjustment or payment. The reason for the rule is that the executing Court is debarred from looking into the question of payment if it is not certified under O. 21, R. 2 and if B is compelled to pay in execution of the decree, the full amount of the decree over again, he is entitled to recover back that sum from the decree-holder as damages. The cause of action for the suit arises on the date when the judgment-debtor pays the amount over again to save his property from sale : *A I R 1938 Pat 41, Disting.* [P 156 C 2; P 157 C 1, 2]

Raj Kishore Prasad — *for Appellants.*K. N. Moitra — *for Respondent.*

Judgment. — This is an appeal by the defendant who was a decree-holder having obtained the decree on 19th September 1929, against the plaintiff for a sum of Rs. 368 besides costs. The judgment-debtor under the decree has been found to have paid three sums, namely Rs. 100 on 1st September 1930, two sums of Rs. 50 on 3rd February 1932, and 13th July 1932, under an agreement or understanding with the decree-holder that he would certify these sums towards the decree. Under that impression the judgment-debtor paid a further sum of Rs. 177 on 17th September 1932, which was the balance according to him then due under the decree. This amount of Rs. 177 was certified as having been received by the decree-holder, the judgment-debtor being under the impression that the whole of the decree has thus been satisfied. But he was surprised to find that the defendant had taken out execution of the decree ignoring the payment of Rs. 200 stated above. His property was put up for sale for realization of this amount and about 1st December 1934 the plaintiff had to deposit the money, that is Rs. 200 over, and thus saved his property from sale. It is obvious therefore that the injury to the plaintiff accrued about 1st December 1934, when he obtained the right to bring a suit for damages to recover the sums if such a suit was maintainable. The defence to the action was that the earlier amount was paid by the plaintiff to the defendant not in discharge of his liability in part under the decree of September 1929, but

for some other antecedent debts due on handnotes or other rookas. This defence has been concurrently disbelieved by the Courts below who have awarded a decree for a sum of Rs. 200 besides interest in the sum of Rs. 83 and costs.

In appeal it is argued that such a suit is not maintainable; but there is a long current of authorities to the contrary which is to be found in Mulla's well-known Commentary, Edn. 10, at pp. 694 and 695. It is well settled now that if *A* executes a decree notwithstanding a payment made by a judgment-debtor *B*, the latter can maintain a suit against *A* to recover damages for breach of contract represented by this adjustment or payment.

The reason for the rule is that the executing Court is debarred from looking into the question of payment if it is not certified under R. 2 and if *B* is compelled to pay in execution of the decree the full amount of the decree over again, he is entitled to recover back that sum from the decree-holder as damages. My attention was drawn to the case in 18 P L T 896,¹ where the facts were entirely different. In that case the suit was brought to enforce a pre-decree arrangement by which the decree-holder undertook to give credit for certain payments, but in spite of those payments being made a decree had been passed. That was an entirely different case, because the question of whether the decree was correctly passed or not is no longer open to controversy in a subsequent suit. The matter is *res judicata*; and further as Lord Carson pointed out as was noticed in that judgment:

That so long as the judgment or decree stands, any sum recovered under the decree or judgment cannot be recovered back in a fresh suit whilst the judgment under which it was recovered remains in force upon the ground that the original decree or judgment must be taken to be subsisting and valid until it is reversed or superseded by some ulterior proceeding.

In the present case the plaintiff did not want and does not want the decree to be set aside or reversed, nor does he pray that any money which has been received thereunder should be paid back to him. All he wants is to recover damages for the loss which he has suffered in having to repay the sum of Rs. 200 twice over in breach of the agreement entered into between him

and the defendant. The cause of action arose on 1st December 1934, and the present suit therefore is within time having been instituted on 3rd January 1935. The only question which appears to me on which the appellant can have any relief is the question of interest. The Courts below have not given any basis for allowing the amount of Rs. 83 as claimed by the plaintiff. It appears from the plaint that the amount of Rs. 83 was calculated by the plaintiff on the basis that the cause of action accrued to him on 2nd September 1930, for Rs. 100, 4th February 1932 for Rs. 50 and 14th July 1932, for the last payment of Rs. 50. This obviously was incorrect. I therefore vary the decree of the Courts below on the question of interest and direct that the plaintiff do recover from the defendant besides the sum of Rs. 200 interest at the rate of 6 per cent. only to be calculated from 1st December 1934. The plaintiff will also recover proportionate costs in all the Courts on this amount which will now be determined in pursuance of my order. The appeal is dismissed except with regard to the matter which has been indicated.

N.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 157

WORT AG. C. J. AND MANOHAR LALL J.

Niluripatra Coal Co. Ltd. —

Defendant 5 — Petitioner.

v.

North Burrakar Coal Co. Ltd. and others — Opposite Party.

Civil Revn. No. 261 of 1938, Decided on 26th August 1938, from order of Sub-Judge, Dhanbad, D/. 10th May 1938.

Civil P. C. (1908), O. 1, R. 1 and S. 115—Party defendants to action claiming cause of action against principal defendants — Court allowing them to be joined as co-plaintiffs—High Court will not interfere under S. 115.

Where, on certain party defendants in action claiming some sort of cause of action against the principal defendants arising out of the same transaction and involving common questions of law and fact, the Court allows them to be joined as co-plaintiffs in the action under O. 1, R. 1 and the principal defendants do not object, the High Court will not interfere under S. 115, especially as it is an interlocutory matter : (1921) 2 K B 1, *Foll.*

[P 158 O 1]

Dr. D. N. Mitter and P. B. Ganguly —
for Petitioner.

S. C. Mazumdar — *for Opposite Party.*

1. Abdul Hamid v. Dhani Dnsadh, (1938) 25 A I R Pat 41=173 I C 123=16 Pat 748=18 P L T 896.

Wort Ag. C. J.—This rule is directed against the order of the learned Judge in the Court below allowing an amendment in the following circumstances: The present respondents were party defendants in an action for trespass with regard to a colliery. They were the lessees of the Raja of Jharia who leased out the land to the principal defendants. They were made defendants but applied to be made co-plaintiffs. To this the petitioner before us had no objection. The learned Judge in the Court below has pointed out that they had some sort of cause of action against the defendants, whether in this suit or in another suit is for the purpose of this matter immaterial. Then at a much later date they made this application for amendment claiming damages for loss of royalty against the principal defendants. Although the argument is directed to the question of the amendment, it is really a question whether the plaintiffs should have been joined as party plaintiffs to the action, once it is decided that they should be joined, the other matter seems to follow necessarily. The latest decision on the point is the case in (1921) 2 K B 1.¹ I refer to that case because the rule in question is the same as the rule under the Civil Procedure Code. Whether the respondents have a cause of action or the defendants have a defence against the respondents plaintiffs' amended claim is not a matter for this Court.

In my judgment there is no ground for interfering, especially as this is an interlocutory matter with the order of the learned Judge under S. 115, Civil P. C. The application is dismissed with costs; hearing-fee two gold mohurs.

Manohar Lall J.—I agree. Under the provisions of O. 1, R. 1, the amendment which has been allowed by the learned Subordinate Judge was amply justified. The added plaintiffs claimed a right to relief arising out of the same transaction, namely the extraction of coal from the colliery in or about 1935. If they brought a separate suit this common question of law and fact would arise and would be tried by the same Judge against the same defendants-petitioners before us. I do not see how we can interfere in revision in this case.

R.M./R.K. *Application dismissed.*

1. *Pyne v. British Time Recorder Co. Ltd.*, (1921) 2 K B 1=90 L J K B 445=124 L T 719=37 T L R 295.

A. I. R. 1939 Patna 158

ROWLAND J.

Suryamal Saraf — Plaintiff —
Appellant.

v.

P. Sriram Naidu and others —
Defendants — Respondents.

Appeal No. 82 of 1934, Decided on 22nd April 1937, from appellate decree of Dist. Judge, Cuttack, D/- 26th January 1934.

(a) Orissa Tenancy Act (2 of 1913), S. 4 (3) — In determining whether certain person is under-raiyat, Court should see whether his immediate landlord is raiyat—Entry in current settlement that immediate landlord is *istimrari chandnadar*—Entry implies that tenancy at its inception was not raiyati tenancy—Person holding under such landlord is not under-raiyat.

For purpose of determining whether a person is an under-raiyat what the Court has to see is not the purpose for which his tenancy was created but the question whether his immediate landlord was a raiyat. In deciding this question the Court is to have regard in accordance with the definition in Sec. 5 (2) primarily to the question whether the right to hold the land was acquired by the alleged raiyat for the purpose of cultivation. [P 159 C 1]

There is a statutory presumption of correctness attaching to the record of rights and where the entries in successive records differ, the presumption attaches to the latest entry. [P 159 C 2]

Where at the current settlement proceedings the lessee is entered as *istimrari chandnadar*, the entry implies that the tenancy which is held by the lessee was not in its inception a tenancy for any agricultural purpose but for residential and house building and it is not a raiyati tenancy and the person holding under him is not an under-raiyat. [P 160 C 1]

(b) Interpretation of Statutes — Every Act is to be read as speaking in present.

The usual canon of construction is that every Act is to be read as speaking in the present, that is to say, speaking on the date on which it is to be applied. [P 160 C 1]

S. C. Chatterji and B. N. Dutta —
for Appellant.

S. N. Das Gupta — for Respondent.

Judgment. — This appeal by the plaintiff arises out of a suit to declare that his status is not that of *darchandnadar* but that of an under-raiyat, to declare that the orders passed during the preparation of the current survey Record of Rights are without jurisdiction and erroneous in so far as they treat the plaintiff as *darchandnadar* and have fixed a rent of Rs. 437.6.0 for the property in suit in his hands. He holds under the defendants who are sons of P. Veriah Naidu. They are entered as

'istimrari chandnadars' and rent of their tenancy is fixed at Rs. 104-5-0. Plaintiff claims that he is not a sub-chandnadar but an under-raiyat and that under Sec. 56, Orissa Tenancy Act, the rent payable by him cannot exceed the rent of the raiyat under whom he holds by more than 50 per cent. The Courts below have concurred in dismissing the suit on the view that the tenancy which the plaintiff has acquired was from its inception a tenancy for the purpose of erecting pakka buildings including a ricemill, etc., and therefore not an agricultural tenancy. So it is said that the plaintiff cannot claim to be an under-raiyat.

Now the first contention advanced by Mr. Chatterji is that the expression "under-raiyats" has been defined in S. 4 (3) of the Act as meaning "tenants holding, whether immediately or mediately, under raiyats." The definition by its terms applies to the tenants falling within the description irrespective of the purpose for which the under-raiyati tenancy was created. Therefore for the purpose of determining whether the plaintiff is an under-raiyat what we have to see is not the purpose for which his tenancy was created but the question whether his immediate landlord was a raiyat. In deciding this question the Court is to have regard in accordance with the definition in S. 5 (2) primarily to the question whether the right to hold the land was acquired by the alleged raiyat for the purpose of cultivation. Unfortunately the Courts have not directly considered this question; but the evidence bearing on it has been referred to in the judgments. The tenancy appears to have been created by a lease (Ex-D) dated 27th December 1865. This was a perpetual lease. Its purpose was not stated. The annual rent was Rs. 37-2-0 and the lessee was apparently a European named Burgess. There is evidence that Mr. Burgess was not an agriculturist and that he acquired this land for the purpose of erecting a bungalow for his own residence which he did erect. He transferred the entire block to Mr. P. Veriah Naidu, who was an Assistant Surgeon in the Cuttack General Hospital and whose sons are the defendants. There is evidence that Veriah Naidu rebuilt the bungalow of Mr. Burgess and also built two more bungalows which he let out and then on 4th November 1907 he gave a sub-lease of 15.08 acres out of this block to Nalum Subramaniam on a rent of Rupees 141-6-0 together with cess Rs. 4-6-9 for the

purpose of erecting pakka buildings, rice-mill etc. as above stated. At the time of this lease the record of rights current was that framed at the time of the Provincial Survey of 1898 in which Veriah Naidu was entered as "istimrari patta khariddar babat pahi raiyat"; but the Revisional Survey was prepared in 1911. In this record Nalum Subramaniam is entered as "shikimi babat chanda raiyat." Thereafter, on 30th November 1921, Nalum Subramaniam sold the land and buildings to the plaintiff for Rs. 41,000. Neither the plaintiff nor his vendor took any steps to challenge the correctness of the Revisional Survey entry or to dispute the legality of the rent payable under the lease which was approximately four times the rent of the entire block of 22 acres. Since then it appears that out of the 22 acre block about 4 acres have been acquired by Government for an emigration office and 18.15 acres were found to constitute at present the tenure or tenancy of the sons of Veriah Naidu, the rent payable by them being Rs. 34-12-3. That was the position when the current settlement proceedings were taken up and they resulted in the sons of Veriah Naidu being entered as istimrari chandnadars and the plaintiff as istimrari darchandnadar and the assessment of fresh rents at the rate of Rupees 104-5-0 for the chandnadar and Rs. 437-6-0 for the plaintiff as darchandnadar. It is to be remembered in considering whether the plaintiff can succeed in this suit that there is a statutory presumption of correctness attaching to the Record of Rights and where the entries in successive records differ the presumption attaches to the latest entry. The entry implies that the tenancy of the defendants was a tenancy which at its inception was not for agricultural purposes but for residential and erection of pakka buildings. This entry is in full agreement with what appears in the evidence of the history of the land; and I have no doubt that the entry is correct. If the plaintiff claims to hold as an under-raiyat and to enjoy the privilege conferred on under-raiyats by S. 56, then the original sub-lease of 4th November 1907 was from its inception illegal and the plaintiff and his predecessor have been paying illegal rents for nearly 30 years.

It has been argued that the expression 'chandnadar' has been defined in Sec. 3 (3), Orissa Tenancy Act, and this definition excludes any persons other than those hold-

ing land which was recorded as chandna in the course of the provincial settlement. Stress is laid on the words "land which has been recorded as chandna in the course of a settlement of land revenue." It is pointed out that the Revisional Survey was not a survey in which land revenue was settled and therefore the use of the word "chandnadar" in the revisional record would not bring the chandnadar within this definition. Leaving aside the revisional survey, however, there is the current survey in which admittedly a settlement of land revenue has been made. But Mr. Chatterji ingeniously argues that entry in the record as 'chandnadar' in this settlement will not bring the land within the definition because the definition must be read as speaking on the date of the commencement of the Act—that is to say if land has not been recorded as 'chandna' before the Act its holder will not be 'chandnadar' at any subsequent time. The usual canon of construction however is that every Act is to be read as speaking in the present—that is to say speaking on the date on which it is to be applied. Hence the argument does not assist the plaintiff in displacing the presumption of correctness attaching to the entries in the Record of Rights.

For the reasons given above, I am of opinion that the entries are correct. The tenancy which is now held by the defendants was not in its inception a tenancy for any agricultural purposes but for residential and house building; it is not a raiyati tenancy and the plaintiff is not an under-raiyat. On this view the appeal must be dismissed with costs. Leave to appeal under Letters Patent is refused.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 160

JAMES J.

Sripati Saran Prasad Singh and others — Petitioners.

v.

Indarjit Mahton and others —
Opposite Party.

Civil Revn. Nos. 128, 146 and 147 of 1938, Decided on 20th October 1938, from order of Munsif, Bihar, D/- 20th December 1937.

Civil P. C. (1908), O. 9, R. 2—Court cannot order plaintiff to file process-fees before fixing date for appearance of defendant—What order should be passed, stated.

Court has no power to require a plaintiff to file process-fees before fixing a date for the appearance of the defendant. The plaintiff may elect, if he pleases, to secure the presence of the defendant without issue of process at all. The proper order is to fix a date for the appearance of the defendant and direct the plaintiff to file process-fees within a reasonable period short of that date. If by the date fixed for the defendant's appearance, the defendant does not appear and the plaintiff has not paid process-fees nor taken the necessary steps for issue of process, the suit is liable to be dismissed under Order 9, Rule 2. [P 160 C 2]

G. P. Singh — *for Petitioners.*

Dasu Sinha and C. P. Sinha —

for Opposite Party.

Order.—These are three applications for revision of the order of the Munsif of Bihar declining to restore three rent suits under O. 9, R. 4, Civil P. C. The plaintiff was called upon to file process-fees and copies of the plaint by 16th November 1937, but on that date nothing had been done. The suits were accordingly dismissed. The order of the Munsif was illegal because he has no power to require a plaintiff to file process-fees before fixing a date for the appearance of the defendant. The plaintiff may elect, if he pleases to secure the presence of the defendant without issue of process at all; but if by the date fixed for the defendant's appearance, the defendant does not appear and the plaintiff has not paid process-fees and taken the necessary steps for issue of process, the suit is liable to be dismissed under O. 9, R. 2. The proper order on 1st October 1937, would have been an order fixing a date for the appearance of the defendant and directing the plaintiff to file process-fees within a reasonable period short of that date. The suit could not have been dismissed on the date fixed for filing the process-fees; but if the plaintiff had defaulted, the suit could then have been dismissed on the date fixed for the defendant's appearance if the defendant had failed to appear. The orders of the Munsif must be set aside and the suits restored. These applications are allowed.

N.S./R.K.

Applications allowed.

A. I. R. 1939 Patna 161

WORT AG. C. J. AND MANOHAR LALL J.

Ramjap Dube — Defendant —

Appellant.

v.

Jagadish Chandra Deo Dhabal Deb —

Plaintiff — Respondent.

Appeal No. 377 of 1937, Decided on 26th August 1938.

(a) **Second Appeal—Finding of fact—Tenant committing breach of Sec. 22, Chota Nagpur Tenancy Act, by using land for building huts—Finding of Court that land has been rendered unfit for tenancy is one of fact — High Court cannot interfere with it in second appeal.**

Where a tenant commits a breach of the terms of his tenancy under Sec. 22, Chota Nagpur Tenancy Act, by using his land for the purpose of building cooly huts, and the lower Court finds that the land, by reason of the building of the huts, has been rendered unfit for purposes of tenancy, its finding is one of fact, with which the High Court sitting in second appeal cannot interfere : *34 Cal 718 (P C), Rel. on.* [P 161 C 1]

(b) **Chota Nagpur Tenancy Act (6 of 1908), Sec. 21 (b)—“Irrespective”—Meaning of.**

The word “irrespective” in S. 21 (b) cannot be held to mean “subject to.” [P 161 C 2]

(c) **Custom—Binding effect—Usage, however extensive, cannot prevail over positive law.**

A usage, however extensive, cannot be allowed to prevail if contrary to positive law, or to such usages as have become part of law having been recognized by legal decisions : *(1875) 10 Ex 337, Foll.* [P 161 C 2]

A. K. Roy and S. S. Rakshit —

for Appellant.

Dr. D. N. Mitter and G. C. Mukharji —

for Respondent.

Wort Ag. C. J. — This appeal must be dismissed. It is the appeal by the tenant-defendant against the judgment of the District Judge granting a conditional ejectment of the defendant for breach of the terms of his tenancy under Sec. 22, Chota Nagpur Tenancy Act. It appears that the defendant used his land or part of it for the purpose of building cooly-huts, the land being in the neighbourhood of the Jamshedpur Factory. That learned Judge in his judgment, after remand has come to the conclusion that the land by reason of the building of these huts has been rendered unfit for the purposes of tenancy. With that finding we are not entitled as a Court of Second Appeal to interfere. I refer to the decision of the Privy Council in *34 I A 133*.¹ In that case

1. *Hari Mohan Misser v. Surendra Narayan Singh*, (1907) *34 Cal 718* = *34 I A 133* = *6 C L J 19* = *11 C W N 794 (P. O.)*, 1939 P/21 & 22

the District Judge had held that the building of an Indigo Factory was not a breach of the Section; the High Court held otherwise; but their Lordships of the Judicial Committee pointed out that the decision of the lower Appellate Court on that question was conclusive and that finding could not be disturbed for any reason by the High Court on appeal.

The other contention of Mr. Roy in this case was that by the facts as stated in the judgment, although the learned Judge has not come to any such conclusion, a usage within the meaning of Sec. 21 (a), Chota Nagpur Tenancy Act, was sufficiently established. In the very well-known decision in *(1875) 10 Ex 337*² at page 357 Cockburn C. J. made this statement :

We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law, including, in the latter, such usages as having been made subject of legal decision, and having been sanctioned and adopted by the Courts, have become by such adoption, part of the common law.

I refer to that case although it related to a mercantile instrument, as the principle laid down there is of universal application. Indeed the very Section which governs the facts of this case on its plain construction is consistent with that principle. Cl. (b) of Sec. 21 provides :

Irrespective of any local custom or usage, in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy.

The word “irrespective” cannot be held to mean “subject to.” In my judgment therefore the contention of Mr. Roy that on the facts as stated by the learned Judge in the Court below the usage was established is one which cannot be supported. The learned Judge came to no such conclusion but had he found that there was a usage by which agricultural lands could be used for building purposes, he would have stated a custom which was contrary to the positive law as laid down by the Chota Nagpur Tenancy Act, a custom therefore which could not be supported. But it is unnecessary for us to come to any such decision under S. 21 of the Act for the ample reason that there no finding that such usage has been established. All that has been stated to be the fact in this case is that for some time since the erection of the Jamshedpur Factory it has been the habit of certain persons to build huts upon the land for the purpose of accommodating the

2. *Goodwin v. Roberts*, (1875) *10 Ex 337*.

coolies working in the Factory. That is the substance of the judgment of the learned Judge in the Court below. That statement is far from finding that such usage as alleged by Mr. Roy has been established. For either of the reasons which I have stated in my judgment, the argument cannot, as I have said, be supported.

The only other question was as to the decree itself. The decision of the learned Judge in the Court below was quite clear on that matter. The defendant had a period of three months during which he must pay compensation which of course was a trifling sum of Rs. 5 and remedy the mischief by the removal of the huts from 12 bighas of the land, which was the subject-matter of the suit. We however extend that time by one month from the date of this judgment. The appeal fails and must be dismissed with costs.

Manohar Lall J.—I agree.

R.M./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 162

COURTNEY-TERRELL C. J. AND JAMES J.

Sarat Chandra Patnaik—Defendant—
Appellant.

v.

Baidyanath Patnaik — Plaintiff —
Respondent.

Appeal No. 61 of 1935, Decided on 5th January 1938, from appellate decree of Addl. Sub-Judge, Cuttack, D/- 31st May 1935.

Appeal — Memorandum — Amendment —
Appeal by one of defendants in form directed against whole decree except figures of valuation and court-fee showing that only part of decree objected to — Memo sought to be amended—Amendment should be allowed.

Where only one of the defendants appeals from the decree and there is nothing in the memorandum of appeal itself which indicates that the appellant is objecting to only part of the decree, except the figures given for valuation and the amount of court-fee paid, then if the appellant offers to amend the valuation and pay the increased court-fee, the offer should be accepted, whether the other defendants are made respondents or not.

[P 162 C 2; P 163 C 1]

M. S. Rao and H. Mahapatra —
for Appellant.

S. N. Sen Gupta and R. N. Sinha —
for Respondent.

James J. — This appeal arises out of a suit for confirmation of possession of certain land which the plaintiff claimed as

reversionary heir of one Batakrishna Patnaik. Defendant 1 had set up a claim to have been adopted by Batakrishna Patnaik and in his capacity of adopted son he had executed a deed conveying a small piece of property to defendant 2. The trial Court found that defendant 1 had not been adopted by Batakrishna Patnaik and that he had no title to make the conveyance to defendant 2. The plaintiff's suit was decreed.

Defendant 1 appealed from the decree but defendant 2 did not. The property conveyed to defendant 2 was valued at Rupees 124-4-0 while the rest of the property forming the estate of Batakrishna Patnaik was valued at Rs. 1216. Defendant 1 in his memorandum of appeal prayed that the plaintiff's suit might be dismissed in toto but he valued his appeal at Rs. 1216 and he did not join defendant 2 as a respondent. When the appeal came on for hearing an objection was taken before the Subordinate Judge that as defendant 2 had not appealed from the Munsif's decree that decree had become final as between the plaintiff and the defendants in the suit and therefore the finding of the Munsif that defendant 1 was not the adopted son was res judicata determining the question of fact in the appeal before the Subordinate Judge. The appellant offered to amend his memorandum of appeal by increasing the valuation and paying the difference of the court-fee and also by adding defendant 2 as a respondent but the Subordinate Judge did not permit this and the appeal was dismissed.

On behalf of the defendant-appellant it is argued that the question between defendant 2 and the plaintiff could not be regarded as finally settled so long as the decree was under appeal because under O. 41, R. 33, Civil P. C., the Subordinate Judge could deal with the decree as a whole, even though the appellant purported to appeal only from a part of the decree, but there is nothing in the memorandum of appeal itself which indicates that the appellant is objecting to only part of the decree except the figure given for valuation and the amount of court-fee paid. Objection might have been taken that the valuation should be increased, and that court-fee should be paid on the sum of Rs. 124, but the presence of defendant 2 as appellant or respondent was not necessary. The omission of defendant 2 to appeal from the decree might have had the effect of ren-

dering the decree final between himself and the plaintiff, if the Appellate Court did not apply the provisions of O. 41, R. 33, but this cannot affect the right of defendant 1. Defendant 1 did appeal in form against the whole decree, and when he offered to amend the valuation and pay the increased court-fee the offer should have been accepted, whether defendant 2 was made a respondent or not. It is within the power of the Appellate Court to deal with so much of the decree as affects defendant 2 by application of the provisions of O. 41, R. 33, Civil P. C., but that is a matter for the Appellate Court to decide. Defendant 1, as I have said, has actually appealed from the whole decree; and at the present moment none of the questions of fact can be treated as *res judicata* between the appellant and the plaintiff. I would set aside the order of the lower Appellate Court and remand Sarat Chandra Patnaik's appeal to the District Judge for disposal according to law. Costs in this Court and in the lower Appellate Court will abide the final result of the suit.

Courtney-Terrell C. J. — I agree.

N.S./R.K.

Appeal remanded.

A. I. R. 1939 Patna 163

VERMA J.

Gursaran Lal and another
Petitioners.

v.

Emperor.

Criminal Revn. Petn. No. 550 of 1938,
Decided on 31st October 1938.

Factories Act (1934), S. 43—Rules under —
Bihar and Orissa Factories Rules (1936),
Rule 112 (c) (5) (i) and (iii) — Provisions are
not alternative.

The provisions (i) and (iii) of Rule 112 (c) (5) of
Bihar and Orissa Factories Rules framed under
S. 43, Factories Act, are not alternative.

[P 163 C 2]

Rajkishore Prasad — *for Petitioners.*

Advocate-General — *for the Crown.*

Order. — This is a petition on behalf of one Babu Gursaran Lal, the managing director and Babu Rajeshwari Prasad, the manager of the Gaya Sugar Mills, Ltd., at Guraru. They have been convicted under Sec. 60 (b), Factories Act (Act 25 of 1934), for having contravened the provisions of R. 112 (c) (5) (i) of the Bihar and Orissa Factories Rules, 1936, i. e. they have not allowed a whole holiday to the workers in

the factory after 13 days' work. The defence of the petitioners was that when the Inspector visited the factory and noticed this irregularity they started correspondence with him pointing out that instead of giving the workers one whole day as a holiday after 13 days' work, they followed the provisions of sub-r. 3 of the same rule, i. e. that as they were working in relay, the workers were allowed 16 hours' rest. But judging from what they actually wrote it appears that they said that they were allowing 32 hours off after every 21 days. The prosecution was started on a complaint filed on 19th March 1938, and the petitioners have been convicted and sentenced to pay a fine of Rs. 100 each in default to undergo simple imprisonment for one month.

Mr. Rajkishore Prasad, appearing on behalf of the petitioners, urges that from the rules it appears that the provisions are alternative, i. e. if the provisions of the sub-clause (5) (iii) are observed, it is not necessary to observe the provisions of sub-clause (5) (i); and he lays emphasis on the use of the word "or" occurring between one sub-clause and the other in sub-rule (5) to R. 112 (c). A mere reading of the Rule will show that this interpretation cannot be supported because it may amount to this, that if a man is given a whole holiday after 13 days' work, it may not be necessary to give him an hour's rest after eight hours' work provided for in sub-cl. (5) (ii) or that the rule of allowing the relay workers at least 16 hours' rest every day cannot be insisted upon if once a whole holiday is allowed after 13 days. As has been pointed out by the learned Advocate-General, these rules have been framed by the Local Government under Sec. 43, Factories Act, and the variations in the rules are introduced in accordance with the provisions of Secs. 35, 36 and 37 of the enactment itself. So this line of argument, I am afraid, cannot prevail.

The other line of argument is that as the manager Rajeshwari Prasad was looking after the factory, Gursaran Lal should not be held responsible for any contravention of the law although he was the occupier and for this he relies on the provisions of Sec. 71 of the Act, exempting occupiers or managers from liabilities in certain cases. That Section runs as follows :

Where the occupier or manager of a factory is charged with an offence against this Act, he shall be entitled upon complaint duly made by him to have any other person whom he charges as the

actual offender brought before the Court at the time appointed for hearing the charge; and if after the commission of the offence has been proved, the occupier or manager of the factory proves to the satisfaction of the Court,

(a) that he has used due diligence to enforce the execution of this Act, and

(b) that the said other person committed the offence in question without his knowledge, consent or connivance,

that other person shall be convicted of the offence and shall be liable to the like fine as if he were the occupier or manager, and the occupier or manager shall be discharged from any liability under this Act.

From this it will be clear that it is for the person claiming exemption to show that he comes within the provisions of this Section. From the attitude taken by Gursaran Lal in this case it does not appear that he was claiming exemption under S. 71 but on the ground that he was misled by his own interpretation of the law on the point. The next question is the question of sentence. It is a fine of Rupees 100 each with one month's simple imprisonment in default against each of the petitioners. In the circumstances of the case, the sentence cannot be said to be severe. I therefore discharge the Rule.

D.S./R.K.

Rule discharged.

A. I. R. 1939 Patna 164

DHAVLE J.

Ramanandan Marwari and others —
Appellants.

v.

Ramjiban Marwari and others —
Respondents.

Appeal No. 929 of 1936, Decided on 28th September 1938, from appellate decree of Sub-Judge, Purulia, D/- 28th August 1938.

Easements Act (1882), S. 13 — Easement of necessity explained.

An easement of necessity is one without which the property retained upon a severance cannot be used at all; not one which is merely necessary to the reasonable enjoyment of that property: *F. A. No. 76 of 1931, Foll. ; (1855) 10 Ex 824, Expl.*
[P 166 C 2]

S. C. Mazumdar — *for Appellants.*

G. C. Mukherji — *for Respondents.*

Judgment. — This is an appeal by the plaintiffs in a suit for declaration of title to portions of land marked 'ga' and 'gha' lying on the east and south, respectively, of a block marked 'kha' on the map in suit. In 1915, plaintiffs first bought the block

of land marked 'ka', which lies immediately to the south of the Bankura Road in the town of Purulia. In 1924 the plaintiffs bought land immediately to the south of 'ka' from another vendor Indumati Dasya; and the claim in the suit was that this sale deed covered not only 'kha' but also 'ga' and 'gha'. The lower Courts have concurrently held that under their purchase of 1924, the plaintiffs acquired no more than the portion marked 'kha' and dismissed the suit. The sale deed of 1924 is vague in several respects. As the lower Appellate Court has pointed out, it leaves it open to controversy what the starting point for the measurement of 25 feet 6 inches from west to east was intended to be. The sale deed gives the western boundary of the land conveyed as "*Amaro aponar paikhana jataater rasta dui foot bade Paran Haldarer paka prachir.*"

The appellants' would translate this as: Paran Haldar's pucca wall excluding the two-feet wide passage which is used for coming and going to our or your privies, while the respondents' construction is: Paran Haldar's pucca wall beyond the two-feet wide passage for going and coming to our privy and yours.

What little I know of Bengali does not enable me to say that either construction is impossible, though I must add that the construction adopted by the lower Appellate Court, rejecting the construction contended for by the appellants, seems on the very wording to be rather more reasonable than the other. The sale deed gave the length of the land conveyed from north to south as 23 feet and the area as "about one katha." The maximum area that could be contained in a quadrilateral measuring 25 feet 6 inches from east to west and 23 feet from north to south falls considerably short of one katha, viz. by between 1.5 and 1.6. It is also practically impossible to take the directions east to west and north to south with any precision, in view of the fact that the land conveyed is bounded on the north by a wall of the plaintiffs which does not appear to run due east to west and is bounded on the west by a passage or lane 2 feet wide to the east of a pucca wall which does not run in a straight line but shows changes of direction at several points. A Pleader Commissioner was taken out to the spot to plot out the land covered by the sale deed and was face to face with the difficulties already indicated. He also found a straight wall at the eastern end of the

block 'kha' and another straight wall on the south of the same block, running in a slanting direction from the end of the wall in the east. Both these walls were admittedly built by the plaintiffs. The Pleader Commissioner expressed his difficulty in the following terms :

So there would be a question as to how to measure this 25 feet 6 inches or 23 feet. Whether 25 feet 6 inches is to be measured along the altitudes on Paran Haldar's wall or along those on the eastern wall which is the straightest or parallel to the southern limit of schedule 'ka' or along the slant of the now existing southern wall. Similarly there is the question as to how to measure the 23 feet, i. e. at right angles to which of the above lines. There will be different results in shewing the schedules 'ga' and 'gha' according as one or the other method is selected. I thought the eastern wall which is the straightest should be selected as the basis and I have drawn schedules 'ga' and 'gha' accordingly. It will be seen that it differed with the plaintiff's map a little, as evidenced from map number 2.

The Commissioner noted that the extent and existence of 'ga' and 'gha' depended on the interpretation of the kebala, which was beyond his jurisdiction, but that as he had been directed by the writ to determine 'ga' and 'gha' he had to take one view or the other:

If the language is taken as a general description of an irregular figure and is taken in the loose sense that 2 feet should be left from the lane along Paran Haldar's wall and then the measurement of the longest portions of the schedule kha should be 25 feet 6 inches and 23 feet, then probably there will be no existence of the schedules 'gha' and 'ga'. On the other hand, if it is to be interpreted that every inch of the eastern side and southern side of schedule 'kha' should be 25 feet 6 inches and 23 feet from Paran Haldar's wall and the southern limit of schedule 'ka', respectively, then the schedule 'ga' and 'gha' should be as I have shown in the map. But in that case also it would be seen from map No. 1 that a small portion on the south-eastern corner of schedule 'kha' the plaintiff is not entitled to, of course if the measurement is taken in the way that I have done and if it is the correct way.

The Pleader Commissioner does not use the familiar language of ordinary geometry, but his meaning is perfectly clear. It is common ground before me that 'kha' as bounded by plaintiffs' new walls on the east and south of the disputed purchase measures 23 feet along the eastern wall and 25 feet 6 inches along the southern wall. The learned Munsif has given a variety of reasons for holding that it was land thus bounded on the east and south that was conveyed by the kebala. He refers to the evidence of plaintiffs' third witness that the plaintiffs had walled the land purchased from Indumati and that the land on the

south of the wall (the southern wall) that is to say 'gha', so far as the dispute before us is concerned, belongs to Indumati. Plaintiffs' story that they had deliberately left land to the south of this wall for later constructions has been disbelieved as a question of fact by both the lower Courts for very strong reasons, to which must be added the circumstance brought out from the report of the Pleader Commissioner that if the length from west to east of the land purchased by the plaintiffs from Indumati is to be measured in the way desired by the plaintiffs, they will be found to have trespassed upon the balance of their vendor's land near the south-eastern corner. It is not difficult to see how the southern wall came to be built where we find it, with a length of 25 feet 6 inches up to the eastern wall which is 23 feet long. Plaintiffs spoke of Indumati building a privy immediately to the south of this southern wall 7 or 8 years ago, but this was given away by their own fourth witness who placed the privy in 1305 or 1306 B. S.

The southern wall was thus rightly taken by the learned Munsif (having regard to the vendor's right under the sale deed to place "rafters but not any beam" on the southern wall, the filled-up gaps seen on his local inspection and the evidence of P. W.s Nos. 3 and 4, etc.) to mark the southern limit of what was conveyed to the plaintiffs by Indumati. The eastern limit is even clearer, if the southern one is thus fixed; for the southern wall slants in the east towards the north and makes it impossible to say that what the plaintiffs bought was a block of land bounded by parallel straight lines on the north and south and by parallel zigzags on the west and east. Nor does it appear that land to the east of the eastern wall was ever before shown by the plaintiffs as theirs (e. g. when they applied to the Municipality) parallel in its varying directions to Paran Haldar's pucca wall on the west. Their story that they deliberately left some land on the east of their eastern wall in order to widen the lane to the north is opposed, as the learned Munsif points out, to the evidence of their third witness who says that the lane on the east is now of the same dimensions as before. He has also pointed out that Indumati would not have parted with her land here in such a way that if plaintiffs had so chosen, they could have narrowed her passage to her house. There also appears to be no reason why plaintiffs should have been anxious to widen the

lane on the east of their house when the lane is of a narrower breadth towards the north.

The lower Courts have both held that the kebala gave the plaintiffs no more than a temporary interest in this lane on the east. The appellants have assailed this and invoked S. 8, T. P. Act, before me. I will deal with their plea of an easement of necessity along this lane later on. It is sufficient in the meanwhile to point out that the provision in the kebala entitling the purchaser, so long as his second storey is not constructed, to use the lane as a passage for himself and his cattle goes much against the contention that the plaintiffs had more than a temporary interest in the lane so as to lead one to believe that they could have had any reason to wish to widen the lane by setting apart land for which they had paid as much as Rupees 1,100 a (Bengal) cottah. The learned Subordinate Judge applied some tests into which I do not consider it necessary to go, partly because they are expressed in language which is so far from clear that the learned advocates may well be excused for not being able to follow it, and partly because the reasons given by the learned Munsif and already referred to by me have not been shaken by the appellants and seem conclusive. We need not therefore inquire how far the lower Courts (the Subordinate Judge especially) were right in referring to the boundaries given in later deeds of Indumati—that evidence may be excluded altogether without affecting the claim of the plaintiffs to 'ga' and 'gha'. In view of the large price paid, plaintiffs cannot well be believed to have left land on the east and the south without any reason; and the reasons they have given fail on the evidence of their own witnesses. The inference is strong that what they walled in on the east and the south—the only directions in which there was any possibility of dispute—was no less than what they had purchased, especially as the lengths of these new walls are 25 feet 6 inches and 23 feet.

The construction of the kebala in the present case is not a matter of the interpretation of the words of the kebala by themselves, but has to be decided in the light of the oral evidence and the local circumstances. Regarding the matter in this way, my conclusion is that the appellants have failed to show that there is any material error in the way the lower Courts have read the kebala and the evidence and

circumstances bearing on the interpretation of it.

The only other point that has been raised before me relates to the plaintiffs' right to use the lane Una to the east of the eastern wall. There was no separate issue framed about it in the trial, but the trial Court discussed it under Issue 4 and pronounced against the plaintiffs' claim that they were entitled to use this lane for ever for going to the Bankura Road from the block marked 'kha'. The lower Appellate Court concurred in that view. It has been contended for the appellants that their interest in this lane is in the nature of an easement of necessity. It is true that before the plaintiffs' purchase of 1924 their vendor, who also owned the lands to the east of the lane and to the south of their southern wall bounding 'kha', had to use this lane for access to her property. Appellants' contention is that in that way there was an easement of necessity along this lane in respect of block 'kha'. But in the first place it is significant that their kebala of 1924 expressly provides that so long as their pucca second storey is not constructed, they with their cattle will be entitled to pass along this lane. Secondly, it is well-settled that

an easement of necessity is one without which the property retained upon a severance cannot be used at all; not one which is merely necessary to the reasonable enjoyment of that property: *Gale on Easements*, Edn. 11, p. 183 :

This principle was followed in First Appeal No. 76 of 1931, decided by the late Chief Justice and Varma J., on 22nd October 1935, a decision to which the learned advocate for the respondents has referred me. The learned advocate for the appellants has, as against this cited (1855) 10 Ex 824.¹ But the actual decision in (1855) 10 Ex 824,¹ was that no question of an easement of necessity arises without an allegation that the plaintiff had no other way. This it is impossible for the appellants to do in the present case, for, as in First Appeal No. 76 of 1931, block 'kha' is bounded on the north by the plaintiffs' own land and there is in addition on the west the lane in front of Paran Haldar's wall which gives access to this block. It is true that in the discussion in (1855) 10 Ex 824,¹ Parke, B. and Alderson, B. were inclined to doubt (1824) 2 Bing 76,² but this was only as

1. *Proctor v. Hodgson*, (1855) 10 Ex 824=24 L J Ex 195=3 C L R 755=156 E R 674.

2. *Holmes v. Goring*, (1824) 2 Bing 76=9 Moore 166=2 L J C P 134=27 R R 549=130 E R 233.

regards whether that decision was to be considered to refer to a grant of such a right of way as from time to time may be necessary—a consideration which does not at all arise in the present case in view of the lane in front of Paran Haldar's wall and of block 'ka,' which plaintiffs purchased years before their purchaser of 'kha.' Both the points urged before me fail. The appeal is dismissed with costs.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1939 Patna 167**

DHAVLE J.

Shiba Prasad Singh — Appellant.

v.

Chamru Pasi — Respondent.

Appeal No. 827 of 1936, Decided on 16th September 1938, from decision of Dist. Judge, Manbhum-Sambalpur, D/. 11th March 1936.

(a) **Registration—Deed of Settlement—Value of property exceeding Rupees 100—Absence of registration not cured by acquiescence or estoppel.**

Where the property in question is worth more than Rs. 100, a valid settlement in respect of that property requires a registered deed. The absence of a registered deed cannot be made good by acquiescence or estoppel : *A I R 1931 P C 79, Rel. on.*

[P 168 C 1]

(b) **Landlord and Tenant—Notice — Implied tenancy.**

An implied tenancy is not such a tenancy as entitles the tenant to a notice of ejectment.

[P 168 O 1]

P. R. Das and N. N. Roy —

for Appellant.

A. C. Roy and B. P. Mahasath —

for Respondent.

Judgment.—This is an appeal by the plaintiff in a suit for ejectment. It was found from measurements made by a Pleader Commissioner appointed in the case that the area in dispute was 2 kathas 12 dhurs. This area has been admittedly built upon by the defendant-respondent. The appellant is the admitted landlord of the estate in which the area lies, and he sued for the defendant's ejectment on the ground that the latter had no right to construct a house on the area. Plaintiff claimed in the alternative recovery of Rs. 110 per katha as selami together with rent at Rs. 6 a katha. The trial Court refused ejectment but gave the plaintiff a decree for rent at Rs. 6 per katha for 2 kathas 12 chataks.

The plaintiff appealed to the District Judge who upheld the order of the trial Court.

It has been contended before me on behalf of the appellant that the lower Courts were in error in refusing ejectment. The lower Appellate Court seems to have taken it that the trial Court had found that the plaintiff had actually settled the land in question with the defendant by a verbal agreement in 1926 and that a mere verbal agreement was entered into between the parties (leading to his entry upon the land and construction of the house thereon) because the plaintiff had at that time no clear title and could not dispose of the land by ordinary straightforward means. I have been taken into the judgment of the trial Court, and it is clear that one looks in vain in that judgment for any findings on the lines indicated. The learned Munsif does set out the defendant's story which includes an allegation that the defendant paid Rs. 154 to the plaintiff through his agent Beni Tewari; and then the only point that he discusses in connexion with the defendant's story is the payment of the selami. Upon this point the learned Munsif says :

I am not satisfied that the defendant has succeeded in proving beyond doubt that he paid Rs. 154 as a selami to Beni Tewari as alleged. Much less there is any proof of the fact that at the time of the alleged payment Beni Tewari was authorized to receive the money on behalf of the landlord.

This seems to make an end of the defendant's story of an oral settlement, and the learned Munsif proceeds to consider whether the construction made by the defendant "was an act of trespass or was acquiesced in by the plaintiff and his men." Upon this question he comes to the conclusion that there was "implied consent" of the landlord to build on the area in question and that the defendant was accordingly the possessor of an implied tenancy. I take it that the resort to an implication itself implies the absence of anything like actual settlement. The learned District Judge, after endorsing what he erroneously took to be the findings of the Munsif as regards an oral settlement, holds that the plaintiff is nevertheless not entitled to ejectment on the principle that "a party cannot plead that his own action was illegal and claim advantage from that illegality," and that the plaintiff cannot make his irregularity in making an oral settlement "without complying with the provision of law requiring a registered instrument for such settlement" the basis of an action for ejectment.

But the treatment of the case on these lines is directly contrary to what was held by their Lordships of the Judicial Committee in 58 Cal 1235.¹ The property in question was worth more than Rs. 100, and valid settlement required a registered deed. The absence of a registered deed cannot be made good by the acquiescence of which the learned Munsif has spoken or by the estoppel that the learned District Judge seems to have had in mind.

Mr. A. C. Roy who appears for the defendant-respondent has endeavoured to support the decrees of the lower Courts by arguing that as the lower Courts have in fact found the defendant to be not trespasser but a tenant, the appellant is not entitled to ejectment without notice. Now, it is perfectly true that in 58 Cal 1235¹ which I have already referred to, a notice had been given to the defendant before the bringing of the action for ejectment. But that was a case where the defendant had been inducted by the plaintiff upon the land under an agreement for a lease, which agreement was not carried out. The findings of fact which I have already detailed in the present case provide no good foundation for the contention that the defendant was in fact a tenant of some sort. The oral settlement was not believed by the learned Munsif, and if it could at all be said to have been believed by the learned District Judge it is only on the erroneous finding that the learned Munsif had found it. In any case the oral settlement, it is clear on 58 Cal 1235,¹ will not save the defendant at all. The implied tenancy spoken of by the learned Munsif is no tenancy at all so as to entitle the defendant to notice. The learned District Judge at one place speaks of the plaintiff actually inducting the defendant on to the land by a contract; but this, in the light of the judgment of the trial Court, seems to be entirely unfounded. Mr. Roy's plea of notice is therefore not tenable, and there is really no defence to this appeal. The appeal is allowed with costs of all Courts. As in 58 Cal 1235¹ the defendant-respondent will be at liberty to apply to the trial Court in three months for fixing a time within which he may remove the materials of the house that he has built upon the land in suit.

N.S./R.K.

Appeal allowed.

1. Ariff v. Jadunath Majumdar, (1931) 18 A I R P C 79=131 I C 762=58 Cal 1235=58 I A 91 (P C).

A. I. R. 1939 Patna 168

DHAVLE AND ROWLAND JJ.

Chatdradhari Lal — Defendant—

Appellant.

v.

*Bhagwati Prashad and others, Plaintiffs
and others, Defendants—Respondents.*

Appeal No. 107 of 1936, Decided on 30th August 1938, from original decree of Sub-Judge, Motihari, D/- 5th May 1936.

Bengal Land Revenue Sales Act (11 of 1859), S. 36—Object of S. 36 explained—During pendency of mortgage suit, mortgage property sold for arrears of land revenue and purchased by mortgagor benami in another's name—Benamidar taking possession and mutation in his name—Suit by mortgagee that revenue sale is fraudulent and inoperative against him held not barred by Sec. 36.

The object of S. 36 is to discourage benami purchases at a revenue sale. The Section contemplates that a purchaser who elects to make his purchase benami in the name of another cannot come to the Court to oust the benamidar on the ground that the purchase was benami. But the Section cannot be construed as meaning that where a creditor of the real owner has to bring the property to sale, the sham title of a benamidar may be set up against the purchaser : 12 Cal 302, *Rel. on.* [P 169 C 2; P 170 C 1]

During the pendency of a mortgage suit, the mortgagor who was the proprietor of the mortgaged property made a default in the payment of land revenue as a result of which the property was put up for sale under the Bengal Land Revenue Sales Act and purchased by the mortgagor benami in the name of another person. After the mortgagee had obtained his preliminary decree the benami purchaser took possession of that property and took up mutation of the property in his name. The mortgagee thereupon filed a suit against the mortgagor and the benami purchaser for a declaration that the revenue purchase was fraudulent and void and inoperative against him, that his mortgage lien had not extinguished and that he could bring the property to sale in satisfaction of the mortgage decree :

Held that the suit was not barred under S. 36 and after considering evidence held that the mortgagee was entitled to the decree as prayed for : A I R 1920 Cal 26 and A I R 1916 P C 227, *Dist. ing.*; A I R 1918 Cal 430, *Rel. on.* [P 170 C 1]

Mahabir Prasad, S. N. Roy and Jaleshwar Prasad — *for Appellant.*

B. N. Mitter and B. Mukherji —
for Respondents.

Rowland J.—The plaintiffs-respondents are the holders of a mortgage dated 15th November 1920, secured on the sixteen annas of tauzi No. 1281, situated in Mauza Sikatia. They brought a suit on their mortgage in 1933. During its pendency there was default by the proprietors, who were the mortgagors, in payment of land revenue

as a result of which the entire estate was put up for sale under the Bengal Land Revenue Sales Act, 1859, on 30th April 1934. It was knocked down at a price of Rupees 17 odd, the bidder being defendant 7 of this litigation, defendant second party. The plaintiffs obtained their preliminary mortgage decree on 31st July 1934 and the defendant second party took out delivery of possession in pursuance of his auction-purchase in December 1934 and followed it up by taking mutation of his name in the Collectorate Register D. The present suit, which was instituted on 12th March 1935, claims a declaration that the revenue sale was altogether fraudulent and was, as against the plaintiffs, void and inoperative, that the plaintiffs' mortgage lien was not extinguished and that the plaintiffs could put the disputed property to sale for the satisfaction of their preliminary decree. The suit was resisted on the ground that the defendant second party was a genuine and independent purchaser who was holding the property in his own right.

The Subordinate Judge came to the conclusion that he was not so, that the defendant in question (defendant 7) was an old and trusted servant and mukhtar-i-am of the father-in-law of defendant 4, who is maternal grandfather also of defendant 5, that in the mortgage suit this very defendant 7 filed vakalatnama on behalf of Bishambhar Nath, the guardian ad litem for the minor defendant. The Subordinate Judge thought it was clear that defendant 7 had full knowledge of the mortgage suit. He found that admittedly this defendant knew that the defendants first party were owners of the mauza. He found that the defendants first party were also fully aware that the mauza had been advertised for sale and that they deliberately made default so as to cause the property to be sold for a paltry sum of Rs. 17 odd which was the actual amount of the revenue. He held that the defendants first party wilfully and deliberately defaulted and brought about the sale in order to defeat the mortgage rights of the plaintiffs and subsequent mortgagees, and that defendant 7 merely lent his name in furtherance of the fraudulent design which these defendants proceeded to carry into effect by making over to defendant 7 the collection papers of the mauza as well as the survey khatian and allowing him to enjoy the services of their own patwari Thakur Prasad. His opinion

was that actually the defendants first party had retained possession and enjoyment of the property for themselves. On this view he held that the plaintiffs were entitled to the declaration prayed for, and he decreed the suit declaring that the revenue sale in respect of the disputed Mauza Sikatia was fraudulent and inoperative against the plaintiffs and that the defendant second party has acquired no title as against the plaintiffs and that the plaintiffs are entitled to proceed against the disputed mauza in satisfaction of their mortgage decree.

Mr. Mahabir Prasad for the defendant second party, who appeals, has contended that on the findings, the plaintiffs could not be given the relief asked for, that if it be conceded that the mortgage lien of the plaintiffs could not be extinguished by the transactions entered into, a declaration of this sort could not be granted, because Sec. 36 of the Revenue Sale Law bars a suit to oust the certificate purchaser. Therefore he said on the findings the plaintiffs might be entitled to an order directing the defendant second party to reconvey the property to defendants first party, or the plaintiffs might be entitled to get a decree on their mortgage in the presence of defendant second party as defendant to a mortgage suit. He referred us to the decisions in 30 C L J 475¹ and 44 Cal 573² in which the final order was for a reconveyance of property to the plaintiff. But both those were cases in which the plaintiffs had a title which had matured into a right to possession at the time of the suit. In this case it is not so. The plaintiffs are still in the position of creditors claiming to be entitled to execute their decree against the property.

As regards the construction of S. 36, I do not think it necessary to interpret afresh the words of this Section as they have been the subject of previous judicial decisions. It will be sufficient perhaps to cite firstly 12 Cal 302³ where, following previous authorities, it was said that the object of S. 36 is that with the view of discouraging benami purchases at sales of this nature, the Legislature says that a suit to oust the

1. Satish Kantha Roy v. Satish Chandra, (1920) 7 A I R Cal 26=55 I O 689=30 C L J 475=24 O W N 662.

2. Deonandan Prasad v. Janki Singh, (1916) 3 A I R P O 227=39 I O 346=44 Cal 573=44 I A 30 (P O).

3. Chandra Caminy Deba v. Ram Ruttan. Pattuck, (1886). 12 Cal 302.

benamidar shall not lie. The Section evidently contemplates this: that the purchaser having elected to make his purchase in a benami name, then wishes to come into Court to have it established that the purchase was a benami one and to have the benamidar ousted by the Court and that appears to be what the Legislature intends to prohibit. But in the vast majority of benami transactions no controversy ever does arise between the benamidar and the real owner. The Section is not to be construed as meaning that where a creditor of the real owner has to bring the property to sale, the sham title of the benamidar may be set up against the purchaser. That would be making this provision, which was intended to discourage fraud, an instrument of fraud. It was pointed out that there were express decisions that in such a case as the present the property may be attached and sold as the property of the real owner. That case was decided as far back as 1885, but it has been followed in subsequent decisions of which it may suffice to instance 37 I C 790.⁴ Having regard to these decisions, it appears to me that the technical objection to the form of the final order and decree fails and the relief granted was the correct relief to be given in accordance with the findings arrived at.

The other point argued was that the Subordinate Judge should not have found the defendant second party to be merely the benamidar of the defendants first party. As for that Mr. Mahabir Prasad read the judgment and contended that the evidence which was mainly circumstantial was insufficient to discharge the burden of proof which lay on the plaintiff to establish the fact alleged and not on the defendant to disprove it. But Mr. Mahabir Prasad could not satisfy us that the facts taken as a whole lead a reasonable man to any other conclusion than that arrived at by the Subordinate Judge. I am of opinion that the view taken by the first Court was correct regarding facts as well as regarding the law. I would dismiss the appeal with costs.

Dhayle J. — I agree. The question of farzi was not Mr. Mahabir Prasad's first ground of attack. He began his argument by saying that assuming that defendant 7 was benamidar for defendants first party, the proper order for the lower Court to pass

would have been to declare that it was open to the plaintiffs to proceed against the appellant after giving him an opportunity to redeem their mortgage, as under S. 36, Bengal Land Revenue Sales Act, 11 of 1859, the sale must stand. But that Section, as my learned brother pointed out on the case from 12 Cal 302,³ does not enable the sham title of a benamidar to be set up against a creditor of the real owner. Appellant's being a mere benami purchase on behalf of the mortgagors, the beneficial title has not yet passed from the latter and is available for the mortgagees to proceed against. In the cases referred to by the learned counsel from 30 C L J 475¹ and 44 Cal 573² the revenue sales had not been held during the pendency of a suit by a mortgagee against the owner sold up ostensibly or otherwise, as in the present case. It is however not necessary to decide what the effect of a real revenue sale (as distinguished from a fraudulent sale under the sale law to a benamidar of the mortgagor owner) would have been on the rights of the mortgagees in the pending mortgage suit. The appellant benamidar's title, it is true, cannot be attacked by the mortgagors owners, but so far as the mortgagees are concerned, that title affords no defence either to the beneficial owners, the mortgagors or to the appellant, their benamidar.

N.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 170

DHAVLE J.

Nanha Prasad Singh and another —
Petitioners.

v.

Jagdambi Singh — Opposite Party.

Civil Revn. Petn. No. 395 of 1938,
Decided on 17th October 1938, against
order of Small Cause Court Judge, Monghyr, D/- 15th February 1938.

Arbitration — Court ordering reference of dispute to arbitration—Some arbitrators subsequently discovered to be indebted to one party — Order of Court superseding reference order substantially concurred in by parties — Court has jurisdiction to proceed with trial.

Where the Court having granted to the parties permission to refer their dispute to arbitrators subsequently supersedes its order of reference upon application by one of the parties on the ground that some of the arbitrators had since been discovered to be indebted to the other party, and such an order of supersession is substantially concurred in by the parties, the Court has jurisdiction to proceed with the trial: 12 M I A 112 (P O), *Disting.* [P 171 O 2]

4. Jagabandhu Dutt v. Rajani Kanta Pal, (1918)
5 A I R Cal 430=37 I C 790.

Raj Kishore Prasad — *for Petitioners.*
B. N. Rai — *for Opposite Party.*

Order. — This is an application in revision out of a Small Cause Court suit for the recovery of Rs. 236 on the ground that this was money paid by the plaintiff for the settlement of 14 bighas 15 kathas of land which however was actually not made over to him by the defendant's father, and son, members of a joint Hindu Mitakshara family.

The learned advocate for the defendants, who are the petitioners before me, points out that on 29th November 1937, there was a joint petition filed in the lower Court for a reference of the dispute to arbitration, as a result of which 7th January 1938 was fixed as the date for the arbitrators to file their award. On 7th January there was a petition filed by the plaintiff praying for superseding the order of reference on the ground that two of the three arbitrators had since been discovered by him to be indebted to the defendants. The order of reference was therefore, as the lower Court puts it, superseded and the trial proceeded. The learned advocate has challenged the propriety of this order and pointed out that two of the three arbitrators had actually sent in their award on the previous date, while the third who had the papers had returned them, saying that there could be no agreement among them. Reference is made to the well-known case in 12 M I A 112¹ for the principle that an agreement referred to arbitration cannot be revoked by any party without good cause. But that was a case where the matter had been referred to arbitration by agreement between the parties without the intervention of a Court of justice and in any event it is not disputed in the present case that two of the three arbitrators were in fact indebted to the defendants. What is urged is that they were appointed arbitrators by both the parties with full knowledge of the fact of their indebtedness to the defendants. It is difficult to accept this assertion as a correct statement of facts in view of the course taken by the trial subsequently. There does not appear to have been any protest against the order of the lower Court superseding the award. On 28th January, defendants filed a petition for time to summon his witnesses, and on 4th

February, defendant 2, son of defendant 1, actually accepted the written statement filed by his father. It is obvious therefore that the parties agreed in having the reference superseded, though it may be that some of the proceedings may not have been absolutely in order. I do not think that it can be said that this is a case where the lower Court had no jurisdiction to proceed with the trial at all. The plaintiff was there, and then came this reference to arbitration which the parties substantially seem to have concurred in getting superseded, followed by the regular trial. That the plaintiff paid Rupees 236 for the settlement of the land and that the land was not actually delivered to him by the defendants are findings of fact which have not been assailed. The learned advocate endeavoured to show that the paper showing the settlement was not properly stamped and should not have been admitted in evidence, but S. 36, Stamp Act, is against this contention.

The only other point raised by the learned advocate is the award of interest by way of damages made by the lower Court. A recent Privy Council decision has shown that such an award cannot be made, and the learned advocate for the opposite party does not contest this. The result is that this application fails substantially and only succeeds to the extent that the interest allowed by the lower Court by way of damages must be omitted from the decree obtained by the opposite party.

N.S./R.K.

Order accordingly.

A. I. R. 1939 Patna 171

WORT J.

Shib Charan Gorain — Appellant.

v.

Raghab Santal and others —

Respondents.

Appeal No. 971 of 1935, Decided on 4th November 1938, from appellate decree of Deputy Commissioner Sub-Judge, Chai-bassa, D/- 2nd August 1935.

Chota Nagpur Tenancy Act (6 of 1908), Ss. 213, 258 — Landlord suing person who is not his tenant and obtaining decree for rent — Holding sold in execution of decree and purchased by stranger—Suit by tenant for recovery of holding is not barred by S. 258 — Application under S. 213 to set aside sale is no bar to recovery of property — Purchaser is not entitled to refund of purchase money paid by him and withdrawn by landlord.

1. Pestonjee Nussurwanjee v. Manockjee & Co., (1867-69) 12 M I A 112=10 W R 51=2 Suther 164=2 Sar 890 (P O).

Where a landlord brings a suit against a person, who is not his tenant, and obtains a decree, and the holding is sold in execution of the decree and is purchased by a third person having no knowledge of the fraud alleged to have been practised by the landlord, a suit by the tenant for recovery of the holding is not barred by S. 258, the plaintiff merely claiming what undoubtedly belongs to him. So also, an application by the tenant to set aside the sale under S. 213 is not a bar to the recovery of the property. The purchaser of the holding is not entitled to an order for refund of the purchase price paid by him and withdrawn by the landlord. [P 172 C 1]

U. N. Banerjee — *for Appellant.*

S. C. Mazumdar — *for Respondents.*

Judgment.—I agree with the learned Judge in the Court below that it would be a shocking thing if the respondent, who is a perfectly innocent person, were deprived of his title by reason of the provisions of S. 258, Chota Nagpur Tenancy Act. The landlord brought an action for rent against a person who was not his tenant; a decree was obtained, the holding sold and purchased by the appellant who also was an innocent person, that is to say innocent of the fraud which was practised by the landlord or said to have been practised by the landlord with regard to these proceedings. One of the contentions which succeeded in the trial Court was that S. 258 was a bar to the suit. I agree with the learned Judge of the Appellate Court and not with the view expressed by the trial Court and hold that Sec. 258 is not a bar, the plaintiff merely claiming what undoubtedly belongs to him, and I do not think that his ill-advised application to set aside the sale under S. 213 is a bar to his recovery of that property. The only other question argued is that the present appellant should be reimbursed the purchase price which it is said has now been withdrawn by the landlord. I find it impossible to make an order in his favour, i. e. in the appellant's favour, and it would be an order in his favour against the co-defendant. If the order could have been made justly against the respondent, it would have been a different matter. But the learned advocate argues that if the decree is set aside it would entitle him to go to the Revenue Court for the purpose of recovering the proceeds of the sale, that is to say the purchase price. The respondent, the real tenant I am now informed, has got possession and it is to the advantage of the appellant that I would make an order setting aside the decree in execution of which the sale took place. I do not decide however and I cannot

decide in this case, whether the appellant, as he alleges, is entitled to go to the Revenue Court to reimburse himself. With the modification indicated above, namely that the decree in the rent suit will be set aside, I would dismiss the appeal with costs.

R.M./R.K.

Order accordingly.

A. I. R. 1939 Patna 172

HARRIES C. J. AND VERMA J.

Nisar Ahmad — Accused — Petitioner,

v.

Emperor.

Criminal Revn. No. 519 of 1938, Decided on 14th October 1938, from order of Sess. Judge, Bhagalpur, D/- 28th June 1938.

Criminal P. C. (1898), S. 256 — Magistrate after framing charge immediately asking accused if he wants to cross-examine witnesses—Failure to record reasons in writing for so doing is irregularity and does not vitiate trial if accused is not prejudiced.

Where a Magistrate immediately after charge is framed asks the accused whether he wants to cross-examine the prosecution witnesses, the Magistrate has to record his reasons in writing for so doing under S. 256. But failure to record such reasons in writing does not amount to anything more than an irregularity or at best it is a kind of omission contemplated by S. 537, Criminal P. C., and can be cured. Such failure therefore, if does not prejudice the accused in any way, does not vitiate the trial. [P 174 C 2]

M. Azizullah — *for Petitioner.*

Harries C. J.—This is a petition for revision of an order of the Sessions Judge of Bhagalpur upholding a conviction of the petitioner by a Magistrate of the First Class of an offence under S. 14 (a), Dangerous Drugs Act. The petitioner was convicted under that Section and sentenced to two years' rigorous imprisonment. The facts of the case are straightforward and simple. The police had received certain information and consequently a number of police officers obtained the assistance of one Bhaglu Ram to approach the petitioner with a view to purchasing from him cocaine. Bhaglu Ram was given two marked rupees, and he and another person Baiju Ram went to the petitioner's house and purchased from him a phial of white powder for Rs. 2 which they handed over to the petitioner. The police who were keeping watch came up, arrested the petitioner, and upon searching his person found the marked rupees. The contents of the phial were analyzed, and it was found that it contained cocaine. No

argument has been addressed to us upon the findings of fact; but it has been strenuously urged that during the course of the proceedings before the trial Magistrate a grave illegality was committed which renders the conviction illegal. After a number of prosecution witnesses had been examined, the Magistrate framed a charge and to that charge the present petitioner pleaded not guilty. He was then asked by the Magistrate whether he desired to cross-examine the witnesses, and his answer was in the negative. He however stated that he would call defence witnesses, and the case was adjourned to another date. Upon that date the defence witnesses did not put in appearance and later the petitioner stated that he would call no evidence. At that hearing some other witnesses were also examined by the Court, and the petitioner stated with respect to these witnesses also that he did not desire to exercise his right of cross-examination. The procedure to be followed by a Magistrate in relation to cross-examination is set out in S. 256, Cr. P. C., which is in these terms :

If the accused refuses to plead, or does not plead or claims to be tried, he shall be required to state at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged.

In the present case the Magistrate, purporting to act under this Section, asked the petitioner immediately after the charge was framed whether he desired to cross-examine the witnesses. This the Magistrate was entitled to do in a proper case; but it is to be observed that if it is done immediately after the charge is framed, the Magistrate must record his reasons for asking the accused forthwith. In ordinary cases the question should be asked at the commencement of the next hearing; but S. 256, Criminal P. C., undoubtedly entitles the trying Magistrate to ask the question immediately after the charge is framed provided the Magistrate gives his reasons for so doing. In the present case the Magistrate called upon the petitioner forthwith to say whether he desired to have any of the prosecution witnesses cross-examined; but unfortunately the Magistrate has not recorded his reasons for so doing. It has been argued that this failure by the Magistrate

to record his reasons is an illegality which vitiates the whole of the proceedings thereafter. Had the Magistrate failed to ask the petitioner whether he wished to cross-examine the prosecution witnesses, such would have been a very grave matter. However in the present case the petitioner was asked whether he wanted to cross-examine any witness and further the petitioner made it clear that he did not wish to do so. The most that can be said in this case is that the Magistrate failed to comply strictly with the terms of the Section in that he did not record his reasons for asking the petitioner forthwith whether he wanted to cross-examine the witnesses or not.

I am perfectly satisfied that in a case such as the present one it is essential in the interests of justice that there should be as little delay as possible, and this is pre-eminently a case where an accused person should be asked immediately after the charge whether he desires to cross-examine or not. Further from the subsequent conduct of the petitioner, I am satisfied that he understood the position though he was not represented by counsel. He appears to have preferred to call evidence on his own behalf, and even when he failed to produce such evidence he showed no immediate desire to cross-examine any witnesses. It was only at the very last stage that an application was made that the prosecution witnesses should be recalled for the purposes of cross-examination. In my view the petitioner has not been prejudiced in this case. He well knew what he was being asked, and he, knowing the possible consequences, declined to have the witnesses recalled for cross-examination. Unless therefore this failure by the Magistrate to record his reasons amounts to an illegality which must in every case vitiate a trial, I am not prepared to hold that the failure in this case has in any way affected the trial. It may be that the failure to ask the accused whether he desired to cross-examine might be an incurable illegality. As I have stated, the most that can be said in this case is that though the Magistrate was entitled to ask the accused forthwith, he failed to record his reasons for so doing. Such a failure to my mind is more in the nature of an irregularity and is curable where no injustice has been caused. In the present case I am abundantly satisfied that the petitioner has not been prejudiced in any way and that being so, there is no force

in the present contention. The facts of the case make it abundantly clear that the petitioner did sell this cocaine in circumstances which amount to a crime under S. 14 (a), Dangerous Drugs Act.

It has also been urged before the Court that the sentence in this case is excessive. In my view this crime is a most serious one and is far too prevalent in Northern India. It is a crime easy to commit and it is a crime which is frequently followed by most terrible consequences. Vendors of these dangerous drugs are often the cause of ruination of many innocent people. The time has come when deterrent sentences must be imposed to stamp out crimes such as these and that being so, I am unable to hold that the sentence is excessive. The result therefore is that I would dismiss this application.

Verma J.—I agree. On the facts of the case there is no doubt that the accused was caught red-handed while trying to sell cocaine on the date and at the time mentioned by the prosecution. The only point that needs consideration is the point of law urged by Mr. Azizullah, the point of law being that on 21st March 1938, when three prosecution witnesses were examined and charge was framed, the learned Magistrate proceeded to put the question to the accused whether he wanted to cross-examine prosecution witnesses. Mr. Azizullah on the strength of the wording of S. 256, Criminal P. C., urges that although he may be justified in putting the question immediately after the charges were framed, he should give reasons in writing for doing the same or the trial is vitiated. Dealing with this case in our revisional jurisdiction, we have first of all to see whether this omission to record reasons amounts to an illegality, and if it is not an illegality but a mere irregularity, whether the accused has been prejudiced in his trial in the case. Now, on that date I find that the accused had an opportunity of expressing his views before the Magistrate (Babu N. N. Das Gupta). First, in answer to the charge which was explained to him, he pleaded not guilty, and he said that he declined to cross-examine prosecution witnesses but wanted to adduce defence. This statement of his was recorded by the Magistrate in the English language; but on the same date there was the examination of the accused in Hindustani, which has been taken down in Kaithi script. His examination evidently was under S. 342, Criminal P. C.

The first question was whether he sold the cocaine or not to Bhaglu Ram. The answer was in the negative. The second question was as to why he was implicated in this case. He said it was due to an altercation with Bhaglu about eight days before the occurrence. Then the last two questions are important. "Will you cross-examine witnesses?" The answer is "No." The next question is "Will you examine defence witnesses?" He said "Yes" and then and there named Hasim Mia, Abdul Hannan and Ahmad Mia, as defence witnesses, and he signed this statement of his in Kaithi. So the argument that the petitioner could not understand the question that was put to him cannot be raised in the face of the document that I have referred to. So far as the question of illegality of the procedure is concerned, there is no doubt that the Magistrate is entitled to put the question either immediately after the charge is framed or on the next date after the charge is framed: but if he puts the question on the date the charge is framed, he is to give his reasons in writing. His failure to give his reasons in writing, to my mind, does not amount to anything more than an irregularity. At best it is a kind of omission in procedure contemplated by S. 537, Criminal P. C. Looking at the conduct of the accused, he does not seem to have been keen about cross-examining witnesses or coming forward with his own version. It cannot be said that he was in any way prejudiced, because it appears that although he cited defence witnesses they did not appear. Then he ultimately gave them up. Then when some more witnesses were examined by the Court, he refused to cross-examine them. So evidently he never intended by his own efforts to demolish the prosecution case. No prejudice has arisen in this case and this is not a matter in which I should in the exercise of our revisional jurisdiction interfere with the conviction or the sentence.

N.S./R.K. *Application dismissed.*

A. I. R. 1939 Patna 174

MANOHAR LALL AND CHATTERJI JJ.

Dinanath Sahay — Petitioner.

v.

Emperor.

Criminal Revn. No. 202 of 1938, Decided on 12th May 1938, from order of Dist. Magistrate, Gaya, D/- 23rd February 1938.

Criminal P. C. (1898), Ss. 162, 537 — Accused has statutory right to be supplied with copies of statements to police by witnesses for prosecution—Magistrate rejecting application of accused for being supplied with such copies and proceeding with trial—Failure to comply with mandatory provisions of Sec. 162 vitiates trial—Provisions of S. 537 cannot be invoked by prosecution.

The accused has a statutory right under S. 162, to be furnished with copies of the statements to the police of the witnesses for prosecution, so that he may be able to show by means of cross-examination that the witnesses are making statements in Court which are directly contradictory to what they stated before the police and the Court should see that the trial of an accused is conducted in the manner so carefully laid down by the Code. The provisions of S. 162 are applicable to a summons case as well. Failure by the Magistrate to follow the clear mandatory provisions laid down in S. 162 vitiates the trial and the accused is entitled to have a retrial. The provisions of S. 537, Criminal P. C., cannot be called into aid by the prosecution in such a case because unless the statements of the witnesses before the police have been furnished to the accused or have been seen by the Court itself, the High Court is unable to say that the accused has not been prejudiced and where there is a violation of the plain directions in the statute as to the mode in which the trial of the accused should be conducted, the High Court is bound to assume prejudice to the accused. [P 176 C 1, 2]

The accused who was being tried for an offence under S. 182, I. P. C., applied for being supplied with the copy of final police report and copies of the statements of the witnesses to the police and for postponement of the cross-examination of the witnesses till then. The Magistrate merely directed the police inspector to show to the accused the copy of the final police report before the case was taken up and proceeded with the trial and convicted the accused :

Held that the whole trial was vitiated by reason of failure by Magistrate to comply with the provisions of S. 162 : *A I R 1927 Pat 243 ; A I R 1928 Pat 215 and A I R 1929 Pat 268, Rel. on.*

[P 176 C 2]

G. P. Das — *for Petitioner.*

Assistant Advocate-General —

for the Crown.

Manohar Lall J.—This case has been referred to us by Verma J. by his order dated 28th April 1938 on the ground that there is no reported Division Bench authority of this Court which covers the question raised herein. The facts which are necessary to elucidate the matter in controversy are extremely simple and may be stated thus: On 12th November 1937 Dinanath Sahay lodged an information before the police regarding theft of a tin box said to contain some miscellaneous articles worth about Rs. 4/12 and certain documents. As the result of the investigation the police took the view that the complainant had lodged the information knowing and believing it to be false, intending

thereby to cause a public servant to do a thing which such public servant ought not to do if the true state of facts respecting which such information was given were known to him and to use his lawful power to the injury or annoyance of the suspects

and lodged a complaint under S. 182, I. P. C., against the petitioner Dinanath before the Subdivisional Officer who, on taking cognizance issued a warrant of arrest against the accused on 25th November 1937. The accused appeared on 8th December and on that date the ingredients of the offence were explained to him in the manner laid down for the trial of a summons case. Upon the accused pleading not guilty, the learned Magistrate ordered that the witnesses for the prosecution should be summoned for 20th December. As all the witnesses were not present on that date, the learned Magistrate, upon his view, "as this is a summons case it is desirable to examine all the witnesses on the same date" adjourned the case to 12th January 1938 for which the witnesses for the prosecution were again summoned to attend and also directed the accused to adduce his defence evidence on the same date. On 12th January 1938 the prosecution witnesses were present but before their examination actually began, the accused put in a petition to the learned Magistrate complaining that although he made an application asking for a copy of the final report in the case, which is the basis of the complaint against him, he had not been supplied any copies so far. He also stated in that petition that he is not in possession of the statements of the witnesses in the police diary and therefore he prayed that the Court may be pleased

to order the copies to be given to him before he is asked to cross-examine the witnesses. As it is extremely difficult to cross-examine the witnesses without copies of the above documents the cross-examination may kindly be postponed.

The learned Magistrate upon that petition passed the following order. "The A. S. I. will show the final report to the accused before the case is taken up." Thereafter the witnesses for the prosecution were examined and cross-examined by the accused without his being in possession either of a copy of the final report or of the statements of the prosecution witnesses. The accused was not ready with his defence witnesses and the Court adjourned the case to 24th January 1938, on which date he examined two witnesses and on their being cross-examined, the case was adjourned to 29th January for

passing of orders. On 1st February 1938 an order was passed convicting the accused under S. 182, I. P. C., and sentencing him to pay a fine of Rs. 200. An appeal against this order was dismissed by the Appellate Court summarily on 23rd February 1938. Against these orders this Court has been moved in revision.

The only question which was argued before Varma J. was whether the conviction of the petitioner should not be set aside on the ground that his trial had been vitiated because the learned Magistrate failed to comply with the requirements of S. 162, Criminal P. C., namely of that part of the Proviso of sub-cl. (1) which enacts that :

When any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by S. 145, Evidence Act, 1872.

Before considering the case-law referred to in the order of reference it will be useful to examine if the rights of the accused which are clearly laid down in the above quotation have been curtailed in the present case by reason of the course adopted by the accused, because it was argued by the learned Assistant Government Advocate for the Crown that the accused did not adopt the proper procedure and suggested that the accused should have renewed his application either orally or in writing after each witness who was being called by the prosecution had entered the witness-box and after his examination-in-chief had been recorded. In my opinion, this will be taking a very narrow view of what the accused intended by reason of this application of 12th January 1938. The accused definitely informed the Court that he would be unable to cross-examine the witnesses of the prosecution unless he was supplied with the copies of the statement of those very witnesses before the police. The learned Magistrate by his order clearly indicated that he had refused that application because he simply ordered the Police Sub-Inspector to show the final report to the accused. But the Legislature has given a statutory right to the accused to insist upon his being supplied with the copies of the police statements so that he may be able to show by means of cross-examination that the witnesses are making statements in Court

which are directly contradictory to what they stated before the police, and the Courts should be careful to see that the trial of an accused is conducted in the manner so carefully laid down by the Code. It was conceded that the provisions of Sec. 162 are applicable to the trial of a summons case as well as to the trial of a warrant case and indeed this is obvious because S. 162, Criminal P. C., does not speak of warrant cases only. The provisions of S. 537, Criminal P. C., cannot be called into aid by the prosecution in this case because unless the statements of the witnesses before the police have been furnished to the accused or have been seen by the Court itself, this Court is unable to say that the accused has not been prejudiced and where there is a violation of the plain directions in the statute as to the mode in which the trial of the accused should be conducted this Court is bound to assume prejudice to the accused in the circumstances existing in the present case. In my opinion the trial of the accused was vitiated and he is entitled to have a retrial upon the terms which will be indicated hereafter irrespective of whether he made a complaint on this score to the Appellate Court.

In the case reported in 6 Pat 329¹ the accused had applied for copies of statements made by the prosecution witnesses to the police during the investigation, and the Magistrate having ordered such copies to be furnished to him, the accused declined to cross-examine the prosecution witnesses until such copies were actually handed over to him, and the Court held that the Magistrate had no option but to postpone the cross-examination. Macpherson J. in the judgment which he delivered stated however that the question of furnishing to the accused a copy of the statement of a witness before the police does not arise until the witness is called for the prosecution and secondly, that the Court is not competent to direct that the accused be furnished with a copy of such statement unless it contains something which constitutes a contradiction to a statement made by the witness in his deposition at such inquiry or trial. If this view was correct it will not be possible for an accused to conduct his cross-examination effectively because he or his lawyer will have to make up his mind at once as to

1. Saadat Mian v. Emperor, (1927) 14 A I R Pat 243=103 I C 597=28 Cr L J 709=6 Pat 329=8 P L T 780.

where the contradiction existed and it would entail a duty upon the Court to place itself in the position of an advocate and try to find whether there was a contradiction or not before it allowed the handing over of the statement to the accused. In my opinion, the true interpretation is that the accused has a statutory right to be furnished with a copy of the police statements of the witnesses for the prosecution who were going to be called (and this can easily be seen from the *hazri* which is filed by the prosecution) and the only duty which rests upon the Court is that it will not allow any part of such statement contained in writing made by the police in the course of the investigation to be used in evidence during the course of cross-examination unless this contradicts the previous statement of the witnesses, and this may well be left for the stage of final arguments. In 7 Pat 205² a similar question was again considered by this Court and it was held that as soon as a witness is produced in Court and the accused applies for a copy of the statement before the police recorded in writing, the Court is bound under S. 162, Criminal P. C., to refer to the writing and to direct that the accused be furnished with a copy thereof and it was pointed out that it was not necessary that before the copy be given some foundation be laid in cross-examination for the suggestion that the evidence given in Court is contradicted by the previous statement recorded by the police. *Jwala Prasad J.* held that the meaning of the words, "the Court shall refer to such writing" is that the Court is to exercise discretion under Proviso 2 and that it does not mean that the right of the accused is at all restricted to obtain a copy, the discretion wherein had been expressly taken away by the Legislature and distinctly held agreeing with *Ross J.* that the Court cannot refuse the granting of a copy till the accused has by his cross-examination showed that there is a contradiction between the statement in Court and the statement referred to before the police.

This view of the Division Bench was expressly affirmed the next year in 8 Pat 279³ where the learned Chief Justice agreed with the judgment of the Court delivered by *Fazl Ali J.* who expressed himself thus

2. *Ramgulum Teli v. Emperor*, (1928) 15 A I R Pat 215=107 I O 817=29 Cr L J 297=7 Pat 205=9 P L T 92.

3. *Jhari Gope v. Emperor*, (1929) 16 A I R Pat 268=118 I O 130=30 Cr L J 858=8 Pat 279=10 P L T 460.

1939 P/23 & 24

upon the point which is now being considered by me :

The language of S. 162 is mandatory and the learned Assistant Sessions Judge had no power to refuse the application once it had been made unless the case came under Proviso 2 to S. 162, Criminal P. C., and in his opinion the statement made by the witness was not relevant to the subject-matter of the inquiry or trial and that its disclosure to the accused was not essential in the interests of justice and was inexpedient in the public interest. Further there is nothing in S. 162, Criminal P. C., to authorize the Court to look into the statement in the police diaries for the purpose of finding out whether it is contradictory to the statement made in Court or not before granting the application. This is really the function of the lawyer for the accused after a copy of the statement has been granted to him. There may be cases in which the accused or his lawyer is inclined to treat certain statements as contradictory whereas the Court may think there are no contradictions and there is nothing in the Code to suggest that the decision of the Court on the point must prevail; nor is there anything in the language of the Section to suggest the view that the accused are to be debarred from examining the statements for themselves to find out if there are any contradictions, merely because the Court has formed an opinion that there are no contradictions.

Upon the examination of the case law which exists in this Court, as no contradictory authority of any other High Court has been brought to our notice, I hold that the learned Magistrate failed to follow the clear mandatory directions of the Code in refusing to give to the accused copies of the statements to which he was entitled under the law. In practice there need be no difficulty in complying with the statute even in a summons case; although it is true that the accused is ordinarily called upon in a summons case immediately to cross-examine the prosecution witnesses as soon as the statement-in-chief of each witness has been recorded; but that procedure is subject to the provisions of S. 162, Criminal P. C., and assumes that at that time the accused had been provided with the statutory materials which are his undoubted right to possess in order to cross-examine the prosecution witnesses. In such cases it will be convenient and consistent with the requirements of the Code that the witnesses for the prosecution are examined-in-chief on one day and then a very short adjournment is given to the accused during which time he can be provided with the copies of the statements of those witnesses who have been examined by the police. In the present case the case had to be adjourned from 12th January to 24th January and the learned Magistrate could well have finished

the examination of the prosecution witnesses on 12th January 1938 and after seeing that the accused had been provided with the copies of the police statements either on that very day or on the next day, the cross-examination of the witnesses could have been fixed for either on 13th or 14th January 1938 or on such other date as would have suited the convenience of the Court, of the witnesses and the parties.

I would therefore set aside the conviction and sentence passed on the accused and direct that the case be remanded to the learned trial Court so that after the accused has been furnished with the copies of the statements of the witnesses before the police and with the final report he may fix a date on which the witnesses for the prosecution may be cross-examined further by the accused in the light of these materials which were denied to him on 12th January 1938. It may be that the accused will not like to cross-examine the witnesses further if he does not find any materials for contradiction in the statements of the witnesses which will now be supplied to him. After such cross-examination, if any, has been allowed the learned Magistrate will proceed to dispose of the case by calling upon the accused to produce such further defence witnesses as he may choose to do so. Thereafter he will dispose of the case after hearing arguments of both sides. If the learned Magistrate has been transferred in the meantime, the proceedings shall commence de novo by a fresh examination-in-chief of the witnesses for the prosecution.

Chatterji J. — I agree.

R.M./R.K.

Case remanded.

A. I. R. 1939 Patna 178

ROWLAND J.

Bachu Singh — Appellant.

v.

Tribeni Sah — Respondent.

Criminal Appeal No. 2 of 1938, Decided on 3rd November 1938, from decision of Sess. Judge, Saran, D/- 20th August 1938.

(a) Criminal P. C. (1898), S. 476 — False complaint — Magistrate refusing to direct prosecution — On appeal Sessions Judge directing prosecution — Order is not appealable.

Where a Magistrate in a case of false complaint has refused to direct prosecution and on appeal the Sessions Judge has directed prosecution, an appeal does not lie from the order of the Sessions Judge. The appeal should therefore be treated as revision: *A I R 1938 Pat 19, Foll.* [P 178 C 2]

(b) Penal Code (1860), S. 211—Ingredients of offence under S. 211—There is no penalty in S. 211 for incautious or negligible acceptance of information which complainant might have learnt by inquiry to be unreliable.

The ingredients of S. 211 go a good deal further than the mere absence of proof of the guilt of the person said to have been falsely charged with an offence. The complainant must have falsely charged such person with having committed an offence, that is to say, the person must be innocent. The complainant must have known that there is no just or lawful ground for the proceeding or charge, that is to say, there is no penalty in this Section for incautious or negligible acceptance of information which the complainant might have learnt by enquiry to be unreliable. Thirdly, there must have been an intention to cause injury to the person. The last can in some cases be inferred from the relation of the parties when the other two elements are established. As regards the other two ingredients, it is important to remember that there is a difference between suspicion and evidence. The prosecution will have to establish facts irreconcilable with the innocence of the accused.

[P 179 C 1]

Nirsu Narain Sinha and Harinandan Singh — for Appellant.

Jaleshwar Prasad and Hareshwar Prasad Sinha — for Respondent.

Judgment.—This was presented in the form of an appeal but an appeal does not lie as held in 18 P L T 917.¹ It will therefore be treated as an application in revision.

The petitioner lodged a complaint on 6th April 1938 against four persons. The substance of the information was that on the previous day, 5th April, he had come to Katcheri at Chapra and left his mare tied in the Katcheri compound while he went elsewhere. On his return the mare was missing. Four persons told him that they had seen the accused taking the mare away, also that the accused had told them they were taking the mare to the petitioner. The Magistrate referred the complaint to the police whom he directed to make a first information report and investigate. The police reported the case to be false but did not recommend a prosecution. The Magistrate agreed with the police report and entered the case in his register as false. Thereafter one of the persons named in the complaint, namely Tribeni Kalwar, presented a petition to the Magistrate for prosecuting the present petitioner under S. 211. The Magistrate refused to take any action as the complainant had not spoken of his own knowledge as to the removal of the

1. *Kesharinandan v. Emperor*, (1938) 25 A I R Pat 19=172 I C 899=17 Pat 9=18 P L T 917 (F B).

mare by the accused persons but had reported it as hearsay from certain witnesses of whom three, who had during the police investigation, confirmed that they made such statement to the complainant. The Sub-Divisional Officer observed that the complainant could not be prosecuted for he filed a complaint believing that statement though that statement may be untrue. Tribeni appealed to the Sessions Judge who has allowed the appeal and ordered prosecution.

In revision it is contended that this is not a case in which there should be a prosecution. The complaint being based on hearsay it is practically incapable of proof that the complainant did not believe the information he had received and it is said that the learned Sessions Judge has confused suspicion with evidence and directed a prosecution in a case in which the facts to be proved are facts of which evidence cannot be forthcoming. Undoubtedly it is necessary, in considering an application for an order to prosecute under S. 476, to bear in mind that whereas had the original complainant gone to trial the entire burden of proof would have lain on the complainant, the opposite party will have to carry the whole burden, should the complainant be prosecuted under S. 211 and the ingredients of S. 211, go a good deal further than the mere absence of proof of the guilt of the person said to have been falsely charged with an offence. The complainant must have falsely charged such person with having committed an offence, that is to say, the person must be innocent. The complainant must have known that there is no just or lawful ground for the proceeding or charge, that is to say, there is no penalty in this Section for incautious or negligible acceptance of information which the complainant might have learnt by enquiry to be unreliable. Thirdly, there must have been an intention to cause injury to the person. The last can in some cases be inferred from the relation of the parties when the other two elements are established. As regards the other two ingredients, it is important to remember that there is a difference between suspicion and evidence. The prosecution will have to establish facts irreconcilable with the innocence of the accused. Now, the Sessions Judge in giving his reasons says first that a perusal of the record raises a strong suspicion that Bachu Singh must have been aware of the falsity of his case;

for it is improbable that complainant's witnesses would have believed Tribeni's explanation of taking the mare to Bachu Singh. Then a reference is made to the deficiency of evidence on the side of the complainant that the mare had been brought to the Civil Court compound. Then there is absence of corroboration of Bachu Singh's story by his pleader. Then reference is made to the fact of which the police found there was evidence that Tribeni was in Siwan on 5th and 6th April 1938 and the fact that Jugal, referred to in the complaint as an eye witness, had not fully supported the case but said that it was merely suspected that the accused might have stolen the mare. The Sessions Judge then says that the Magistrate was not warranted by the record in believing that Bachu had merely acted on statements made by his witnesses. The Sessions Judge then states:

Even on this view of the case, it must be held that it is the duty of every complainant, who professes to act on hearsay, to verify the information received by him before instituting a case against innocent persons and he cannot escape responsibility if enquiry subsequently shows that the case instituted by him had no foundation in fact while resulting in harassment and inconvenience to the opposite party.

I do not think the Sessions Judge could have said this if he had carefully read Sec. 211. Prosecutions under that Section are not to be undertaken so lightly as this. There is no finding by the Sessions Judge that a prosecution is necessary in the interest of justice and though it has been held that the absence of such a finding is not necessarily fatal, it is certainly desirable that Courts dealing with these matters should apply their minds directly to the question; and in doing so, they should consider whether an attempt to use the law in aid of a private grudge is being made and whether the Courts should allow themselves to become the instrument of a private grudge and also what facts can be proved and whether these facts are likely to be sufficient to support the conviction. In this case Tribeni, the petitioner for prosecution, was admittedly an avowed enemy of Bachu Singh. As regards the facts that can be proved, it is obvious that a conviction cannot be based merely on improbability or on what a particular officer suspects. The police report which I have read indicates two points on which Bachu's complaint may have contained deliberately false averments of facts. One is as to his coming to Chapra on 5th April. It appears that the

police were told by the Bench Clerk that on that date Harinarain had come to Court in Chapra but Bachu Singh had not. If it can be proved that Bachu had not come to Chapra that morning, the entire case instituted by him is false and cannot have been instituted in good faith. Another point is that the police had some information that the mare was lost not from Chapra Court but from the field in Bachu's village. If this can be proved, the complaint of Bachu cannot but be false and the matters which have been referred to in the Sessions Judge's order as matters of suspicion will naturally go in as indications of malicious intention and so on. As there is apparently some possibility of these two facts being definitely established, and as this is not an appeal but a revision, I do not think I should interfere and stop the prosecution from going forward.

I should mention one more matter, namely the alibi of Tribeni on 5th April as having been in Siwan. If the complaint in its generality was bona fide, I would not regard the fact that one accused person had been wrongly identified as a ground for instituting a prosecution under S. 211. In the result the rule is discharged.

D.S./R.K.

Rule discharged.

A. I. R. 1939 Patna 180

HARRIES C. J. AND AGARWALA J.

Shiva Prasad Singh —

Plaintiff—Appellant.

v.

Bhagwandas Agarwala and others —

Defendants—Respondents.

Appeal No. 601 of 1937, Decided on 14th November 1938, from appellate decree of Dist. Judge, Manbhum-Singhbhum, Purulia, D/- 17th March 1937.

Landlord and Tenant—Tenant renouncing tenancy—Landlord still accepting rent from tenant—Landlord cannot say that tenancy has ceased.

Where even after the tenant has executed a release in favour of landlord, the landlord accepts rent from the tenant and gives him receipts, the release has no effect and the landlord cannot be heard to say that the tenant was not his tenant.

[P 181 C 1]

S. N. Bose and N. N. Ray —

for Appellants.

Ray Guru Saran Prasad, S. C. Mazumdar, Jyotirmay Ghosh and Ray Paras Nath — *for Respondents.*

Harries C. J.— This is a plaintiff's second appeal against a decree of the lower Appellate Court substantially dismissing the plaintiff's claim. The lower Appellate Court did give the plaintiff possession of certain items of property, and against that portion of the decree the respondents have filed a cross-objection.

The material facts of the case can be shortly stated as follows: Jodharam and his co-sharers had a raiyati holding having occupancy rights in mouza Dhanbad. The total area of the holding was approximately 14.9 acres. In the year 1920 Jodharam sold approximately 5 acres of this holding to defendants 1 to 3 and this sale deed is dated 7th October 1920. Thereafter the plaintiff received the rent of whole holding, though it would appear that the defendants 1 to 3 contributed the rent in respect of their portion, namely 5 acres. The plaintiff however accepted the rent in the name of Jodharam and thereby acknowledged Jodharam as his tenant of the whole holding. In the year 1930 Jodharam executed a release in favour of the plaintiff; but both the Courts below have held as a fact that this transaction was not a genuine one and had no effect whatsoever. In fact, after the year 1930 the plaintiff gave receipts for the rent of the whole holding in the name of Jodharam. In short, until the institution of this suit, the plaintiff had insisted that Jodharam was still tenant of the whole holding. In the present suit the plaintiff contended that the transfer of 7th October 1920 to defendants 1 to 3 had no legal effect whatsoever. It is said that this land is subject to the provisions of the Chota Nagpur Tenancy Act and that the transfer could have no effect by reason of S. 46 of that Act. It is conceded that the transfer could not give to defendants 1 to 3 a tenancy in this property.

The Court of first instance came to the conclusion that after this transfer the transferees, namely defendants 1 to 3, held adversely to the plaintiff. The trial Judge was of opinion that as the transfer gave defendants 1 to 3 no title, they must have been in possession in consequence adversely to the plaintiff. Accordingly the trial Court came to the conclusion that with regard to one item of property defendants 1 to 3 had obtained a title by adverse possession. The trial Court further held that with regard to other items of property which defendants 1 to 3 were in possession through certain

sub-tenants, these defendants had also obtained title by adverse possession. The learned District Judge on appeal upheld the finding of the trial Court with regard to the first item of property of which the defendants 1 to 3 were in khas possession. With regard to the other items of property which were in the possession of sub-tenants, the learned District Judge held that defendants 1 to 3 had not acquired a title by adverse possession. He accordingly decreed the plaintiff's claim with regard to these items but did not give the plaintiff actual physical possession. He merely held that the plaintiff was entitled to collect the rents from these sub-tenants.

In my view, this case can be disposed of upon one point. The plaintiff throughout has insisted that Jodharam was the person liable to pay the rent for the whole holding. After the transfer in 1920 the plaintiff gave receipts for the rent of the whole holding in the name of Jodharam. Even after the alleged surrender in 1930 the plaintiff continued to give receipts for the rent of the whole holding in Jodharam's name. The learned District Judge, though holding that the release was not genuine and that it had no legal effect, seems to have been of opinion that it was a renunciation on the part of Jodharam which was binding upon him. It is to be observed that a tenant cannot renounce his tenancy if the landlord insists on treating him as a tenant. In the present case it is difficult to treat the transaction of 1930 as a renunciation when it has been found as a fact by both the Courts that it was not a genuine transaction or in other words that it was a purely colourable transaction. Such a transaction can have no effect whatsoever either as a release or renunciation. In any event it is clear that the plaintiff refused to accept any renunciation by Jodharam, because it is found as a fact that after 1930 the rent of this holding was paid in full and that the landlord insisted on treating the rent as being paid by Jodharam and gave his receipts accordingly. That being so, the plaintiff cannot now be heard to say that Jodharam was not his tenant right up until the date when this suit was instituted. If Jodharam was his tenant at the date of the institution of the suit, then clearly the plaintiff had no right to immediate possession. Having no such right to immediate possession, the present suit against all the defendants was bound to fail. In my view,

once it is held that Jodharam is still tenant of this holding, the plaintiff's claim was bound to fail in its entirety.

In my judgment, the plaintiff's claim should have been dismissed by the learned District Judge and accordingly I would dismiss this appeal and allow the cross-objection filed on behalf of the respondents. The plaintiff should pay the costs in this Court and in the Courts below. The defendants 1 to 3 and defendants 8 and 9 will be entitled to separate costs.

Agarwala J.—I agree.

D.S./R.K.

Appeal dismissed.

* A. I. R. 1939 Patna 181

WORT, AG. C. J. AND MANOHAR LALL J.

Abdul Matin — Appellant.

v.

*Bidesi Rajwar and another—Claimants
— Respondents.*

Appeal No. 164 of 1937, Decided on 12th April 1938, from original order of Commissioner under Workmen's Compensation Act, Gaya, D/- 22nd June 1937.

(a) Workmen's Compensation Act (1923), S. 30, Proviso 1—One employee awarded compensation less than Rs. 300 and another employee awarded compensation more than Rs. 300—Appeal by employer—To decide whether appeal lies each case must be treated as separate.

Where compensation awarded to one employee is more than Rs. 300 and that awarded to another employee is less than Rs. 300 and the employer appeals against them, the Court must treat each of these cases as separate cases, although they may be the subject-matter of one appeal. S. 30 cannot be construed as to entitle the employer to appeal where the total amount in the appeal involves a sum of more than Rs. 300. This being so, the appeal so far as the employee who is awarded compensation less than Rs. 300 is concerned does not lie to High Court. [P 182 C 1]

(b) Workmen's Compensation Act (1923), S. 10—Words "has been instituted within six months" mean institution of legal proceeding before Commissioner (*Obiter*).

The word 'institute' is an act referable to the making or filing formally before the appropriate Court a claim for compensation. Hence the words "has been instituted within six months" do not mean a claim against the employer, but means the institution of legal proceedings before the Commissioner : *A I R 1934 Cal 460 (SB), Ref.*

[P 182 C 2]

* (c) Workmen's Compensation Act (1923), S. 10, Proviso 3 — "Sufficient cause" — Ignorance of law is not sufficient cause.

Ignorance of the rules or the law on the part of workman cannot be any reasonable cause within the meaning of the Act : (1911) 1 K B 982, *Rel. on.*

[P 183 C 1]

N. K. Prasad II and Ramanugrah Pd.—
for Appellant.

Choudhury Mathura Prasad —
for Respondents.

Wort Ag. C. J.—The appeal in this case is by the employer against the order of the Commissioner acting under the Workmen's Compensation Act granting compensation for an accident which arose out of and in the course of his employment of one Meghan awarding Rs. 231-1-7 for permanent disability and in the case of one Bidesi compensation amounting to Rs. 462-3-2. Under S. 30 of the Act an appeal is given to this Court in a case which raises a substantial question of law, but it provides that no appeal lies in a case in which the amount in dispute is less than Rs. 300. So far as Meghan's case is concerned, that condition is not complied with as I have already said, because the compensation awarded is only Rs. 231 odd although in the other case it was in excess of the Rs. 300, that is in Bidesi's case. Now it is contended by the learned advocate who appears on behalf of the appellant, that the words of the Proviso to S. 30 must be construed as entitling the employer to appeal where the total amount in the appeal involves a sum of more than Rs. 300. If that argument is to be accepted, then the rights of one workman would be governed by the conditions and circumstances of the case of the other workman. That in my judgment, as I have said, is an impossible contention. We must treat each of these cases as separate cases although they may be the subject-matter of one appeal, and that being so, the appeal so far as Meghan's case is concerned, in my judgment, does not lie to this Court.

The circumstances of both cases however are very similar with regard to the point which is in dispute. The learned Commissioner has come to the conclusion that sufficient cause within the Proviso to S. 10 has been shown entitling him to take cognizance of these cases, although the claim was made more than six months after the accident. That the claim before the Commissioner was made six months after the accident is not in dispute; but it is contended by the learned advocate appearing on behalf of the workmen that the words "unless the claim for compensation with respect to such accident has been instituted within six months" must be construed as meaning a claim made against the employer and although this Court is not

entitled to go into the evidence, we have been referred to the evidence in support of that contention. The evidence of Bidesi himself is that he was three months in the hospital, that he received nothing from Matin Babu and afterwards when he went to him he refused to give him anything. Now, in my judgment, even if we had jurisdiction to go into the evidence it would be impossible to hold on that evidence a view contrary to that held by the Commissioner that either a claim for compensation had been made to the employer, or to use the words of the Section itself, a claim had "been instituted within six months." The question whether the words "has been instituted within six months" mean a claim against the employer or the institution of legal proceedings before the Commissioner has been the subject-matter of a decision of the Calcutta High Court in 61 Cal 508,¹ where Buckland A. C. J. made the observation that the word "institute" in sub-cl. 1, S. 10, is an unfortunate substitution for the word "make" in the English Act. The words in the Act are the following :

Unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or in case of death within six months from the time of death.

In my judgment, the question does not strictly arise in this case; but had it arisen and had it been necessary for the purpose of the decision of this case it would seem to me that the Proviso to sub-s. 1, S. 10, would make the matter clear. The words of the Proviso are :

Provided further that the Commissioner may admit and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been instituted, in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or institute the claim, as the case may be, was due to sufficient cause.

In my judgment, as I have said, it seems to me that those words are quite conclusive as regards the meaning of the words "instituted within six months." The word "institute" is an act referable to the making or filing formally before the appropriate Court a claim for compensation. The learned Commissioner in this case appears to have taken that view of the Section and comes to the conclusion that sufficient cause has been shown in the following words :

1. Abdul Karim v. Eastern Bengal Railway, (1934) 21 A I R Cal 460=1934 Cr C 613=149 I C 169=61 Cal 508=38 C W N 613 (S B).

Meghan is of the coolie class, he was in hospital for a long while seriously ill, and cannot be expected to know the rules. Bidesi is also of the same class. The accident is not denied as it was reported by the manager on 16th February 1936. I consider that adequate cause has been shown.

It would appear from the order that he was of the opinion that in the case of Bidesi sufficient or adequate cause had been shown by reason of Bidesi's ignorance of his right or ignorance of the law. Sufficient authority against that view of the matter is a decision on the same words in the English Act in (1911) 1 K B 982² where the Court of Appeal held that ignorance on the part of the workman of the existence of the Act was not a reasonable cause, and it is perfectly obvious, if I may be allowed to say so with respect to the decision of the learned Judges of the Court of Appeal that their decision is obviously right and necessarily ignorance of the law cannot be any reasonable cause within the meaning of the Act. That being so, it seems to me that Bidesi's case should have been held by the Commissioner as not maintainable. So far as Meghan's case is concerned, I have already said that no appeal lies. The appeal so far as Meghan's case is concerned will therefore be dismissed; but in the case of Bidesi the appeal will be allowed and the order of the learned Commissioner awarding compensation will be set aside. There will be no order as to costs.

Manohar Lall J.—I entirely agree. In my opinion when proper occasion arises it will be necessary to consider the correctness of the decision of the Calcutta High Court in 61 Cal 508.¹ The question which arose in that case does not fall to be determined in the present case.

D.S./R.K. *Order accordingly.*

² 2. *Roles v. Pascall & Sons*, (1911) 1 K B 982=60 L J K B 728=104 L T 298.

A. I. R. 1939 Patna 183

MANOHAR LALL AND CHATTERJI JJ.

Maksood Ali and others

v.

President, Union Board, Garhwa.

Criminal Ref. No. 18 of 1938, Decided on 14th June 1938, made by Judicial Commissioner, Chota Nagpur, D/- 3rd May 1938.

(a) Nuisance — Public nuisance by trade — Dispute whether trade should be stopped or not—Overwhelming evidence proving existence

of nuisance—Magistrate under S. 133, Criminal P. C., ordering trade to be stopped and giving reasons why order for regulation of trade not proper—Magistrate using discretion properly and legally—Trade held could not be ordered to be regulated in revision.

The only dispute between the parties was whether the trade which one party was carrying on and which was becoming a nuisance should be stopped and there was no dispute that the trade should be regulated. There was overwhelming evidence given by several public officers which amply proved the existence of such a nuisance as was injurious to the health and physical comfort of the public. The Magistrate who conducted proceedings under S. 133, upon being satisfied as to the existence of nuisance ordered the trade to be stopped and gave adequate reasons why he did not think it proper to pass an order for regulating the trade :

Held that the Magistrate having exercised his discretion in a proper and legal manner, it was not within the province of a Court of revision to impose conditions by ordering regulation of trade which the evidence did not justify and which the parties never contemplated: 7 *Beng L R* 499 and 7 *Beng L R* 516, *Foll.* [P 185 C 1, 2]

(b) Nuisance — Public nuisance dangerous to health cannot be legalized by long enjoyment (*Obiter*).

No length of enjoyment can legalize a public nuisance involving actual danger to the health of the community : 7 *Beng L R* 499, *Rel. on.*

[P 186 C 1]

M. Rahman and Syed Imam Hasan —
for Reference.

Awadesh Nandan Sahay and Vishnu
Deva Narayan — *Against Reference.*

Manohar Lall J. — This is a reference by the Judicial Commissioner of Chota Nagpur recommending that the order of Mr. S. W. A. Bilgrami, Deputy Magistrate with first class powers at Daltonganj dated 25th February 1938 passed under S. 133, Criminal P. C., against the opposite party may be modified in the manner suggested by the learned Judge. The order passed was that the opposite party as butchers do close the business of slaughtering animals and selling meat and beef in their respective houses within a month. The learned Judicial Commissioner thought that this order was far more drastic than was warranted by the findings and therefore recommended that, as the effect of this order would be to deprive the butchers of their means of livelihood, they should not be deprived of those means without being given a chance to improve their methods. They have been admittedly carrying on the business up to the date of the order. The learned Judge recommended that the order should be altered in this wise that an order should be passed in these terms that the butchers

may be ordered "to regulate their business in such a way as to eliminate the defects noticed."

We have heard the learned advocate on behalf of the opposite party and Mr. Awadesh Nandan Sahay on behalf of the Crown. The proceedings were started as a result of an application before the Subdivisional Magistrate of Daltongunj filed by the tahsildar of the Union Board of Garhwa dated 6th October 1937. The allegations in that petition were in brief that owing to the slaughter house being near the public institutions and the way in which the slaughter house is kept and the meat and beef are kept for sale, the butchers were creating a great nuisance to the public and the members of the public living in that locality and to the general passersby.

It was also alleged that the bones and hides that are kept in the houses of the opposite party give out bad smell causing a complete nuisance to the public in the neighbourhood. For several years past the Health Officer of the school and the other authorities were alleged therein to have pointed out that the existence of this slaughtering house and the carrying on of the trade so close to the English High School had the result that the hostel and the school were rendered insanitary and undesirable. The Inspector of Chota Nagpur Division, it is stated, had also strongly condemned the existence of this slaughter house and had directed the authorities of the school to take proper steps in the matter. The Union Board, it was then stated in the application, made every attempt to stop the nuisance but owing to the alleged obstinacy of the opposite party the nuisance still continued and now that the nuisance had become very great and was injurious to the health and physical comfort of the community, he, the petitioner, prayed that proper proceedings should be taken to stop and prohibit the nuisance. Seven witnesses were examined on behalf of the complainant. We have gone through the evidence of these witnesses at length as we have been invited to do so by the learned advocate for the opposite party who insisted that there was no evidence whatsoever to justify the finding of the Magistrate that these slaughter houses (private) were a nuisance. Several of the important witnesses are public officers whose evidence is entitled to a great weight and the learned Magistrate who had the witnesses before him had no hesitation whatsoever in relying completely upon the statements elicited from them.

Witness 1 who is a Tahsildar of the Union Board states that the houses of the accused are east of the road. On the west side of the road there is the Garhwa High School which has a hostel. The thana and the hostel are close to the school. The slaughter of cattle in those courtyards is a nuisance to passersby as the sight and the smell are both offensive. The hides are kept in those court-yards. In rainy season there is very bad smell.

Witness 2 (Mr. J. N. Gupta) speaks of the previous reports which were submitted by him on this matter from time to time and he speaks in his evidence in these words :

I inspected the School on 25th April 1936 When I was giving lantern lecture in the school compound on 25th April 1936 at about 6.30 p.m., I felt stinking smell which was rather nauseating which might be due to tanning of raw hides I asked the Headmaster to take necessary steps for the removal of the slaughter house from the vicinity of the school.

Witness 3 for the prosecution is a Medical Officer of the school. He states that the Headmaster drew his attention to the existence of the slaughter house near the school which was 50 yards off and in answer to the question put by the Court he stated that bad smell comes from the side of the slaughter house when wind blows from that side. During inspection I smelt the bad smell coming from that side.

Witness 4 for the prosecution is an officer in charge of the police station at Garhwa. He says that "bad smell comes from the slaughter house" and he gives his reason for not taking any steps in the matter because he says that he understood that the school authorities were taking necessary steps for the removal of the slaughter house. Witness 5 is a shopkeeper of the village who states that the slaughter houses in question are visible from the road and are kept in bad condition and bad smell comes therefrom; the houses of the accused are kacha houses. The next witness is also a man of that place and is a cultivator and sweetmeat seller. He says that the houses of the opposite party give very bad smell; the bad smell is felt when strong wind blows. The last witness is the Head master himself who says in his evidence :

Frequently bad smell comes from the houses of the accused persons to the school classes, and the hostel and Headmaster's quarters. Within the school compound we often find pieces of meat and bones dropped by birds or dogs. Sometimes when the smell becomes unbearable we have to dismiss the classes.

We were also taken through the documentary evidence in the case. This completely corroborates and supports the oral evidence which has just been summarized. The evidence which I have briefly summarized above was accepted by the learned Magistrate who heard these witnesses and saw their demeanour in the witness-box. I cannot see any error in law which he has committed in accepting this overwhelming evidence and I hold that the conclusion at which he has arrived was absolutely justified by the evidence. I am not referring to the evidence of the opposite party because the learned Magistrate has given good reasons why he cannot place any reliance upon that evidence and as a Court of fact his decision is final.

The question then arises whether the recommendation made by the learned Judicial Commissioner should be accepted. Now it is to be remembered that the learned Magistrate had complete jurisdiction to adopt either of the courses provided in S. 133. Sub-cl. (1) itself contemplates that a Magistrate may order that the trade or occupation be prohibited or regulated. In this case the only dispute between the parties was whether the trade which was being carried out by the opposite party should be ordered to be stopped. There was no dispute that it should be regulated in any manner. The opposite party were insisting that they were carrying on their trade in a proper manner and that it was in these circumstances not a nuisance; and when that matter has been decided against them, it is not within the province of a Court of revision to impose some conditions which the evidence in the present case does not justify and to which the minds of the parties were never directed. The learned Magistrate in his explanation has pointed out why he did not think it proper to pass a conditional order for regulating the trade of the butchers. He says that he was of opinion that the Court was not able to frame a set of rules, or a set of conditions for regulating the slaughtering of animals and selling of meat by the opposite party. He also thought that the imposing of conditions would lead to a never ending trouble between the butchers and the Garhwa Union because there will be complaints by the Union that the conditions were violated in this way and that way and the best course was to prohibit the trade (as he was fully empowered to do under the law) and

to enable the butchers to fix their trade at some other convenient place distant from the school premises. Ordinarily a Magistrate is not allowed to supplement his judgment by means of an explanation; but in this case as the question was raised for the first time before the Judicial Commissioner and later on before this Court on behalf of the opposite party (there being nothing in the evidence whatsoever which suggested that the trade could be or should be allowed to be regulated in any particular manner), we have allowed ourselves to be impressed by the explanation which the learned Magistrate has given. In these circumstances we think that the learned Magistrate had exercised his discretion in a proper and legal manner in passing the order which he has done.

We have derived assistance from the two leading cases on this point in 7 Beng L R 499¹ and 7 Beng L R 516.² Both these cases related to similar facts. At p. 535 the learned Judges observed :

The evidence of the witnesses for the prosecution goes to show that this slaughter house, constructed as it is, could not be carried on without creating nuisance. Looking at the whole evidence, we think, it cannot be said that the cause shown ought to have satisfied the Magistrate that his order ought not to have been made. We cannot say that in point of law he was not fairly justified in coming to the conclusion, upon the evidence before him, that the trade of slaughtering cattle, as carried on by the defendants at the Kurya slaughter house, was injurious to the health of the community; nor can we say that his order that such trade should be suppressed, was not a legal and proper order.

The remarks apply *a fortiori* to the facts of the present case. At page 507 of the earlier case the following instructive passage occurs :

As observed by Lord Tenterden, in a case somewhat similar to the present, *Rex v. Cross*,³ the license would not entitle the defendant to continue the business one hour after it became a public nuisance to the neighbourhood. Although the Commissioners had taken no steps under Act 7 of 1865 against the defendants, the defendants had ample warning to set their house in order by the prosecution instituted against them by many hundreds of their neighbours in the course of last year.

In the present case also the opposite party, though repeatedly informed from at least 1930, have not set their houses in

1. Municipal Commissioners of the Suburbs of Calcutta v. Mahomed Ali, (1871) 7 Beng L R 499=16 W R Cr 6.
2. Municipal Commissioners for the Suburbs of Calcutta v. Amanat Ali. (1871) 7 Beng L R 516.
3. (1826) 2 Car & P 483=81 R R 684=172 E R 219.

order. As to the argument that the butchers had prescriptive right to continue the trade which existed in some form or other in this locality from 1844, the learned Judges observed as follows :

As to the claim of a prescriptive right alluded to by the learned Judge, we may observe that no prescriptive right to maintain the slaughter house in its present condition was set up before the joint Magistrate, nor could any such right have been effectually asserted; first, because it appears on the evidence that the slaughter house has existed in its present position only for about six, or at most 10 years; (as also in the case before us) : secondly, there is no evidence that, even during the whole of that time, the place was used in the same manner and the stench emitted to the same extent as at present; thirdly, in our opinion it is clear that no length of enjoyment can legalize a public nuisance involving actual danger to the health of the community.

It is unfortunate that this order may to some extent interfere with the carrying on of the trade by the butchers who do not seem to be persons in substantial positions in life, but when people choose to live in a well ordered society, their personal liberties are often curtailed in the interest of the public at large and indeed the health of the public must be considered to be of paramount importance. Following the reasoning in the two cases referred to above I consider that the facts as found by the learned Magistrate justified him in making the order which is recommended for revision and I have no hesitation in discharging the revision and confirming the order passed by Mr. S. W. A. Bilgrami.

Chatterji J.—I agree.

N.S./R.K.

Revision discharged.

A. I. R. 1939 Patna 186

VERMA J.

Bankim Behari Sen — Petitioner.

v.

Yusuf Mian and others —

Opposite Party.

Criminal Revn. No. 595 of 1938, Decided on 9th November 1938, from order of Dist. Magistrate, Gaya, D/- 22nd September 1938.

Criminal Trial — Acquittal — Setting aside — Original charge under S. 427, I. P. C. — After holding local inquiry without notice to parties Magistrate concluding that offence was under S. 426 and acquitting accused under S. 247, Criminal P. C. — Acquittal held must be set aside.

Accused was originally charged with offence under S. 427, I. P. C. But as a result of a local inquiry which the Magistrate held without notice

to the parties during the course of trial he came to the conclusion that the offence made out was one under S. 426, I. P. C., and so acquitted the accused under S. 247, Criminal P. C. :

Held that the order of acquittal must be set aside as the trial was vitiated owing to the inquiry having been held without notice to the parties. [P 186 C 2]

L. K. Chaudhury — *for Petitioner.*

M. Yasin Yunus — *for Opposite Party.*

Order. — Although this Court is reluctant to interfere with an order of acquittal yet on account of the serious illegalities committed by the trial Court, I am afraid, I shall have to set aside the order of acquittal passed by it under S. 247, Criminal P. C. To begin with, the charge framed against the accused was one under S. 427, I. P. C. This charge was never amended till for the first time we hear in the final order that the Magistrate thinks that the offence committed possibly came under S. 426, I. P. C., and after having come to that conclusion he acquits the accused under S. 247, Criminal P. C., because the complainant does not happen to be present on the date on which the Magistrate was to pronounce judgment. It appears, as pointed out by Mr. Yasin Yunus, that he held a local inquiry and evidently it is upon the basis of that local enquiry that he has come to the conclusion that the offence made out was one under S. 426, I. P. C., but even with regard to this local enquiry I see no indication in the order sheet as to when the Magistrate made up his mind to go to the place and whether he informed the parties about the local inspection or not. The inspection note of course is dated 4th September 1938. He has therefore utilized his observation in the course of the local enquiry for coming to a certain finding. As the local enquiry was held without any notice to the parties (so far as one can see from the order sheet) and as the charge, which was framed under S. 427, I. P. C., was, in order to utilize the provisions of S. 247, Criminal P. C., suddenly deemed to be a charge under S. 426, I. P. C., on the basis of the observations made in the local inquiry, I am afraid the cumulative effect of all these is that the last order which is an order of acquittal under S. 247, Criminal P. C., is vitiated and therefore it must be set aside. The case should be sent back to the Magistrate to be disposed of in accordance with law.

N.S./R.K.

Acquittal set aside.

A. I. R. 1939 Patna 187

DHAVLE J.

Babu Ram Pandey — Petitioner.

v.

Shyamdeo Narayan and others —
Opposite Party.

Criminal Revn. Appln. No. 521 of 1938,
Decided on 12th October 1938, against
order of Sub-Divisional Magistrate, Siwan,
D/- 28th January 1938.

(a) Criminal P. C. (1898), Ss. 145 and 439—
Order under S. 145—Interference in revision.

High Court does not interfere in revision with
orders under S. 145 on the merits as a rule.

[P 187 C 2]

(b) Hindu Law—Joint family — Members of
joint family recorded in revenue papers as
holding each certain specific portion of pro-
perty—This does not indicate separation.

Where brothers are all members of a joint family
the mere fact that in the revenue papers each
brother is recorded as holding certain specific por-
tion of property cannot be taken as any indication
of separation among brothers: 18 All 176, *Rel.*
on.

[P 187 C 2]

S. S. Rakshit and Indu Bhusan Biswas
— for Petitioner.

Jaleshwar Prasad — for Opposite Party.

Order. — This application in revision
arises out of a proceeding under S. 145,
Criminal P. C. The petitioner to this Court
is the first party in the proceeding. The
trial Court held "on a comparison of the
evidence put before me" that the weight of
this is on the side of the second party, and
found accordingly that possession of the
disputed land lay with the second party
"Diplal and his brothers." Against the order
of the trying Magistrate an application was
made to the Sessions Judge who went into
the merits in some detail on all the points
that appear to have been urged before me
and declined to interfere.

The learned advocate for the petitioner,
who obtained a rule from Manohar Lall J.
explains that the application was admitted
as soon as he mentioned his first ground,
namely that the order of the Magistrate
was without jurisdiction in that it was in
favour of the brothers of Diplal who are
not parties to the proceeding. This conten-
tion is, on the words of S. 145, sub.s. (4)
correct, and the learned advocate for the
opposite party, while referring to the evi-
dence that Diplal was joint with his bro-
thers, has not urged that it is of any
importance to him whether or not the
offending words "and his brothers" after

Diplal are allowed to remain in the order.
The learned advocate for the petitioner
urged somewhat strenuously that the judg-
ment of the trial Court is defective in that
no reference was made to the presumption
of correctness attaching to the revisional
record of rights, which I understand is
dated 1918. He further contended that the
omission of the trying Magistrate to bear
that presumption in mind cannot be made
good by the Sessions Judge. These conten-
tions do not take into account the consi-
deration that this Court does not interfere
in revision with orders under S. 145, Crimi-
nal P. C., on the merits as a rule. The law
does not provide an appeal, and the peti-
tioner is fortunate that besides the trying
Magistrate the Sessions Judge has looked
into the merits of the case. The arguments
before me also proceeded on the footing
that because khewat No. 2/12 was in the
name of Ramnarain Lal while Diplal, the
leading member of the second party in the
present proceeding, had khewat No. 2/18
therefore it must be taken that they were
separate. That proposition is entirely unten-
able in law, as will be seen from 18 All
176¹ which has been repeatedly referred to
by their Lordships of the Judicial Commit-
tee in several later cases. The evidence here
was that Ramnarain Lal and Diplal and
their brothers were all members of a joint
family, and in fact, there was a deed of
surrender executed by the father in 1916
in which it was stated that all the brothers
were joint. The revisional record of rights
came two years afterwards, but it is not
pretended that there is any indication on
the record that in the interval their family
had become separate. The entries in the
revenue papers, namely the khewats and the
D. Register that followed those khewats
can, in these circumstances, not be taken
as any indication of separation among the
brothers. The result is that the petitioner
will have the satisfaction, by means of this
application in revision, only of having the
three words "and his brothers" after the
name of Diplal struck out from the order
of the trying Magistrate, and that for the
rest the rule must be discharged.

D.S./R.K.

Order accordingly.

1. *Gajendra Singh v. Sardar Singh*, (1896) 18 All
176=1896 A W N 23.

A. I. R. 1939 Patna 188

MOHAMAD NOOR J.

Deonandan Pandey — Appellant.

v.

Rampirita Rai — Respondent.

Appeals Nos. 1065 and 1066 of 1936, Decided on 1st November 1938, from appellate decrees of Sub-Judge, Arrah, D/- 4th September 1936.

Bengal Irrigation Act (3 of 1876), Ss. 47, 59 and 63—Only registered owner can sue for rent—In suit for rent by such owner defendants cannot plead that rent was due to some one else also.

The scheme of the Act is that the Canal Department will deal with those owners only whose names are registered in their books, and they will issue authority for the realization of the rent in their favour only. Reading Ss. 47, 59 and 63, taken together it is clear that no one else, except a registered owner who has been awarded right to realize rent, can sue for rent and when such a person has brought a suit, the defendants cannot plead that the rent was due to some one else also.

[P 189 C 1, 2]

Harians Kumar — *for Appellant.**B. P. Mahaseth* — *for Respondent.*

Judgment.—These two second appeals arise out of two suits instituted by the same plaintiff against two different defendants for realization of what is called channel rent. Under the Bengal Irrigation Act the canal water is brought in Government channels up to a certain point and then it is distributed among the cultivators through private channels owned by private individuals who are described in the Act as the owners of the channels. Under S. 59 of the Act the owner of a village channel is bound to construct and maintain the village channels for irrigation and drainage and to keep them and other necessary constructions in that connexion in an efficient condition and to allow their use on such terms as may be declared equitable by the Canal Officer. He is entitled to get supply of water at the rate fixed and is also entitled to receive rent for the use of the village channel by other persons as the Canal Officer may award. S. 47 of the Act enjoins upon the Canal Officer to keep a register of all village channels whether existing or constructed under the Act and to register the names of the owners of every private channel.

The plaintiff's case is that he is the registered owner of channels Nos. 189 and 550 of village Raimalpur alias Sikrahata and that as such he sued the defendants of the two suits who used them for the reco-

very of the channel rent according to the rate fixed by the Canal Officer. The defence material for the purposes of these appeals was that the plaintiff was not the only owner of the channels in question and that some other persons, namely Ramdip Pandey and others, were also co-owners of the two channels and that the plaintiff's share of rent was only one-third and the remaining two-thirds was payable to the aforesaid persons. There was a plea of payment also which was disallowed by the trial Court and we are not concerned with it in these appeals.

In order to meet the main defence of the defendants the plaintiff urged that as he alone was registered as the owner of the channels in question in the Canal Office, he alone was entitled to realize the rent and that the defendants were precluded from asserting that a part of the channel rent was due to some one else and that if others had any interest in the channels they could realize their dues from the plaintiff. The plaintiff also denied that Ramdip Pandey and others had any interest in his channels. The learned Munsif decreed the suit. He examined the scheme of the Bengal Irrigation Act and came to the conclusion that the plaintiff alone was entitled to realize the channel rent. He also found that the defendants failed to prove that any other person was the cosharer of the plaintiff in these channels. On appeal by the defendants, the learned Subordinate Judge has modified the decree of the trial Court. He has held that Ramdip Pandey and others were owners of the channels to the extent of two-third and that the plaintiff was not entitled to realise the entire rent. He therefore decreed the plaintiff's suit to the extent of one-third of the claim only. The plaintiff has preferred these two second appeals.

In my opinion the view taken by the learned Munsif was correct. The right to realise rent for the use of the channels by the villagers for irrigation purposes is provided for in the Act and the rate at which the rent is to be realized is to be fixed and awarded by the Canal Department. S. 59 of the Act says that "every owner of a village channel shall be bound" etc. etc. and shall be entitled "(e) to receive such rent for the use of the village channel by other persons as the Canal Officer may award him." It is therefore clear that the right to realise the rent is dependent upon the award of the Canal Officer and in this case

the khatiwanis, Exs. 1 to 1.B, are in favour of the plaintiff only and they authorise only the plaintiff to realise the rent at the rate of Re. 0-2-9 per bigha from 1929-30 to 1938-39.

Section 63 of the Act authorizes the representative of a deceased owner of a channel to apply for registration of his name. Then it provides that if such an application for registry be not made within six weeks from the death of the owner the remaining registered owners of the village channel, if any, shall be deemed to be the owners of the entire interest in the village channel until some other person shall have established his claim to be registered as owner in place of the deceased. This clearly shows that in case no representative of a deceased owner is registered as owner of the channel in the Canal Department, the remaining owners alone shall be deemed to be the owners of the channel and the representative of a deceased owner will not be entitled to realise the rent though there is no question that he is also a co-owner of the channel. The Section further provides that if a sole registered owner dies and the name of his representative has not been registered the Canal Officer shall be deemed to be his representative for the purposes of this part of the Act and shall exercise all rights and be bound by all liabilities which attached to the deceased in respect of his ownership of the village channel until some person shall have established his right to be registered as owner thereof in place of the deceased, and then it provides what the Canal Officer will do with regard to the money which he receives and spends in exercise of the right which devolves upon him on the death of the sole registered owner of the channel. The scheme of the Act therefore seems to be that the Canal Department will deal with those owners only whose names are registered in their books, and they will issue authority for the realisation of the rent in their favour only, the obvious reason being that those who use the village channels may definitely know to whom the rent is payable and how much is payable. The Canal Department will also be in a position to enforce the liability of the owner of the channel as provided in S. 59 of the Act against those owners only who are registered. Reading Ss. 47, 59 and 63, taken together, I am clearly of opinion that no one else except a registered owner

who has been awarded right to realize rent can sue for rent and when such a person has brought a suit the defendants cannot plead that the rent was due to some one else also. This plea, if allowed, will lead to serious anomalies and complications which will make the working of the Act impossible and the realization of rent will be difficult. Issues of title will have to be decided in a simple suit and the carrying out of the liability of maintenance of the channel will become difficult to enforce.

Mr. P. P. Varma, appearing on behalf of the respondents, relied upon the definition of 'owner' in the Irrigation Act. According to it

owner includes every person having a joint interest in the ownership of the thing specified and all rights and obligations which attach to an owner under the provisions of the Act shall attach jointly and severally to every person having such joint interest in the ownership.

The learned advocate contended that all those who have a joint interest in the channel come within the term 'owner' as mentioned in S. 59 of the Act. But we are not concerned with the question whether anyone else other than the plaintiff is also a joint owner of the channel with him. The question is whether anyone else even if an owner but not registered can realize rent directly from the cultivators. The very definition of owner shows that the right of joint owners can be exercised by them jointly or severally. So any one of them can exercise the right, and as I have shown only those can sue who have been registered. This will not be adverse to the interest of those who have not been registered. The registered owner will be acting on behalf of them all.

Then the learned Munsif has, as I have said, held that there was no evidence to prove that any one else other than the plaintiff had a share in the channels. The defendants had filed a copy of a compromise petition to prove that the channels in question are owned to the extent of two-thirds by Ramdip Pandey and others. The learned Munsif refused to act upon it on the ground that there was no decree to show that the compromise petition was accepted and a decree was passed according to it. The learned Subordinate Judge has, in my opinion, wrongly acted upon it. He has wrongly treated it to be a decree which it is not. It is merely a copy of the petition and the learned Munsif was perfectly right in not acting upon it. In this respect also

the judgment of the learned Subordinate Judge is erroneous. But in my opinion the question need not be gone into in this case, as for the purposes of the present suit it is enough to hold that the plaintiff is admittedly the only registered owner of the channels and as the Canal Department has authorized him to realize the rent, he alone can do so. The result is that I set aside the decree of the lower Appellate Court and restore that of the learned Munsif. The appellant will be entitled to his costs in this Court as well as in the Court of Appeal below.

D.S./R.K.

Decree set aside.

A. I. R. 1939 Patna 190

COURTNEY-TERRELL C. J. AND JAMES J.

Khirod Ranjan Das — Appellant.

v.

Syed Mohammad Wasy — Respondent.

Letters Patent Appeal No. 9 of 1937, Decided on 28th January 1938, from decision of Mohamad Noor J., in Appeal No. 801 of 1934, D/- 24th February 1937.

(a) Tort—Joint tort-feasors—Act in furtherance of common design is necessary (Per *Mohamad Noor J.*).

Persons are said to be joint tort-feasors when their respective shares in the commission of the tort are done in furtherance of a common design.

[P 191 C 2]

(b) Master and Servant — Wrongful dismissal—Damages — Measure of (Per *Mohamad Noor J.*).

The measure of damages for wrongful dismissal independent of damages for the loss of character is the amount of wages which the plaintiff was prevented from earning by reason of his wrongful dismissal.

[P 191 C 2]

(c) Tort — Joint tort-feasors — Master and servant committing two separate wrongful acts — Suit for damages for wrongful dismissal against both—Damages awarded against master —No separate damages can be awarded against servant also unless damages awarded are insufficient (Per *Mohamad Noor J.*).

The principle that an action against the principal bars an action against the servant cannot be applied where there are not two actions but only one in which both the master and the servant have been impleaded. That principle is applicable in cases in which a wrong act is done by a servant for which the master is also liable and in cases of joint tort-feasors and not in cases where both the master and the servant commit two separate wrongful acts.

[P 192 C 1]

A suit for damages for wrongful dismissal was filed against both the master who dismissed the plaintiff and the servant who was responsible for the dismissal by making a report against the plaintiff. Plaintiff was awarded damages as against

the master. He claimed damages as against the servant. But the servant contended that the plaintiff was barred from so doing :

Held that the plaintiff was not barred from claiming damages against the servant as the principle that an action against the principal bars an action against the servant was not applicable but that he could not be awarded separate damages against the servant also unless the damages awarded as against the principal were insufficient.

[P 192 C 1]

(d) Libel — Accepting libellous statement to be true is not actionable (Per *Mohamad Noor J.*).

Accepting a libellous statement to be true is not actionable. Hence where a person dismisses another on the basis of a libellous report made by his subordinate but there is nothing defamatory in the order of dismissal, such person cannot be held liable for libel.

[P 192 C 1, 2]

(e) Libel — Qualified privilege — Defendant need not prove truth of allegation unless plaintiff proves malice (Per *Mohamad Noor J.*).

Where a subordinate sends a report which contains libellous matter on being asked by his superior, the occasion is a privileged one and law will not presume malice; and unless malice is proved it cannot be said that the subordinate abused the occasion for ulterior motive. He is not required to substantiate the truth of the accusation unless plaintiff proves malice : (1891) A C 73, *Rel. on.*

[P 193 C 1 ; P 194 C 2]

(f) Libel — Question of malice is one of fact (Per *Mohamad Noor J.*).

The question whether the occasion was privileged is one of law, but whether there was malice is one of fact.

[P 193 C 2]

(g) Appeal—Letters Patent—Suit based upon wrongful dismissal — Appeal on ground of suit for defamation — Letters Patent appeal not maintainable (Per *Courtney-Terrell C. J. and James J.*).

A Letters Patent Appeal was filed on the contention that the suit was for defamation. But it was clear from the pleadings that the suit was based upon wrongful dismissal and not on defamation :

Held that the appeal was not maintainable.

[P 194 C 2]

Hareshwar Prasad Sinha and Rati Kant Chaudhury — *for Appellant.*

S. N. Bose — *for Respondent.*

Appeal No. 801 of 1934.

Mohamad Noor J. — This is an appeal by defendant 4 of a suit instituted by the plaintiff-respondent for recovery of damages for wrongful dismissal. The plaintiff was a travelling ticket examiner under the B. N. W. Railway. It appears that an application purporting to be on behalf of the residents of Digwara in the district of Saran, was submitted to the authorities of the railway complaining against the conduct of the plaintiff. The main allegation against him was that he was carrying on an intrigue with a certain lady doctor who was residing in Digwara Bazar and that his conduct

gave annoyance to the residents of the village. This petition was in due course sent for inquiry to defendant 4 who was the Traffic Inspector under the railway. He submitted a report in which he referred to some previous dereliction of duty by the plaintiff and reported that the allegation made against him in the petition was true, adding that on the night of 11th March 1931, he had himself seen the plaintiff getting down from a train at Digwara and had a talk with him, thereby supporting the allegation in the petition of his paying visits to Digwara. The Traffic Superintendent after making some inquiry reported for the dismissal of the plaintiff from the railway service and thereupon the Traffic Manager of the Railway dismissed him with effect from 26th March 1931. The plaintiff thereupon after serving notices brought the present suit for recovery of damages amounting to Rs. 900 for loss of service by wrongful dismissal. His suit was against (1) the Railway Company, (2) the Traffic Manager of the Railway Company, (3) the Traffic Superintendent and (4) the appellant who was Traffic Inspector.

The trial Court held the dismissal to be wrong and that the report of defendant 4 about the plaintiff being at Digwara on the night of 11th March 1931, and the charge of his intrigue with the lady doctor were false, and that on the night of 11th March 1931, he was working on the section between Sonapur and Muzafferpur. It therefore gave the plaintiff a decree for Rs. 25 only, being his one month's salary to which he held him entitled to in lieu of notice. It dismissed the suit against the remaining defendants and ordered the parties to bear their own costs. The plaintiff appealed, and the lower Appellate Court, over and above the decree granted by the trial Court against the company, has given the plaintiff a decree for damages amounting to Rs. 150 with costs in both the Courts against defendant 4, the appellant, who has preferred this second appeal. The main points urged on behalf of the appellant are that no separate decree for wrongful dismissal of the plaintiff could be passed against the appellant nor could a decree be passed for libel contained in the report as the occasion when the appellant is said to have libelled the plaintiff was privileged. The first branch of the argument of the learned advocate is based upon the principle of the law of England that a judgment against the

principal bars an action against the servant. He relied upon the decision in (1872) 7 C P 547¹ and contended that though by 25 & 26 Geo. V, c. 30, the law in England has been changed by statute, the Common law of England still applies to this country as a principle of justice, equity and good conscience till the Legislature of this country intervenes. He relied upon the case in 3 Cal 353.²

Now the plaintiff in this case has two grievances. One is that he was wrongfully dismissed and the other is that he was libelled by the appellant in his report submitted to the Traffic Manager. The two stand upon two different footings. The measures of damages for the two wrongs and the liability for them are separate and different. The defendants cannot be said to be joint tort-feasors either in respect of the wrongful dismissal or in respect of the libel. Persons are said to be joint tort-feasors when their respective shares in the commission of the tort are done in the furtherance of a common design: Clerk and Lindsell on Tort, p. 59. In this case there is no allegation that the defendants had a common design to dismiss the plaintiff or to libel him. I shall therefore deal with them separately. Regarding the first, the gist of the wrong is the dismissal of the plaintiff without just and lawful cause. The liability is of the railway company and of the Traffic Manager, defendant 2. Defendant 4 is also liable for bringing about that dismissal. Now it having been found by the trial Court that the plaintiff was dismissed from a permanent service without notice, it was for the defendants, who are liable for this wrong, to show that the dismissal was for just and lawful cause. The Court has found that the charge against the plaintiff was not true and therefore the dismissal was wrong. The measure of damages in such a case independent of damages for the loss of character is the amount of wages which the plaintiff was prevented from earning by reason of his wrongful dismissal: Halsbury's Laws of England, Vol. 22, page 167.

The plaintiff's case was that at the time of the employment he was promised a life-long service if he worked honestly and diligently, and claimed damages for 29 years'

1. Brinsmead v. Harrison, (1872) 7 O P 547 = 41 L J O P 190 = 27 L T 99 = 20 W R 784

2. Hemendra Kumar Mullick v. Rajendro Lall Moonshee, (1877) 3 Cal 353 = 1 O L R 488.

service at the rate of Rs. 25 per month, relinquishing out of it Rs. 7801. The trial Court has not specifically found any such promise, but having assumed it, has held that the plaintiff was liable to be dismissed on one month's notice and has allowed him one month's salary in lieu of it. The learned Subordinate Judge has allowed six months' salary, without finding that this was the amount which the plaintiff lost on account of the wrongful dismissal. He has given a decree for this amount for what he calls loss of character which is independent of the wrongful dismissal. The adequacy or otherwise of the damages awarded to the plaintiff by the trial Court is not before me nor is there any finding or material for finding the loss of wages to the plaintiff on account of the wrongful dismissal, and whether it was more than one month's salary. The only question before me in this connexion is whether the plaintiff, having obtained damages to which according to the trial Court he was entitled, can get a separate damages from the appellant. In my opinion, though the principle contended for by the learned advocate for the appellant is not applicable, the plaintiff is not entitled to it. The principle that an action against the principal bars an action against the servant cannot be applied to this case, firstly, because there are not two actions but only one in which both the master and the servant have been impleaded and, secondly, because the liability of the appellant is for his bringing about the dismissal. The plaintiff had two causes of action: one against the railway for dismissing him without just and lawful cause and another against the appellant for being responsible for that dismissal. The principle contended for by the learned advocate is applicable in cases in which a wrong act is done by a servant for which the master is also liable and in cases of joint tort-feasors, and not in cases where both the master and the servant commit two separate wrongful acts. But the plaintiff having been awarded damages on the basis of loss of wages to which he was held to be entitled, no separate damages can be awarded against the appellant in the absence of any finding that the damage awarded by the trial Court for loss of service was insufficient.

Next comes the consideration of the loss of character of the plaintiff on account of the libel contained in the appellant's report to his superior officer which, as I have said,

stands upon a different footing, and for this the liability is mainly of the appellant. The railway is liable indirectly, as the libel was published by the appellant in the course of the employment. The railway through its agent, defendant 2, the Traffic Manager, only accepted the report of the appellant but did not itself libel the plaintiff. Accepting a libellous statement to be true is not actionable. The order of dismissal is not on the record and there is nothing to show that there is any defamatory word in that order. There is no allegation in this case that the railway through its officer did anything to libel the plaintiff. Now it has been contended by Mr. S. N. Bose that the appellant was protected by qualified privilege. The principal law in this respect is thus stated in *Gatley on Libel and Slander* (page 215):

The principle upon which the law of qualified privilege rests is this: that where words are published which are both false and defamatory, the law presumes malice on the part of the person who publishes them. The publication may however take place under circumstances which create a qualified privilege. If so, the presumption of malice is rebutted by the privilege, and in an action for libel or slander founded on a publication upon a privileged occasion the plaintiff has to prove express malice on the part of the person responsible for the publication. The effect of proving express malice is sometimes spoken of as defeating the privilege. This is a convenient expression and conveys in a single word a correct idea of what has really happened, namely that although the occasion remains a privileged occasion, the privilege afforded by the occasion ceases to be an effective weapon of defence. The reason for this is obvious. Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this, the defence vanishes, and it becomes immaterial that the publication was on a privileged occasion.

The libel, the subject-matter of the suit, is contained in the report (Ex. J) submitted by the appellant to the Traffic Manager on 31st March 1931. The question for consideration is whether this report had a qualified privilege, and secondly whether the appellant abused the occasion for some ulterior motive; or, in other words, whether the report was actuated by malice. Now, as to the privilege, it is an admitted fact that the appellant did not send the report of his own accord. A petition purporting to have been signed by numerous residents of Digwara was sent to the railway authorities and the appellant was asked to enquire and report. The report was submitted to the superior officer and no one was told anything about it. Therefore

there is no question that on account of the position which the appellant held he was bound to submit report to his superior officers and the occasion was undoubtedly privileged. Therefore law will not presume malice, and unless malice is proved it cannot be said that the appellant abused the occasion for ulterior motive. Gatley on Libel at page 313 says :

Where a defence of qualified privilege is set up, it is for the defendant to allege and prove all such facts and circumstances as are necessary to bring the words complained of within the privilege . . . The onus lies on the plaintiff to prove malice and not on the defendant to prove his bona fides or absence of malice, for where the occasion is privileged, the bona fides of the defendant is always presumed. 'Once there is proof that the defendant published the defamatory matter on a privileged occasion, it will be assumed he did so honestly believing his statement to be true, unless there is some evidence, the onus of giving which lies on the plaintiff, from which a contrary inference may be drawn.' The moment the Judge rules that the occasion is privileged, the burden of showing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is thrown upon the plaintiff.

At page 691 he says :

The burden of proof lies upon the plaintiff to show that the defendant was actuated by the malice where the occasion on which the words were published is one of qualified privilege.

Now, the report has been found to be false and in one particular, namely that the appellant had himself seen the plaintiff at Digwara on the night of 11th March 1931, it was false to the knowledge of the appellant. I shall deal with this finding later. But in my opinion this is not enough to entitle the plaintiff to get damages, unless express malice is proved.

Now the learned Munsif has found that the plaintiff's allegation of malice against the appellant was unfounded. The learned Subordinate Judge has not reversed this finding. No doubt, in his judgment he mentions that the appellant acted maliciously, but it is too vague and it is clear from the judgment that the malice referred to by him is what is termed "malice in law," that is, a malice which law presumes when a man defames another. Ordinarily, malice will be presumed and need not be expressly proved; but when the libel is published at a qualified privileged occasion the law will not presume malice and it is for the plaintiff to establish it. The learned advocate for the respondent has, however, contended that from the fact that the appellant made a statement false to his knowledge about the visit of the plaintiff to Digwara on the night of 11th March 1931,

it must be held that he was actuated by malice. He has relied upon a decision of the Madras High Court in 24 M L J 8³ for the proposition that when a defamatory statement is false to the knowledge of the defendant the plaintiff is entitled to damages. It, however, appears from the judgment of Miller J. in that case that malice was proved. The learned advocate relied upon Ayyer's Law of Tort at pp. 299 and 300 and contended that the untruth of the statement to the knowledge of the defendant is conclusive proof of malice. The same thing is mentioned in Salmond at p. 428. The question whether the occasion was privileged is one of law, but whether there was malice is one of fact. Salmond in his Law of Tort at page 428 says :

The existence of malice is a question of fact for the jury, but the burden of proof lies upon the plaintiff; and the Judge has to be satisfied that there is some reasonable evidence of malice to go to the jury. On a plea of privilege, it is not for the defendant to prove that he used his privilege honestly and for its proper purpose; it is for the plaintiff to prove that the privilege has been maliciously abused.

It is true from the fact that the accusation was false to the knowledge of the defendant. A Court of fact may hold that there was malice. It is not open to me to reverse the finding of the fact arrived at by the learned Munsif which was not challenged by either party before the learned Subordinate Judge. Though on the one hand, it may be argued that having found that the statement in the report of the appellant that the plaintiff was seen at Digwara on the night of 11th March 1931, the Court ought to have held that the appellant was actuated by malice; on the other hand, it may be argued that the fact that the appellant had no malice against the plaintiff ought to have weighed with the learned Munsif in deciding that the report was true. I must act on the finding as it stands. If the finding that the accusation of the appellant was false is conclusive the finding that the appellant had no malice is also conclusive. I cannot accept the one and reject the other, and come to my own finding about malice. Had it been open to me to enter into facts it was likely that I might have come to a different conclusion about the falsity of the appellant's accusation. The judgment of the learned Munsif is not free from defect. At places there are

8. Vaidyanatha Sastri v. Somasamundara
Thambiran, (1912) 24 M L J 8=16 I O 786.

indications of want of common knowledge, especially when he has commented upon the fact that the permanent employees of the railway are required to contribute towards the Provident Fund. Unfortunately all the evidence on the point for some reason or other has not been considered by the learned Munsif. The plaintiff refuted the statement of the appellant about his being at Digwara on 11th March by deposing that on that night he was working on the Sonapur-Samastipore line and in support of it produced some papers alleged to have been signed or initialled by the various station masters. None of them was however examined as a witness.

The story is based upon the testimony of the plaintiff alone. He himself proved the initials or signatures of the station masters. The absence of the station masters from the witness-box is very suspicious. What the learned Subordinate Judge has called unimpeachable evidence is the testimony of the plaintiff himself and of no one else. A little experience would have demanded caution in accepting the evidence of the plaintiff. Then the fact that one of the tickets for which the plaintiff alleged to have realized excess fare was of a different train is also suspicious. The reports of the Traffic Superintendent (Ex. D-2), who could not be examined as he was absent in England, states that when he held the enquiry one of the Station Masters concerned, Mr. Young, had told him that his signature on the plaintiff's book was forged. This previous record of service of the plaintiff has not been clear. The learned Munsif has commented upon the fact that the defendant did not call the Station Masters to disprove the statement of the plaintiff. It was unfair to expect the appellant to call as his witnesses those persons who were said to have signed the plaintiff's books in token of his having worked on Sonopore-Samastipore line on the night in question. Then this is in effect expecting the appellant to prove the truth of his allegation. This was not necessary when malice was not proved. In (1891) A C 73⁴ where the jury were told that the existence of privilege was contingent upon whether in their opinion the defendant honestly believed his volunteered communication to be true, and that the burden of proof to that effect was upon him, it was held that

this was misdirection, and the verdict in favour of the plaintiff was set aside. I have referred to these facts not with a view to set aside the finding of the Munsif but to show that if the facts are re-opened there are other aspects of the case to be considered. The learned advocate for the respondent pointed out that the finding of the learned Munsif about the falsity of the charges was not questioned before the learned Subordinate Judge. This is so, but it does not follow that the appellant admitted that his report was false. The lawyers who appeared might have thought that legal argument would be sufficient in the case.

In my opinion, the law is that when there is a qualified privilege the defendant is not required to substantiate the truth of the accusation unless the plaintiff proves malice and the decree against the appellant cannot be supported. I set aside the decree of the learned Subordinate Judge and restore that of the learned Munsif. As it has been found that the accusation against the plaintiff was false, I direct that the parties bear their own costs in this Court and the Court of Appeal below. Leave for a Letters Patent Appeal is asked for and is allowed.

Letters Patent Appeal

Judgment. — This appeal comes up before us on the contention that this is a suit for defamation, but it is not a suit for defamation but a suit for wrongful dismissal and this is clear from the pleadings. It is obvious that the appeal cannot be maintained if the suit is based upon wrongful dismissal and not on defamation. The appeal and the suit are dismissed against the respondent-defendant 4 with costs throughout.

K.S./R.K.

Order accordingly.

A. I. R. 1939 Patna 194

DHAVLE AND AGARWALA JJ.

Mt. Mehdatunnissa Begum—Appellant.
v.

Mt. Halimatunnissa Begum —
Respondent.

First Appeals Nos. 65 and 59 of 1935,
Decided on 29th August 1938, from decision
of Sub-Judge, Patna, D/- 22nd December
1934.

Contract—Indemnity — Benefits of — Transferees of portions of mortgage property undertaking to pay sale consideration to mortgagee — Contract of indemnity is created between mortgagor and transferees to relieve former

4. *Jenoure v. Delmege*, (1891) A C 73=60 L J P C 11=63 L T 814=39 W R 388=55 J P 500.

from mortgage liability — Cause of action to enforce contract when arises stated—Limitation is governed by Art. 83, Limitation Act—Donee from mortgagor taking remaining property free from encumbrance is entitled to benefits of contract.

Where there is an undertaking by the vendee or other transferee to pay off a mortgage debt existing on the property, the covenant is not merely one to pay the purchase money in a particular manner to the vendor's nominee, but one to relieve the vendor from the liability of the mortgage, and in that sense there is a contract of indemnity, which may be expressed or implied. In such cases a cause of action arises when the vendor or a transferee entitled to the benefits of the contract with the vendor is actually damnified by the sale of the property in the suit by the mortgagee, and, under Art. 83, Limitation Act, the plaintiff has three years from the time when he is so damnified: *A I R 1938 All 297 (F B), Rel. on; A I R 1930 Pat 46 and A I R 1931 Pat 271, Ref.* [P 197 C 1]

Mortgagor sold a portion of the mortgage properties to certain persons and the sale consideration was left with the transferees who undertook to pay it directly to the mortgagee towards the satisfaction of the mortgage debt. The mortgagor then gifted a portion of the remaining properties to one of his heirs, free from encumbrances. The transferees having failed to pay the said amount to the mortgagee, the latter brought a suit upon the mortgage and the properties which had been transferred and also that which had been gifted were sold in execution of the mortgage decree. The heir whose property was so sold filed a suit for recovering the amount of loss which she had sustained on account of the failure of the transferees and others to pay those portions of the mortgage debt which they had undertaken to pay and joined among others, the transferees as defendants to the suit:

Held that the heir was entitled to the benefit of contract between the mortgagor and the transferees: *A I R 1937 Pat 628 and A I R 1930 P C 183, Foll.* [P 196 C 1]

S. N. Roy and Raj Kishore Prasad (in No. 59), Ray Guru Saran Prasad and B. C. Sinha (in No. 65) — *for Appellant.*

B. C. De, B. N. Mitter, Syed Ali Khan, Chaudhury Mathura Prasad, Ram Chander Prasad, Syed Hasan and Ajit Kumar Mitter — *for Respondent.*

Dhavlé J.—These appeals arise out of a suit for the recovery of Rs. 7222, the amount for which the plaintiff's properties were sold in execution of a mortgage decree. In March 1919, one Saiyid Badshah Nawab died, leaving (inter alia) to his heirs 31 properties subject to a mortgage. Shortly before his death the amount of this mortgage was settled at Rs. 61,200 and odd. Saiyid Chhote Nawab, a brother of the mortgagors, took a one-third interest in the mortgaged properties and in the mortgage debt as one of the heirs. In August 1920 he sold his share in five of the pro-

perties to defendant 2 for Rs. 6581-6-0, which sum was left with the purchaser for payment towards the mortgage debt. In October 1920, he similarly sold one property to defendants 3 and 4 for Rs. 3000, which amount was to be paid by the purchaser towards the mortgage. The same month he also gave five other properties to defendant 5, wife of defendant 6, in mokarrari for a consideration of Rs. 4500 which was left with defendant 5 for payment towards the mortgage. In March 1924, Saiyid Chhote Nawab divided the remaining properties together with his debts among his heirs, one son and three daughters, namely the plaintiff, defendant 1 and defendant 8 by tamliknamas under which each daughter was required to pay the debts assigned to her and was also made liable, in case any such debt had to be paid by some other heir, to compensate such heir. In this way defendant 1 was liable to pay Rs. 10,818 and odd, the balance of the principal of the mortgage debt due from Saiyid Chhote Nawab after deducting the amounts left with purchasers (*badminhai zimme kharidaran*) towards Saiyid Chhote Nawab's share of the mortgage debt. The mortgage was sued upon in due course, and a decree obtained against Saiyid Chhote Nawab and his transferees for his share of the mortgage debt in 1926.

Under the mortgage decree the properties assigned to defendant 1 were to be the properties to be "first sold in execution," but defendant 1 succeeded in obtaining an order that on her depositing Rs. 15,500 her properties were not to be sold. She made the deposit in May 1928. In June 1929, the properties transferred to defendants 3 and 4, 5 and 6, and 2 were sold in execution for Rs. 2025, Rs. 5025 and Rs. 8055, respectively. The order passed by the executing Court in favour of defendant 1 on condition of her depositing Rs. 15,500 had not however satisfied defendant 1, who endeavoured to obtain a reconsideration of it, and then appealed to the High Court. As a result, it was ordered that the mortgagee decree-holder was not to proceed against the properties of defendant 1 unless he refunded the deposit of Rs. 15,500, but that this was not to affect the right of the plaintiff in the present suit to claim contribution from her. The execution then proceeded, and only came to an end when five properties of the plaintiff's were sold for Rs. 7222 on 15th December 1932. On 22nd

December 1933, plaintiff brought the present suit for the recovery of this money, besides Rs. 1000 as cost of the execution proceedings, with interest at 1 per cent. per mensem. Plaintiff's case was that she had suffered this loss on account of the failure of defendant 1 and of defendants 2 to 6 to pay those portions of the mortgage debt that they had undertaken to pay.

The lower Court held that defendant 5 (with whom goes defendant 6) had paid her share to Saiyid Chhote Nawab himself before the execution of the tamliknamas in favour of his daughters, and that defendants 1 to 4 were liable for the loss caused to the plaintiff. The claim of the plaintiff was accordingly decreed rateably against defendant 1, defendant 2, and defendants 3 and 4, the costs claimed being disallowed together with interest. Against this decree defendant 1 has filed First Appeal No. 65 and defendant 2, First Appeal No. 59. The learned Subordinate Judge had no difficulty in finding privity of contract between the plaintiff and defendant 1 on the ground that the tamliknamas in favour of the daughters formed the consideration for one another. This view has not been, as it cannot be, seriously contested. As regards defendant 2 also, the liability is clear (*see* 16 Pat 557¹) on the footing (approved by their Lordships of the Judicial Committee in 52 All 358=57 I A 189²) that there passed to the plaintiff the benefit of the contract by which the money was to be applied by defendant 2, so that the plaintiff could say: "I have a contract which frees me from the liability to contribution which the Section (S. 82, T. P. Act), would otherwise impose upon me."

It has however been contended on behalf of defendant 2 that the time is long past for enforcing his personal liability for the money left with him by Saiyid Chhote Nawab and that the vendor's lien for unpaid purchase money is also gone since the property has been sold in the execution proceedings taken by the mortgagee. On behalf of defendant 1 also it has been contended that the personal remedy is barred by lapse of time, and that, in any case, the sum of Rs. 15,500 deposited by her was more than sufficient to cover what was due from her.

Taking the last point first, defendant 1 has given her calculations in para. 6 of her written statement. These calculations are erroneous in two respects. In the first place, they assume that the amount of Rs. 10,818 odd, for which she became liable, refers to March 1924, when the tamliknama was executed, and not to March 1919, when the sum outstanding under the mortgage was settled just before the death of the mortgagor. Secondly, they assume that the sum of Rs. 10,818 odd was arrived at after deducting not only the amounts left with the purchasers defendants 2, 3 and 4 but also the amount of Rs. 4500 which the mokarraridar of 1920 was to pay towards the mortgage debt. A reference to the tamliknama of defendant 1 (Ex. 1) shows quite clearly that both these assumptions are erroneous. Saiyid Chhote Nawab's one-third share of the mortgage debt, as calculated in March 1919, was Rs. 20,400.2.9, an amount which is only Rs. 9581.6.0 in excess of the amount allotted to defendant 1; and this difference of Rs. 9581.6.0 is the total of Rs. 6581.6.0 due from defendant 2 and Rs. 3000 due from defendants 3 and 4. The tamliknama purports to specify Rs. 10,818.12.9 as the principal of the mortgage debt besides interest after deduction of the amount in deposit with the purchasers. That no interest after March 1919 is included in the amount allotted to defendant 1 is further made clear by the fact that in the schedule of debts given in the tamliknama there is one item relating to a handnote with the specific remark 'including interest.'

Defendant 5 was not a purchaser (khari-dar), but only a mokarraridar, and if the Rs. 4500 due from her were to be deducted from Saiyid Chhote Nawab's share of the mortgage debt, and interest calculated in the way that defendant 1 has done, her liability in March 1924, works out, not at Rs. 10,818 odd, but at Rs. 11,169 odd.

That the mokarraridar paid Rs. 4500 to Saiyid Chhote Nawab before the tamliknamas is established by the evidence of his son Saiyid Muhammad Mehdi, P. W. 1, whose evidence there is no good reason to doubt. It is true that he does not know all the details, but the account that he speaks to, Ex. 2, as worked out by the Diwan of the estate, so far as it shows that Rs. 17,387 odd was found due at that time on account of the mortgage, has been shown by

1. Isri Prasad v. Jagat Prasad, (1937) 24 A I R Pat 628 = 16 Pat 557 = 18 P L T 787.

2. Ganeshi Lal v. Charan Singh, (1930) 17 A I R P C 183 = 124 I C 911 = 52 All 358 = 57 I A 189 (P C).

the calculations of Mr. De, who appears for the plaintiff, to be entirely consistent with the exclusion from Saiyid Chhote Nawab's share of the mortgage debt as calculated in March 1919, of the two sums assigned to defendant 2, and defendants 2 and 4 only, without reference to the sum due from the mokarraridar. This supports the story of Saiyid Muhammad Mehdi. It has been pointed out on behalf of defendant 1 that it was plaintiff's own case that defendant 5 was also liable to contribute. That did not however preclude the lower Court from ascertaining how the amount of Rs. 10,818 odd, allotted to defendant 1, was really arrived at, and from distributing the liability for plaintiff's loss among the parties that were really liable. The liabilities inter se of the transferees from Saiyid Chhote Nawab did not really arise in the mortgage suit, and the finding of the Subordinate Judge in that suit that defendant 5 had failed to make out her story of payment to Saiyid Chhote Nawab plainly does not act as *res judicata* in the present suit. Rs. 10,818 odd must therefore be taken as due from defendant 1, not from March 1924, but from March 1919 for the purpose of the calculation, so that her liability in March 1924 was Rs. 17,387 odd and on 15th May 1928 was much in excess of the deposit of Rs. 15,500 made by her.

The contentions regarding the personal remedy against defendants 1 and 2 being barred by lapse of time and as against defendant 2 regarding the vendor's lien for unpaid purchase money having been extinguished by the mortgage sale are without merit. As the *placitum* of the recent Full Bench decision of the Allahabad High Court in I L R (1938) All 500³ puts it :

Where there is an undertaking by the vendee (or, it may be added, other transferee) to pay off a mortgage debt existing on the property, the covenant is not merely one to pay the purchase money in a particular manner to the vendor's nominee, but one to relieve the vendor from the liability of the mortgage, and in that sense there is a contract of indemnity which may be express or implied. In such cases a cause of action arises when the plaintiff vendor is actually damaged by the sale of the property in the suit by the mortgagee, and under Article 83, Limitation Act, the plaintiff has three years from the time when he is so damaged, but the time is extended to six years by Art. 116 as the contract of indemnity was contained in a sale deed in writing registered.

This is in substantial accord with the

8. Tilak Ram v. Surat Singh, (1938) 25 A I R All 297=175 I O 241=I L R (1938) All 500=1938 A L J 455 (F B).

view taken in this Court in 8 Pat 860⁴ and 10 Pat 451.⁵ The present is of course not a suit by the vendor himself, nor is defendant 1 a vendee but only a transferee. It is a suit by a person entitled to the benefit of the contracts with Saiyid Chhote Nawab, and as it was brought a little over a year from the time the plaintiff was actually damaged, it is plainly within time, whether we regard it as governed by the limitation prescribed in Art. 83 or Art. 116 or Art. 120, Limitation Act. It has been urged on behalf of the appellants in the two appeals that the calculations of the lower Court are wrong. Before dealing with this point however it is convenient to dispose of the plaintiff's cross-objection in the appeal by defendant 1. This cross-objection relates to the costs and interest (both prior to the institution of the suit) claimed in the plaint. The amounts were not disputed in the lower Court, but the learned Subordinate Judge disallowed the costs on the ground that

defendant 1 as well as the decree-holders having contested the plaintiff's prayer for having her properties put up for sale last of all, the plaintiff cannot equitably call upon defendants 1 to 6 only to reimburse her in respect of her said cost.

It is said on behalf of defendant 1 that she had arrived at an arrangement with the decree-holder to refrain from proceeding against her properties in the first instance on condition she made a deposit; but this was no justification as against the plaintiff whom defendant 1 was bound under her *tamliknama* to save harmless. Plaintiff seeks by her cross-objection to recover from defendant 1 her proportionate share of the costs amounting to Rs. 348, and there does not seem to be any reason why she should not have these costs against defendant 1. As regards the interest claimed up to the date of institution of the suit, the claim cannot be supported on any of the grounds that would appear admissible from 12 Pat 216⁶ and 42 C W N 985.⁷ That claim must therefore be disallowed.

4. Ram Rachhya Singh v. Raghunath Prasad, (1930) 17 A I R Pat 46=122 I O 244=8 Pat 860.

5. Mt. Rajbansi Kuer v. Bishundeo Narayan Singh, (1931) 18 A I R Pat 271=132 I O 104=10 Pat 451=12 P L T 211.

6. J. H. Pattinson v. Bindhya Debi, (1939) 20 A I R Pat 196=146 I O 56=12 Pat 216=14 P L T 149.

7. B. N. Ry. Co. Ltd. v. Rattanji Ramji, (1938) 25 A I R P O 67=173 I O 15=82 S L R 374=I L R (1938) 2 Cal 72=65 I A 66=42 C W N 985 (P O).

The only point that remains is the correct calculation of the respective liabilities of defendants 1, 2, 3 and 4. The interest calculated in the lower Court seemed to be wrong, at least at one point, and has been checked by the Bar in this Court, with the result that the interest on the sum of Rs. 6581-6-0 chargeable to defendant 2 must, it is now agreed, be taken to be not Rs. 6588-11-0 but Rs. 7578-11-0. In the account of defendant 1 Rs. 15,500, the amount of her deposit, has been credited to her ; but the deposit was made on 15th May 1928, while the account was made up to 15th December 1932, an interval which carried interest at eight annas per cent. per mensem, the rate allowed from the date of the expiry of the period of grace. This interest, it is agreed, amounts to Rupees 3807-7-0 and must be credited to defendant 1. In the account of defendant 2 no allowance has been made for the sum of Rs. 8055 that was realized by the sale of his properties in the execution proceedings. With interest this amount, it is agreed, comes to Rs. 9746-8-0, a figure which must be credited to defendant 2 in his account. There is a similar omission in the account of defendants 3 and 4. Their property was sold in the execution proceeding for Rupees 2025, to which Rs. 390 odd must be added as interest, the total being credited to these defendants. The pro rata liabilities of the defendants must be worked out in the light of these revised figures. The calculations may be simplified by working out the totals to the nearest rupee, leaving out annas and pies. Except for these arithmetical modifications the appeals fail. I would dismiss them but without costs. I would also allow the cross-objection in F. A. No. 65 in part, as already indicated. The cross-objection in the other appeal, being out of time, was not pressed and must be dismissed.

Agarwala J.—I agree.

N.S./R.K. *Appeals dismissed.*

A. I. R. 1939 Patna 198

HARRIES C. J. AND WORT J.

*Rajeshwari Prasad Singh and others —
Defendants — Appellants.*

v.

*Saheb Singh and others —
Plaintiffs — Respondents.*

Letters Patent Appeal No. 8 of 1938,
Decided 5th January 1939, from decision of
Dhavle J., D/. 21st April 1938.

(a) **Cosharer—Joint decree—Decree cannot be affirmed as to unascertained shares of some and reversed as to those of others.**

Under no circumstances can a decree be affirmed as to the unascertained shares of some joint shareholders and reversed as to the unascertained shares of the other joint share-holders: *11 C W N 504, Rel. on.* [P 199 C 1]

(b) **Appeal — Abatement—Decree obtained in names of individual members of family — Appeal from decree given up against one member — Appeal cannot be continued against remainder.**

Where a decree is obtained in the names of the individual members of a joint family, then the question of representation does not arise. Any appeal against such a decree must be brought against all the persons in whose names the decree stands. If the appeal is given up against one of them, the appeal cannot be continued against the remainder: *11 C W N 504, Applied.* [P 199 C 2]

**Dr. D. N. Mitter and D. C. Varma —
for Appellants.**

**S. M. Mullick, J. C. Mallick and Rati
Kanta Choudhuri — for Respondents.**

Harries C. J.—This is a Letters Patent appeal from a judgment of a learned single Judge of this Court in a second appeal. The suit out of which the appeal arises was brought by nine plaintiffs for the recovery of possession of certain joint family property. One of the plaintiffs was a minor and during the pendency of the suit plaintiff 1, who was the senior member of the family, died. Eventually the remaining eight plaintiffs obtained a decree in their favour in the trial Court, and this decree was affirmed by the lower Appellate Court and by the learned single Judge of this Court. In these proceedings the minor plaintiff who had now become respondent 8, was represented by the Deputy Registrar as guardian ad litem. The minor was impleaded as one of the respondents in this Letters Patent appeal, but certain costs payable to the guardian were not paid. On 2nd August 1938 the learned Registrar ordered the appellants to deposit these costs within a period of two weeks. On 9th August 1938 it appears from an order of the Deputy Registrar that the appellants abandoned their proceedings in so far as respondents 8 to 24 were concerned. Respondent 8 was, as I have stated, the minor plaintiff who had been represented later through the learned Deputy Registrar, his guardian ad litem.

Mr. Sushil Madhav Mullick who appears on behalf of the respondents has taken a preliminary objection that this appeal is incompetent. He has argued that the

decree under appeal is in favour of eight plaintiffs including respondent 8 who was a minor. The decree gave to the plaintiffs possession of family property and by abandoning their appeal as against respondent 8 the whole of the appeal is bound to fail. Reliance has been placed upon the case in 11 C W N 504.¹ In that case during the pendency of an appeal against a decree setting aside the sale of a joint estate for arrears of revenue, two of the plaintiffs-respondents died and there was no application for substitution of the heirs of the deceased respondents, the right to sue not surviving against the other respondents. It was held that the appeal abated inasmuch as the decree could not be reversed without the representative of the deceased being placed on the record. It was further held that under no circumstances could the decree be affirmed as to the unascertained shares of some joint share-holders and reversed as to the unascertained shares of the other joint share-holders. Mr. Mullick has argued that there is no distinction in principle between the Calcutta case and the case now before us. In my view this preliminary objection is well founded and must be sustained. The decree was a decree in favour of eight members of a joint family granting them possession of certain joint family property. If this appeal could proceed against the remaining seven plaintiffs, it might be that the decree would be reversed as to the unascertained shares of seven of the members of the family and remain unaffected as against the unascertained share of the minor plaintiff 8. Such a position cannot be allowed, and that being so, I must hold that the appeal is incompetent as against the remaining seven respondents.

Dr. Dwarka Nath Mitter who appears on behalf of the appellants has contended in the first place that the abandonment of the appeal in so far as it was directed against respondent 8 in no way affects the matter. Plaintiff 1 was described in the plaint as the karta of the family and undoubtedly he could have brought these proceedings on behalf of the family without any of the other members being added as co-plaintiffs. Plaintiff 1 died, but the new karta was also amongst the plaintiffs. At the time the appeal against respondent 8 was given up the name of the karta of the

family was on the record, and it is contended that such being the case, the minor respondent was still represented though in terms the proceedings had been given up against him. In my view as the decree was in terms in favour of eight plaintiffs including respondent 8, it was essential that the eight of them should have been impleaded. Where a decree is obtained in the names of the individual members of a joint family, then the question of representation does not arise. Any appeal against such a decree must be brought against all the persons in whose name the decree stands. In the present case it was, in my view, essential that the appeal should have been continued against the eight plaintiffs and the result of giving up the appeal against one of them is that the appeal cannot be continued against the remainder.

Dr. Mitter has further argued that the properties in question in this suit were not joint family properties. He has pointed out that the properties were not in terms purchased in the name of the joint family; but throughout the proceedings it is clear that they have been regarded as joint family properties. In fact, it is pleaded in the plaint that though the properties were not purchased in the name of the joint family they were in fact purchased for the joint family and that all the plaintiffs as members of a joint family were interested in the same. Dr. Mitter has argued that the properties are self-acquired properties in which the plaintiffs had an interest as tenants-in-common. In my view the properties were clearly joint family properties in which the plaintiffs had unascertained shares. That being so, the case falls completely within the principle laid down by the Calcutta case, 11 C W N 504¹ to which I have previously referred.

Dr. Mitter has argued that if the effect of giving up appeal against respondent 8 is to render the appeal against the remaining respondents incompetent, then we should allow respondent 8 to be added afresh as a party. He has argued that the abandonment of the appeal against respondent 8 was due to a mistake. Junior counsel who appears for the appellants has informed us that he did not intend to give up the appeal against respondent 8; but from the order-sheet it is clear that there was no mistake at the time this order was made. It may well be that learned counsel at that time did not realize the importance of re-

1. *Dharanjit Narayan Singh v. Chandeshwar Prosad Narayan Singh*, (1907) 11 C W N 504 = 5 C L J 393.

taining respondent 8 on the record, and it appears that a few days afterwards when it was brought to the counsel's notice that the appeal had been given up against respondent 8, even then the importance of the fact was not appreciated. I can well believe that there is an element of mistake in this case; but even so, I am unable to agree that we should at this late stage again add respondent 8 to the array of respondents and thus enable the appeal to proceed. Had application been made immediately or within a reasonable time of the learned Deputy Registrar's order, I might have been inclined to accede to it. However, at this late stage it would be manifestly unjust to the respondents to allow respondent 8 to be added in order to enable the appellants further to prosecute the appeal. For the reasons which I have given, I am bound to hold that the appeal, as at present constituted, is incompetent and accordingly I would dismiss it with costs.

Wort J. — I agree that the preliminary objection succeeds.

N.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 200

JAMES AND CHATTERJI JJ.

*Sree Sree Ramchanderji and others —
Plaintiffs—Appellants.*
v.

*Hem Chandra Singh and others —
Defendants — Respondents.*

Appeal No. 237 of 1937, Decided on 10th November 1938, from appellate decree of Addl. Sub-Judge, Bhagalpur, D/- 16th July 1936.

(a) Bengal Tenancy Act (8 of 1885), Section 86 (6) — S. 86 (6) does not apply to non-transferable holding.

Section 86, Cl. (6) does not apply to a non-transferable holding. Though the Section speaks in general terms of a holding it has to be read with the other provisions of the Act. Occupancy holdings in the absence of proof of any custom to the contrary are presumed to be non-transferable. The mortgagee of raiyat cannot claim that the surrender of the mortgaged property to the landlord could not be valid unless it was made with his consent. [P 201 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 167 — Non-transferable holding sold under rent decree—Holding purchased by landlord — He need not annul encumbrance on it.

Where a holding is non-transferable and a purchaser under a rent decree happens to be the landlord he in his capacity as landlord is entitled to disregard the encumbrance, if not made with his

consent, and may take possession of the purchased holding and may successfully maintain it in opposition to the claims of encumbrancer: *A I R 1927 Pat 53; A I R 1928 Pat 234 and A I R 1929 Pat 222, Rel. on.* [P 201 C 2 ; P 202 C 1]

(c) Bihar Tenancy Act (8 of 1934), Ss. 26-B and 26-N—Ss. 26-B and 26-N do not apply to mortgages, still less to usufructuary mortgages.

Sections 26-B and 26-N by their terms apply to transfers by sale, exchange, gift or will. They do not apply to mortgages and therefore do not protect sudhbarnadar. Assuming however that the view that when a mortgage is followed by a sale in execution of a decree on the mortgage the execution sale may be treated on the same footing as a voluntary sale and would therefore come within the purview of S. 26-B is correct, it does not hold good with regard to usufructuary mortgages. [P 202 C 1]

Chandeshwar Prasad Sinha —

for Appellants.

S. M. Mullick and Nitai Chandra Ghose
— *for Respondents.*

Chatterji J.—This is a second appeal by three Hindu deities represented by their shebait Rameshwar Prasad Singh who brought a suit under O. 21, R. 103, Civil P. C. The dispute relates to an area of 33 bighas 13 kathas out of a nakdi jote which belonged to the defendants second party. They executed a sudhbarna bond dated 14th June 1921 in respect of the disputed 33 bighas 13 kathas in favour of the plaintiffs. In 1930 the defendants first party who are the landlords of the holding brought a suit for rent against the defendants second party, describing the holding to be of 36 bighas 7 kathas 3 dhurs, and obtained a decree in execution of which they purchased the holding and took possession of it on 18th May 1932. The plaintiffs then filed an application under O. 21, Rule 100, Civil P. C., but it was dismissed on 16th January 1933. Thereupon they brought the present suit on 15th January 1934. Their main allegations were that the decree for rent obtained by the defendants first party was a money decree because the suit was brought in respect of a portion of the holding, the area of the entire holding being 38 bighas 1 katha 3 dhurs, and all the tenants interested in the holding were not made defendants in the suit. They further asserted that even if the decree was a rent decree their encumbrance not having been annulled under the provisions of Sec. 167, Ben. Ten. Act, the defendants first party as purchasers had no right to dispossess them.

The main defence in the suit was that the sudhbarna bond of the plaintiffs was

not a bona fide transaction and that the decree in question was a rent decree the suit being in respect of the entire holding and against the entire body of tenants. It was alleged that though the previous area of the entire holding was 38 bighas 1 katha 3 dhurs the raiyats surrendered two plots of the holding, namely plots 54 and 373 having an area of 1 bigha 14 kathas, in 1331 and since then the landlords were in khas possession of those two plots. The area of the holding was thus reduced to 36 bighas 7 kathas 3 dhurs and it was for this area that the rent suit was brought. The learned Munsif who tried the suit dismissed it holding that the decree in question was a rent decree because the claim was for an entire holding and all the tenants interested in the holding were made defendants in the suit. On the question whether the sudhbharna bond of the plaintiffs was a bona fide transaction he found in their favour. On appeal his decision has been affirmed by the Additional Subordinate Judge. Hence this second appeal. The first point raised on behalf of the appellants is that the decree for rent was a money decree. The first ground urged in support of this contention, namely that all the tenants interested in the holding were not made defendants in the suit, is concluded by the concurrent findings of fact. Both the Courts below have found that all the persons who were recorded in the landlord's books were made parties to the suit. That being so, the plea that the suit was not brought against the entire body of tenants must fail.

On the question whether the suit was in respect of a portion of the holding it has also been found by the Courts below that at the time of the suit the area of the holding was 36 bighas 7 kathas 3 dhurs and the suit was for the rent of this holding. The previous area of the holding of course was 38 bighas 1 katha 3 dhurs, but in 1331 the raiyats surrendered the plots 54 and 373 comprising an area of 1 bigha 14 kathas and this has been found by both the Courts below. The learned advocate for the appellants however contends that the two plots 54 and 373 being included in their sudhbharna bond, there could be no valid surrender in respect of those plots without their consent. In support of this contention reliance is placed on S. 86, Cl. 6, Ben. Ten. Act. The learned Subordinate Judge has found that since the surrender

in 1331 the landlords have been in possession of the surrendered plots 54 and 373 and the plaintiffs never raised any objection to their possession. The learned Subordinate Judge has therefore held that there was implied consent of the plaintiffs to the surrender. Apart from this fact, S. 86, Cl. 6, Bengal Tenancy Act, does not in my opinion, seem to apply to a non-transferable holding. Though the Section speaks in general terms of a holding it has to be read with the other provisions of the Act. Occupancy holdings in the absence of proof of any custom to the contrary are presumed to be non-transferable. Suppose a raiyat after mortgaging his holding surrenders it without the mortgagee's consent to his landlord who comes into possession, the mortgagee then sues upon his mortgage and obtains a decree in execution of which he purchases the holding and seeks to obtain possession. The landlord, unless he has given his consent to the purchase, is entitled to ignore it altogether and though he might have come into possession on the strength of an invalid surrender he can successfully resist the purchaser's claim for possession. The purchaser cannot force himself upon the landlord as his tenant without his consent. If this is the position of the mortgagee, how can he claim that the surrender could not be valid unless it was made with his consent? Thus Sec. 86, Cl. 6 would obviously be of no avail to him.

The next contention on behalf of the appellants is that their encumbrance, not having been annulled under the provisions of S. 167, Bengal Tenancy Act, is effective and binding against the defendants first party who are the purchasers under the rent decree. The answer to this contention is that the defendants first party are themselves the landlords and they need not have annulled the encumbrance. Indeed Section 167 by its terms does not exclude a landlord-purchaser but the Section has to be read in accordance with the general provisions of the Act. In the case of a non-transferable holding, as I have already pointed out, the mortgagee cannot by enforcing his rights under the mortgage claim possession from the landlord unless he has recognized him as his tenant. Of course a purchaser under a rent decree as such is bound by an encumbrance which he has not annulled under Sec. 167, Bengal Tenancy Act, but if the purchaser happens to be the landlord he in his capacity as

landlord is entitled to disregard the encumbrance, if not made with his consent, and may take possession of the purchased holding and may successfully maintain it in opposition to the claims of the encumbrancer. The view I take is in accordance with the decisions of this Court in 6 Pat 235,¹ 7 Pat 155² and 8 Pat 439.³ The learned advocate for the appellants contends that these decisions are no longer good law because under the amended provisions of S. 26, Bihar Tenancy Act of 1934, all occupancy holdings have been made transferable. The relevant clauses of that Section are 26-B and 26-N. Section 26-B runs as follows :

(1) An occupancy raiyat shall have power to transfer his occupancy holding or any portion thereof, together with the right of occupancy therein, by sale, exchange, gift or will, but, except as provided in sub-s. (2), no such transfer shall be valid against the landlord unless he has given, or is deemed under S. 26-F to have given, his consent thereto.

Section 26-N runs as follows :

Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before 1st January 1923, and, in the case of the transfer of a portion of a holding, to have accepted the distribution of the rent of the holding as stated in the instrument of transfer, or if there is no such instrument, as settled between the transferor and the transferee.

These Sections, by their terms apply to transfers by sale, exchange, gift or will. They do not apply to mortgages and therefore do not protect the plaintiffs who are sudhbarnadars. It may, however, be said that when a mortgage is followed by a sale in execution of a decree on the mortgage the execution sale may be treated on the same footing as a voluntary sale and would therefore come within the purview of Section 26-B. Assuming for a moment that this view is correct, it does not hold good with regard to usufructuary mortgagees. The plaintiffs are usufructuary mortgagees and they claim to have been in possession of the mortgaged lands till they were dispossessed by the landlord-purchasers. Even under the amended provisions of the Bihar Tenancy Act their claim cannot be

enforced against the landlord. There is another aspect of the case. The plaintiffs as usufructuary mortgagees were liable to pay rent of the mortgaged property which formed the major portion of the holding. They did not pay the rent and for the arrears, the bulk of which was payable by them, the rent suit was brought. Rent is a first charge on the holding and the holding having been sold in execution of the rent decree, it is now too late for the plaintiffs to assert their right as encumbrancers against the landlord-purchasers. There is no substance in any of the contentions raised by the appellants and I would dismiss the appeal with costs.

James J. — I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 202

JAMES AND CHATTERJI JJ.

Baraik Akhaj Singh — Plaintiff —
Appellant.

v.

Shri Nath Tewari and others —
Defendants — Respondents.

Appeal No. 603 of 1935, Decided on 1st November 1938, from appellate decree of Judicial Commissioner, Chota Nagpur, Ranchi, D/- 2nd April 1935.

Lease—Construction — Mokarrari lease executed by jagirdar in Chota Nagpur — Words “putra poutradik mai warisan kayem mokamian” in lease mean “male heirs of lessee’s body, representatives or assigns.”

It cannot be laid down as a general rule that all leases executed in Chota Nagpur by whosoever they may be executed, must be governed by the peculiar customs which govern the enjoyment of jagirs or khorposh grants made by the zamindars of the District. [P 203 C 2]

The words “putra poutradik mai warisan kayem mokamian” used in a mokarrari lease executed by jagirdar in Chota Nagpur mean “male heirs of lessee’s body and his representatives or assigns” : *A I R 1918 P C 203, Ref. ; A I R 1920 Pat 785, Disting.* [P 203 C 2]

B. C. De and K. K. Banarji —
for Appellant.

S. M. Mullick, Rai Guru Saran Prasad
and **Rai Paras Nath —**

for Respondents.

James J. — The plaintiff in this litigation holds a jagir in the estate of the Maharaja of Chota Nagpur. In 1901 he made a mokarrari settlement of two villages Kuda and Dufu with Lachman Sahu reserving an annual rent of Rs. 14 and taking

1. Hargobind Das v. Ramchandra Jha, (1927) 14 A I R Pat 53=97 I C 309=6 Pat 235=8 P L T 464.

2. Badlu Pathak v. Sibram Singh, (1928) 15 A I R Pat 234=107 I C 310=7 Pat 155=9 P L T 241.

3. Sourendra Mohan Singh v. Kunjbihari Lal, (1929) 16 A I R Pat 222=116 I C 518=8 Pat 439=10 P L T 129.

a premium of Rs. 4458. Lachman Sahu made a darmokarrari grant of Dufu to certain defendants in this case and a darmokarrari grant of the greater part of Kuda village to other defendants; while he sold his interest in the remaining area of Kuda to a third set of defendants. All of Lachman Sahu's sons died during his life and after the death of Lachman Sahu, the plaintiff instituted this suit for recovery of possession of the villages on the ground that the grant had lapsed on failure of male heirs of Lachman Sahu. The plaintiff claimed that by custom such grants were resumable on the failure of male heirs, but the Subordinate Judge found that this custom had not been proved. The Subordinate Judge found that the mokarrari lease was a perpetual and absolute grant and dismissed the suit. His decision was confirmed on appeal by the Judicial Commissioner of Chota Nagpur.

The lease purported to be a lease in perpetuity to Lachman Sahu and his heirs. The words used in the lease were "putra poutradik mai warisan kayem mokamian." "Kayem mokamian" means "deputies or representatives" and according to Johnson and Richardson's Persian Dictionary means also 'agents or assignees.' The term 'putra poutradik' used in grants and jagirs in Chota Nagpur means ordinarily 'heirs in the direct male line' and this may be assumed to be its ordinary meaning in Chota Nagpur. Mr. B. C. De cites as authority for this proposition the decision of the Judicial Committee in 46 Cal 683¹ and although it is to be remarked that in these cases where a particular meaning has been applied to words used in grants of jagirs, the decision has been on the evidence in the case, it may be taken, that in Chota Nagpur 'putra poutradik' standing alone means heirs of the grantee's body in the direct male line. The words 'istimrari mokarrari' in the Ramgarh estate have been held to confer only a life interest when they are accompanied by no other words of inheritance; but here we have to consider what is to be taken to be the effect of the expression "putra poutradik mai warisan kayem mokamian." This might be translated into English as male heirs of his body, general heirs and assigns; and it appears to me that it would be un-

reasonable to hold that the addition of these words does not in any way modify the effect of the words 'putra poutradik'. In 5 Pat L J 265² it was held that in the grant of a jagir by the Maharaja of Chota Nagpur these words added nothing to the effect of the words 'putra poutradik', but that decision was based on the existence of a custom which had been pleaded by the plaintiff and admitted by the defendant by which jagirs were resumable on failure of heirs male in the male line of the grantee. Here we are dealing not with a jagir but with a lease executed by a jagirdar. As I have said, it has been found by the Subordinate Judge that the custom pleaded by the plaintiff has not been proved; and I do not consider that it can be laid down as a general rule that all leases executed in Chota Nagpur, by whosoever they may be executed, must be governed by the peculiar customs which govern the enjoyment of jagirs or khorposh grants made by the zamindars of the district. The mokarrari lease purports to be a permanent grant to Lachman Sahu and his heirs and representatives or assigns; and in the absence of proof of a special custom, it cannot be interpreted as conveying anything less. It appears to be clear that the jagirdar in this case retained no right of resumption except in circumstances in which the mokarrari grant would escheat if it had been a mokarrari estate in Bengal or Bihar. I would confirm the decision of the Judicial Commissioner and dismiss this appeal with costs.

Chatterji J. — I agree.

D.S./R.K.

Appeal dismissed.

2. Brojokeshore Ram v. Jagat Mohan Nath, (1920) 7 A I R Pat 785=58 I O 486 = 5 Pat L J 265.

A. I. R. 1939 Patna 203

HARRIES C. J. AND MANOHAR LALL J.
Sukhraj Rai and others — Plaintiffs
— Appellants.

v.

Prithvi Chand Lal Chaudhuri —
Defendant — Respondent.

Appeal No. 53 of 1937, Decided on 6th January 1939, from original decree of Sub-Judge, Bhagalpur, D/- 10th October 1936.

Interest — Rate of — Loan on handnote — Chances of repayment slight — Substantial rate of interest can be demanded—18 per cent. per annum compoundable yearly is not unfair.

1. Ram Narayan Singh v. Ram Saran Lal, (1918) 5 A I R P O 203=50 I O 1=46 Cal 683=46 I A 88 (P O).

It has always been recognized that the lender of money upon a note of hand is entitled to a greater rate of interest than the lender of money on security. Further the lender of money to a person whose chances of repayment are slight is obviously entitled to demand a higher rate of interest than if he was lending to a person who was obviously in a position to pay whenever called upon so to do. In such circumstances the lender is entitled to demand a substantial rate of interest to compensate him for the risk he is running. The rate of interest of 18 per cent. per annum compoundable yearly cannot be said to be unfair or excessive in such a case : *A I R 1929 Pat 383, Ref.*

[P 204 C 2 ; P 205 C 2]

S. C. Mazumdar and Ramanugraha Narain Sinha — *for Appellants.*

A. H. Fakhruddin — *for Respondent.*

Harries C. J. — This is a plaintiffs' appeal against a decree of the learned Subordinate Judge of Bhagalpur partly decreeing their claim. The respondent has preferred a cross objection against the same decree. The suit out of which this appeal arises was brought for the recovery of Rs. 13,306 on the basis of a roka dated 20th September 1932. According to the plaintiffs, the defendant borrowed on that day from the plaintiffs a sum of Rs. 50,000 and executed the roka in question. In the roka it is provided that the defendant was to pay interest at the rate of 18 per cent. per annum with yearly rests. The plaintiffs admitted that the defendant had from time to time made payments amounting to Rs. 50,000 and the claim was brought for the balance of principal and interest due upon this transaction. The defendant admitted borrowing Rs. 50,000 but pleaded that the interest agreed upon was not 18 per cent. per annum compoundable yearly but 6 per cent. per annum simple.

The learned Subordinate Judge came to the conclusion that the rate of interest agreed upon was 18 per cent. per annum compoundable yearly. He however was of opinion that this interest was excessive and that the transaction as between the parties was substantially unfair. He accordingly acting under the provisions of the Usurious Loans Act 1918, reduced the rate of interest upon this loan to 12 per cent. per annum simple and passed a decree upon that basis. The plaintiffs being dissatisfied with this decision as to interest have preferred this first appeal. The defendant being dissatisfied with the finding that the rate of interest was not 6 per cent. per annum simple as alleged by him has preferred a cross-objection.

In the first place, it must be observed

that the loan in this case was a very substantial one, namely Rs. 50,000. Further it was a loan made upon no security whatsoever. In ordinary circumstances the risk of such a loan is great, and in my view the risk was greater than usual in this case by reason of the financial position of the defendant. The learned Subordinate Judge has referred to the defendant as a man possessing vast properties yielding an annual income of about Rs. 10,00,000. However it is clear that the defendant's properties are very heavily mortgaged and at the time when this loan in dispute was made, a portion of the defendant's properties was about to be sold for arrears of Government revenue. It is obvious that at the time when the money was borrowed the defendant was financially embarrassed. In evidence he has admitted that interest is mounting up rapidly on their loans, and it cannot possibly be said that the defendant is a person with ample resources out of which he can repay money borrowed. He is a man who owns large properties, but unfortunately for him those properties yield him little or nothing at all. Lending to a man whose financial position is similar to that of the defendant is a highly risky transaction. That being so the lender is clearly entitled to a higher rate of interest to compensate him for the risk which he is running.

The learned Subordinate Judge at a later stage in his judgment stresses the fact that the defendant was in serious financial difficulties, though earlier in his judgment he mentions that the defendant was a man of vast properties to whom money could be lent with little or no risk. He stresses the defendant's financial difficulties to show that the relationship existing between the lenders and the borrower were such as to render the transaction substantially unfair. The learned Judge points out that the defendant was in urgent need of money to prevent his property being sold. It appears that plaintiff 2, who is the son of plaintiff 1 had apparently at an earlier stage agreed to lend money at 9 per cent. per annum. It may be that the son promised to lend money at that low rate, but it is clear that the moment his father was brought into the transaction no money could be obtained at that rate. This promise of the son, it is suggested, shows that money was readily available at this time at the rate of 9 per cent. per annum, and the very fact that 18 per cent. per annum compoundable yearly

was obtained, shows that the plaintiffs took advantage of the defendant's financial position. If a lender does take advantage of the embarrassed condition of a borrower and accordingly drives a harsh and unconscionable bargain, the Court may reduce the rate of interest under the provisions of S. 3, Usurious Loans Act, 1918. There can be no doubt that the defendant was financially embarrassed, but I am not satisfied that the plaintiffs took advantage of his position to demand an unreasonable rate of interest. Persons who are financially embarrassed cannot hope to obtain loans as cheaply as persons who can offer substantial security. It has always been recognized that the lender of money upon a note of hand is entitled to a greater rate of interest than the lender of money on security. Further, the lender of money to a person whose chances of repayment are slight is obviously entitled to demand a higher rate of interest than if he was lending to a person who was obviously in a position to pay whenever called upon so to do. It appears to me that in the circumstances of this case, the plaintiffs were entitled to demand a substantial rate of interest to compensate them for the risk they were running. The learned Judge has held that the agreed rate of interest was 18 per cent. per annum compoundable yearly, and in my view it cannot be said that such a rate is unfair or excessive in all the circumstances of the case.

It has been laid down in 10 P L T 430¹ that what rate of interest can be charged depends upon the circumstances of each case and the security offered and that no fixed rate of interest can be specified as being reasonable or fair in all cases. In that particular case a rate of 15 per cent. per annum compoundable yearly was held not to be by itself excessive and would not by itself make a mortgage transaction unfair. It will be observed that in that particular case the advance was upon security, yet the Court held that interest at the rate of 15 per cent. per annum compoundable yearly was not unfair. In the present case, as I have pointed out, there is no security of any kind except the promise of the defendant, who at that time was clearly not in a position to carry out.

The version given by the defendant of

1. Dalip Narayan Singh v. Mt. Sharfunnissa, (1929) 16 A I R Pat 888 = 119 I O 410 = 10 P L T 430.

this transaction cannot possibly be accepted. According to him, the rate of interest agreed upon was 6 per cent. per annum simple. He says that at the actual date of the loan one Meherchand, a servant of the plaintiffs, came to him and refused to hand over the bank draft unless the roka now relied upon by the plaintiffs was signed. According to the defendant, the roka showed a rate of interest 18 per cent. per annum compoundable, though the contract rate was only 6 per cent. Further the defendant alleges that a payment of Rs. 1500 was made to Meherchand as interest in advance at the rate of 6 per cent., but the learned Judge has found that this payment of Rs. 1500 was not a payment of interest in advance but of commission or a bribe to Meherchand for negotiating the loan. The fact that the defendant had to pay Meherchand a bribe or commission of Rs. 1500 to secure this loan is in itself strong evidence of the fact that money, even at a comparatively high rate of interest could not be obtained by the defendant in his then circumstances. It is inconceivable that the plaintiffs could have agreed to advance the defendant Rs. 50,000 at the rate of 6 per cent. per annum simple. Such a rate is practically unheard of in mortgages where substantial security is given, and I cannot believe that any money-lender would lend money on a mere note of hand to a financially embarrassed borrower at such an absurdly low rate of interest. In my view, the defendant's case was clearly false and the learned Subordinate Judge was perfectly right in rejecting it in its entirety. In my view the learned Subordinate Judge was right in holding that the agreement was to pay interest at the rate of 18 per cent. per annum compoundable yearly and such is the rate of interest which he ought to have granted.

For the reasons which I have given, I hold that the plaintiffs are entitled to interest at the rate of 18 per cent. per annum compoundable yearly and I would accordingly allow this appeal with costs, and dismiss the cross-objection with costs.

Manohar Lall J.—I agree.

D.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 206

DHAVLE J.

Kunjo Mandal and another —

Petitioners.

v.

Sarju Ram Marwari and another —

Opposite Party.

Criminal Revn. Nos. 525 and 460 of 1938, Decided on 11th November 1938, against order of Sub-Divisional Officer, Madhipura at Supaul, D/- 31st May 1938.

(a) Criminal P. C. (1898), S. 145 (2) — Fees *khutagarai*, *arhat* and *keali* do not come within definition of "land or water."

Fees *khutagarai*, *arhat* and *keali* which are collected in respect of boats moored in a shallow channel and which are dissociated from the ownership of the site are not included within the expression "land or water" as used in sub-s. (1) of S. 145 and as explained in sub-s. (2) of that Section: 38 Cal 387; A I R 1934 Pat 86 and 3 C L J 137, Ref. [P 207 C 1]

(b) Criminal P. C. (1898), Ss. 145 and 147—S. 147 may apply where S. 145 does not apply.

Where S. 145 does not apply, S. 147 may, and proceedings under latter Section are carried on in the same manner as proceedings under the former: A I R 1924 Bom 452, Rel. on. [P 207 C 1]

(c) Criminal P. C. (1898), S. 145—Fact that witnesses are examined locally does not disentitle party to costs.

Witnesses may be examined locally to avoid expenses but that does not mean that no expense is properly incurred at all so as not to award costs to any party. [P 207 C 1]

(d) Criminal P. C. (1898), Ss. 145, 147 and 435—High Court has revisional powers over proceedings under S. 145 and S. 147 — High Court in revision will interfere with exercise of discretion when it is exercised on wrong principles.

With the delation in 1923 of sub-s. (3) of S. 435, the High Court has full revisional power over proceedings under Ss. 145 and 147, and though the High Court will be slow to interfere with a real exercise of discretion by the lower Courts, there can be no hesitation in interfering in revision when no discretion has been exercised at all, or when, what discretion has been exercised, has been exercised on wrong principles altogether. [P 207 C 1, 2]

L. K. Jha, Satish Chandra Misra and Kapildeo Narain Lall (in No. 525) and G. N. Mukherji, Benoy Bhusan Ray and Assistant Government Advocate (in No. 460) — *for Petitioners.*

G. N. Mukherji, Benoy Bhusan Ray and Assistant Government Advocate (in No. 525) and L. K. Jha, Satish Chandra Misra and Kapildeo Narain Lall (in No. 460) —

for Opposite Party.

Order. — Criminal Revision No. 525 of 1938 relates to an application by the first party in a proceeding had in the Court of

the Sub-divisional Officer of Madhipura at Supaul under S. 145, Criminal P. C. The dispute which led to the proceeding arose out of the collection of certain fees called *khutagarai*, *arhat* and *keali*, levied in respect of boats bringing grain and moored in a shallow channel in a locality known as Jagir Lowa Lagam Amanat Sircar, Tauzi Nos. 428, 5050 and 5955. These tauzis belong to the proprietor who is included in the first party along with his lessee. I understand that Jagir Lowa Lagam Amanat Sircar lies within the ambit of Mauza Ghosai, Tauzi No. 3306, and the lessee from the proprietor of this tauzi is the leading member of the second party. The Sub-divisional Officer considered the evidence before him and came to the conclusion that *arhat*, *keali* and *khutagarai* are realized from the entire village Ghosai including the three tauzis of the first party by the lessees of the second party and are not collected by the lessees of the first party. An application against his order was made to the Sessions Judge in revision by the first party but the learned Additional Sessions Judge dismissed it. Mr. Jha, who appears here for the petitioners first party, has raised two points. The first is that the Sessions Judge has not discussed the evidence of the second party. The contention overlooks the fact that the first party were not entitled to anything of the kind at the hands of the Sessions Judge at all. It was not a case which was open to appeal, and the learned Judge only dealt with the points that were pressed before him. The trial Court dealt with the evidence of both parties in detail and arrived at its own finding, and the petitioners before me failed to displace that finding, as we see from the judgment of the Sessions Judge.

The second point raised by Mr. Jha before me is that the fees in dispute do not come within the definition of "land or water" in sub-s. (2) of S. 145, Criminal P. C. In support of this contention he cited such rulings as 38 Cal 387,¹ 13 Pat 153² and 3 C L J 137.³ The channel where the boats are moored, and mooring and other fees levied, lies, I understand, within the

1. Ram Saran v. Raghu Nandan, (1911) 38 Cal 387=9 I C 6=13 C L J 445=16 O W N 574.
2. Ramroop Mahton v. Mano Mian, (1934) 21 A I R Pat 86=1934 Cr C 113=147 I C 774=35 Cr L J 481=13 Pat 153=15 P L T 147.
3. Narayan Misser v. Bhugwan Misser, (1906) 3 C L J 137=3 Cr L J 214.

tauzis of the first party, which tauzis themselves lie within the ambit of the mauza Ghosai, forming tauzi No. 3306, on the strength of the title to which the second party have been collecting the fees. The fees are thus dissociated from the ownership of the site, and it may well be that Mr. Jha is right in saying that they are not included within the expression "land or water" as used in sub-s. (1) of S. 145 and explained in sub-s. (2) of that Section. But it is obvious that this by itself would be no reason for interfering with the order passed by the Sub-divisional Magistrate in favour of the second party. Where S. 145 does not apply, S. 147 may, and proceedings under the latter Section are carried on in the same manner as proceedings under the former. This is clear from the terms of S. 147 itself and is also supported by authorities. In 48 Bom 512⁴ for instance, which has been cited by the learned Assistant Government Advocate appearing on behalf of the opposite party, an order passed under S. 145 was upheld by the High Court under S. 147. The two points raised by Mr. Jha therefore fail, and the application in revision must be dismissed.

Criminal Revision No. 460 of 1938 is an application by the second party in the same case and relates to the order of the Sub-divisional Magistrate that the parties do bear their own costs. The second party seems to have succeeded before the Magistrate on practically every point that was in dispute, and it is difficult to see why, in these circumstances, the Magistrate did not award costs as against the first party. In the explanation submitted by him the learned Magistrate says that witnesses were examined locally at the request of the parties in order to avoid expenses, but that both sides engaged lawyers suited to their purses, and therefore it was not considered necessary to give costs to either of the parties. This shows a clear misapprehension on the part of the learned Magistrate. Witnesses may be examined locally to avoid expense; but that does not mean that no expense is properly incurred at all. Mr. Jha has contended that the Magistrate having exercised his discretion, this Court ought not to interfere with the order disallowing costs; but with the deletion in 1923 of sub-s. (3) of S. 435, Criminal P. C.,

4. In re Amarsang Shivasangji, (1924) 11 A I R Bom 452 = 86 I O 404 = 26 Or L J 772 = 48 Bom 512 = 26 Bom L R 486.

the High Court has full revisional power over these proceedings, and though even now the High Court will be slow to interfere with a real exercise of discretion by the lower Courts, there can be no hesitation in interfering in revision when no discretion has been exercised at all, or when, what discretion has been exercised, has been exercised on wrong principles altogether. The order disallowing costs to the second party must therefore be set aside and the Magistrate directed to assess the costs of the second party in accordance with the law and award them to this party.

D.S./R.K.

Order accordingly.

A. I. R. 1939 Patna 207

HARRIES C. J. AND AGARWALA J.

*Shiva Shankar Sah and another —
Defendants—Appellants.*

v.

*Manbharan Rai, Plaintiff and others,
Defendants—Respondents.*

Appeal No. 117 of 1938, Decided on 3rd November 1938, from appellate decree of Sub-Judge, Chapra, D/- 14th June 1937.

Civil P. C. (1908), S. 66 — Claim of person who alleges actual purchase to be exclusively on his behalf or on behalf of himself jointly with certified purchaser in pursuance of agreement is barred by S. 66.

Section 66 operates as a bar to a claim by a person who alleges that the actual purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise, for no benami purchase can ever be otherwise than as the result of an agreement of some sort between the principal and the benamidar. The fact that the principal claims only to have provided a part of the purchase money and to be entitled to only a share in the property purchased does not make any difference in principle: *A I R 1937 All 176, Rel. on; A I R 1921 Pat 39, Dissent.* [P 208 O 1, 2]

Hareshwar Prasad Sinha —

for Appellants.

Harinandan Singh — *for Respondents.*

Agarwala J. — This appeal by the defendants arises out of the following facts. Lakshman Rai obtained a money decree against Hira Sah. In execution of that decree he put up to sale five items of property which belonged jointly to the judgment-debtor and the latter's brother. Two items, namely Nos. 1276 and 3565 were purchased by Manbharan Rai and the remaining three items, Nos. 1422, 1425 and 3562, were purchased by Lakshman Rai. Each of the auction-purchasers obtained possession of the items purchased by him

respectively, jointly with the brother of the judgment-debtor. Subsequently a suit was instituted for partition as against the brother of the judgment-debtor, purporting to be a suit by Manbharan Rai and Lakshman Rai, the two auction-purchasers. Defendant 1 pleaded inter alia that Lakshman Rai was not in fact a party to the suit and that Manbharan Rai had no rights in those items of property which had been purchased by Lakshman Rai. Lakshman Rai also filed a petition supporting this plea of the defendant. He alleged that his name had been fraudulently used as a plaintiff in the suit and he had nothing to do with it. The plaintiff Manbharan Rai, on the other hand, affirmed that there had been an agreement between himself and Lakshman Rai that any of the properties to be put up to sale in execution of the money decree which should be purchased by either of them, should be held on behalf of both of them by the purchaser. It is on the strength of that agreement that he claims partition. The claim is met by the bar of S. 66, Civil P. C. As was pointed out by a Division Bench of the Allahabad High Court, in a case where the facts were indistinguishable from the facts of this case [I L R (1937) All 113¹], that Section is a bar to a suit where a partnership or agreement is entered into between two persons to purchase property at an auction execution sale with funds contributed by both in the name of one person only.

The plaintiff-respondent relies on the decision of a single Judge of this Court (62 I C 720²), in which it was held that S. 66 does not take away the jurisdiction of the Civil Court to deal with a cause of action based on a contract between the parties and on the equities arising out of that contract. If that decision is in fact contrary to the decision of the Division Bench of the Allahabad High Court already referred to, I respectfully disagree with it. To me it seems that the Section operates as a bar to a claim by a person who alleges that the actual purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise,

for it is clear that no benami purchase can ever be otherwise than as the result of an agreement of some sort between the principal and the benamidar; nor does the fact that the principal claims only to have provided a part of the purchase money and to be entitled to only a share in the property purchased make any difference in principle. In my view therefore the Section is a bar to the present suit. But it is contended by the learned advocate for the plaintiff that this is a suit not against Lakshman Rai, the certified purchaser of three of the items of the property, but defendant 1. With regard to the three items of property purchased by Lakshman, the plaintiff admittedly has no title at all unless he can establish that Lakshman purchased on his behalf, so that in that event he would not be entitled to succeed in this suit for partition against defendant 1; and if he does rely on that agreement as I have already indicated, S. 66 bars the suit.

The learned advocate sought to rely on the finding of the Appellate Court that Lakshman Rai was in fact a party to the suit. That finding was based on a statement in an affidavit filed by Manbharan Rai, the plaintiff, after the hearing of the suit had been completed, in which he alleged that Lakshman Rai had filed an affidavit of service at an earlier stage of the proceedings. Manbharan Rai's affidavit was for the purpose of inducing the Court to call for this affidavit of service. The application was rejected, and therefore the defendants had no occasion to controvert the allegations made in it. The Court below was not entitled in a suit to take evidence by affidavit. If it was necessary to secure the plaintiff's evidence with regard to any point, the other side was entitled to cross-examine. The result of this appeal therefore is that with regard to items 1422, 1425 and 3562, the decree of the Courts below is set aside and the plaintiff's suit is dismissed. With regard to the other two items, namely 1276 and 3565, the plaintiff claims in these a one-fourth share which he seeks to partition and to that extent his suit succeeds and the appeal with regard to those two items is dismissed. The parties will bear their own costs throughout.

Harries C. J.—I entirely agree.

N.S./R.K.

Order accordingly.

1. *Bishan Dayal v. Kesho Prasad*, (1937) 24 A I R All 176=167 I C 683=I L R (1937) All 113=1937 A L J 52.

2. *Bikram Ahir v. Lala Rajpati Lal*, (1921) 8 A I R Pat 39=62 I C 720.

A. I. R. 1939 Patna 209

HARRIES C. J. AND ROWLAND J.

Ranchi Zamindari Co. Ltd. —

Petitioners.

v.

Pratab Udainath Sahi Deo and another
— Opposite Party.

Criminal Revns. Nos. 662 and 671 of 1938, Decided on 6th January 1939, from order of Sub-Divisional Magistrate, Ranchi, D/. 24th September 1938.

(a) Criminal P. C. (1898), S. 145 — Scope — Dispute as to possession of minerals.

Proceedings under Sec. 145 can be instituted in cases where dispute has arisen as to the possession of minerals: *A I R 1917 Pat 183; A I R 1919 Pat 210 and A I R 1922 Cal 83, Foll.* [P 211 C 2]

(b) Criminal P. C. (1898), S. 145—Proceedings under — Magistrate can consider question of title to ascertain who is in possession — Unworked minerals how can be possessed stated—Person having heritable and transferable interest in land under patta — Sub-soil rights not granted by patta — Person cannot claim to be owner of minerals — Minerals underlying land would be deemed to be owned by proprietor.

In proceedings under Sec. 145 a Magistrate can properly consider questions relating to title where such is necessary in order to ascertain who is in possession: *A I R 1920 Pat 499, Foll.; 34 Mad 138, Rel. on.* [P 211 C 2]

Unworked minerals are not capable of such possession as the surface of land or a house. They cannot be occupied nor can be possessed except by actual working. Where a large portion of mineral area has not been worked, it is necessary for a Magistrate in an inquiry under S. 145 to consider who is the owner of these minerals in order to assist him in coming to the conclusion as to who is in possession of the same. [P 212 C 1]

Where a proprietor holding a permanently settled estate grants by a patta, a permanent, heritable and transferable interest in certain lands but the patta does not in express terms grant the rights in the minerals, the person holding the land under the patta cannot found a title to the sub-soil rights. The proprietor shall in such case be deemed to be the owner of the minerals underlying the land: *A I R 1931 P C 162, Rel. on.* [P 212 C 2]

(c) Criminal P. C. (1898), S. 145—Possession—Nature of—Unworked minerals — Owner of unworked minerals who sinks shaft or begins to work minerals in area or grants leases to third person under portion of defined area is deemed to be in possession of minerals within that area.

In proceedings under Sec. 145, it is possession that matters and not ownership. The nature of actual physical possession varies with the subject-matter. In the case of unworked minerals possession follows title and the owner of unworked minerals is in possession of them though he is not actually engaged in working them. He is in a position to work them when he so desires, and he can lease them to others who may work them. If

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the owner of unworked minerals under a defined area sinks a shaft and begins to work the minerals in that area, he can properly be said to be in actual physical possession of the whole of the minerals in that area. In the same way, if the owner of minerals under a defined area grants to third parties mining leases of the minerals under portions of such area, he exercises acts of ownership over those minerals and he can truly be said to be in possession of the whole of the minerals under that defined area: *A I R 1922 Cal 83; A I R 1920 Cal 824 and A I R 1920 Pat 383, Rel. on.*

[P 212 C 2; P 213 C 2]

(d) Criminal P. C. (1898), S. 145 — Possession and ouster — On considering facts, party held in possession of minerals at places being worked by him—Operations by party held did not constitute ouster of proprietor's possession over unworked minerals.

A party who was in possession of a certain land under a patta which did not however grant right to the minerals therein, had caused to be made a geological survey of some portion of the land. He had been mining bauxite and had stacked quantities of ore obtained near these sites. He had also built a road up to the nearest railway station for carting the bauxite for transit by rail and had built a bhandar for the use of coolies working on the site. But he had not worked over the whole area. Intensive working had only taken place for a very short time before proceedings under S. 145 were started and even up to that time work had taken place only at three spots on the extreme edge of a hill situated in those lands:

Held that the party was deemed to be in possession of the minerals at the places which were being actually worked by him: *A I R 1920 Pat 383; A I R 1920 Pat 542 and (1877) 6 Ch D 719, Rel. on.* [P 215 C 1]

Held however that the operations carried on by the party did not constitute an ouster of the possession of the proprietor grantor, over the unworked minerals in that area: *(1909) 1 Ch 666, Rel. on; A I R 1931 P C 186 and A I R 1931 P C 162, Disting.* [P 215 C 2; P 216 C 1]

P. C. Manuk and N. N. Sen —

*for Petitioners.*P. R. Das, S. M. Mullick, B. C. De,
K. K. Banarji and P. K. Banarji —*for Opposite Party.*

Harries C. J. — These are two applications for revision of orders relating to certain minerals made under S. 145, Criminal P. C., by the learned Sub-divisional Officer of Ranchi and the learned Judicial Commissioner of Chota Nagpur. The applications arise out of a dispute concerning the possession of bauxite ore under a hill situate in plot No. 215 in the village of Bhusar, P. S. Lohardagga, in Chota Nagpur. The first party was the Maharaja of Chota Nagpur and his employees, whilst the second party was the Ranchi Zamindari Co. Ltd. and their employees. The Maharaja of Chota Nagpur claimed to be in

possession of the whole of this bauxite ore and alleged that the second party was interfering with his possession. On the other hand, the second party claimed to be in possession of these minerals and complained of wrongful interference by the Maharaja. The Courts below have held that the minerals are partly in the possession of the first party and partly in possession of the second party. Each still claims possession over the whole, hence the present applications.

The case for the Maharaja is that the entire village of Bhusar together with the hills surrounding it is comprised in Tauzi No. 1 in the Chota Nagpur Raj of which the Maharaja is the proprietor. He claimed that all the minerals and underground deposits within the Chota Nagpur Raj belonged to him and that he was in possession of the same. According to the case of the first party a grant of surface rights in the village of Bhusar was made in the year 1824 to Thakur Udai Nath Sahai Deo and by the terms of this grant the land was resumable by the then Maharaja or his successors on extinction of the male heirs of the grantee. It is contended by the Maharaja that no rights to minerals or other deposits were granted to the said grantee. In the year 1918, the entire jagir including village Bhusar, which is described in these proceedings as the Kairo lot, was sold in execution of a rent decree and purchased by the predecessors of the second party. Later, the Maharaja granted a fresh patta to the auction-purchasers in order to end disputes and define the rights of the parties. The second party are the assignees of the auction-purchasers of this property and are now in possession of the jagir. According to the Maharaja, the second party are in possession of the surface rights only in the village of Bhusar and they have no right whatsoever to work the minerals under the said village. It appears that bauxite ore has been discovered recently in the hills and near the village and in hills near a neighbouring village called Bagru. The Maharaja has granted mining leases of property in the village of Bagru and other villages in the vicinity; but it is to be observed that he has granted no lease of, neither has he attempted to work the minerals in or adjacent to the village of Bhusar. According to the Maharaja's case, information was received in January last that the employees of the Ranchi Zamin-

dari Co. Ltd. had wrongfully commenced to quarry bauxite in a hill adjacent to the village of Bhusar. The Maharaja protested, but the employees of the second party continued quarrying.

The case for the second party is that they are the successors in title of an independent talukdar. According to them, at some time long before the permanent settlement the then Maharaja of Chota Nagpur who exercised sovereign rights over what is now the Chota Nagpur Raj, made an absolute gift of the Kairo lot to one Dandu Rai. It is contended that the said Dandu Rai was the absolute owner of the property and that the second party now have similar rights and accordingly it is argued that they are the owners of the minerals and are therefore entitled to work the same. There can be no doubt however that the second party's apparent title is that of tenure-holders under a patta dated 11th December 1936 granted by the Maharaja of Chota Nagpur to Raja Baldeo Das Birla, the immediate predecessor-in-title of the second party. According to the terms of this grant, Kairo lot is a jagir resumable by the Maharaja on extinction of the male heirs of Raja Baldeo Das Birla. It appears that there had been some dispute as to the nature of the respective interests of the two parties in this property and Raja Baldeo Das Birla challenged the rights of Maharaja. The suit was compromised, and the patta to which I have referred was granted by the Maharaja to Raja Baldeo Das Birla in order presumably to put an end to all disputes. This patta while granting to the second party a putrapautradik jagir contained a clause reserving to both parties all their antecedent rights, but the claim of the second party to be regarded as the successors in title of an independent talukdar was not found by the Magistrate to be supported by any reliable evidence and for the purpose of these proceedings must be taken as negatived. The second party, however, have persisted in their claim that they are the proprietors of this property including the minerals and have for some time been working the same. There is evidence that they had some years previously employed geologists to survey the minerals, though it is impossible to say whether this was a really comprehensive survey. They had also for some years extracted small quantities of bauxite from the land, but it is clear that intensive

mining had only been going on for about a month or two before these proceedings were launched.

The learned Magistrate to whom application was made by the Maharaja came to the conclusion that a breach of the peace was likely, and eventually proceedings were drawn up under Sec. 145, Criminal P. C. The learned Magistrate heard the evidence adduced by both the parties and came to the conclusion that the Maharaja was in possession of all the unworked minerals under the land in dispute but that the Ranchi Zamindari Company were in possession of the minerals in the area which had been actually worked by them. As the area actually worked by the company was not clearly defined in the map which had been put in evidence, the learned Magistrate ordered that a kanungo should be deputed to demarcate the actual areas in possession of the respective parties. He therefore forbade all disturbance of such possession of the Maharaja and the company until they are evicted therefrom in due course of law. Both parties applied to the learned Judicial Commissioner for revision of this order: but the latter declined to make a report to this Court under Sec. 438, Criminal P. C., and dismissed both applications. Both parties being dissatisfied with the orders passed, have made the applications to this Court which are now under consideration.

It has not been contended by either party that proceedings under S. 145, Criminal P. C., are not applicable to possession of minerals and indeed it would be difficult for either party so to contend. It has been held by this Court and by the Calcutta High Court that proceedings under S. 145, Criminal P. C., can be instituted in cases where disputes have arisen relating to the possession of minerals. In 2 P L J 637¹ a Bench of this Court upheld an order passed by a Magistrate under this Section regarding the possession of certain mica deposits. In 4 P L J 154² Roe J. held that proceedings under S. 145, Criminal P. C., could be taken in cases of disputes concerning the possession of coal mines or seams

of coal. In 35 C L J 456³ a Bench of the Calcutta High Court held that proceedings under S. 145, Criminal P. C., could be taken in a case where a dispute existed as to mining rights. Having regard to these authorities, I am bound to hold that proceedings under S. 145, Criminal P. C., are appropriate in cases of disputes as to the possession of minerals. It must be observed that in the present applications no question arises as to the possession of the surface. The second party are clearly entitled to possession of the surface and the only dispute relates to the seam or deposit of bauxite which lies underneath the surface. The application by the second party was the first to be presented to this Court and it will be convenient to deal firstly with this application. Mr. Manuk who has appeared on behalf of the second party has strenuously contended that the order, in so far as it declares the Maharaja to be in possession of the unworked minerals, should be set aside. He has argued that the Maharaja is not in possession of these minerals but that the second party are in actual possession of the same. He has contended that the learned Magistrate has in this case decided questions of title which he could not do. According to Mr. Manuk, the learned Magistrate has held that the Maharaja is in possession of the unworked minerals solely on the ground that he is the owner of these minerals and that possession follows title. In any event, it is contended that the Maharaja is not in possession though he may be the owner of these minerals. There can be no doubt that the learned Magistrate has considered the question as to who is the owner of these minerals and has held that the Maharaja is the owner of them, but he has only considered this aspect of the case in order to determine who is in actual possession of the same. In my view the Court, in proceedings under S. 145, Criminal P. C., can properly consider questions relating to title where such is necessary in order to ascertain who is in possession. This is clearly laid down in 1 P L T 387.⁴ At page 388 Sultan Ahmad J. observed :

The learned Magistrate has gone very elaborately into the question of title of the parties, much

1. *Sunder Mall v. Jhari Lal*, (1917) 4 A I R Pat 188=41 I C 132=18 Or L J 756=2 Pat L J 637.

2. *Andrew Yule & Co. v. A. H. Skone*, (1919) 6 A I R Pat 210=49 I C 647=20 Or L J 199=4 Pat L J 154.

3. *Bimala Prosad Mookerjee v. Tata Iron and Steel Co. Ltd.*, (1922) 9 A I R Cal 83=71 I O 236=24 Or L J 108=85 O L J 456.

4. *Ram Saroop v. Mt. Darsano Koer*, (1920) 7 A I R Pat 499=58 I C 252=21 Or L J 748=1 P L T 887.

more, in my opinion, than a proceeding under S. 145 would justify. A Magistrate in proceedings under S. 145 is entitled to look into the question of title only to arrive at a satisfactory conclusion on the question of possession. He has got no power to decide the question of title or look into it apart from the question of possession. If he wanted to go into the question of title in order to effectively decide the question of possession, he would be perfectly justified in doing so. On the other hand, if the question of possession could be effectively decided without a decision on the question of title, he would not be entitled to go into the title of the parties.

The case in 34 Mad 138⁵ is to the same effect. There it was held that evidence of title is admissible in an inquiry under S. 145, Criminal P. C., to enable the Court to decide the question of actual possession though proof of title was not proof of actual possession. In the present case the learned Magistrate had to decide who was in possession of certain unworked minerals. Unworked minerals are not capable of such possession as is the surface of land or a house. Land can be cultivated; a house can be occupied; but unworked minerals cannot even be occupied. Minerals can be possessed by actual working; but in this case a large portion of the mineral area had admittedly not been worked. In such a case it was in my view necessary that the learned Magistrate should consider who was the owner of these minerals in order to assist him in coming to the conclusion as to who was in possession of the same. Admittedly, the first party had not worked any minerals in the village of Bhusar, though he had granted mineral leases of bauxite under adjacent villages. Before a Court could come to the conclusion as to who was in possession of the unworked bauxite ore in the village of Bhusar the question of ownership had to be considered. In my view there is evidence in this case to support the Magistrate's finding that the Maharaja of Chota Nagpur is the owner of the minerals underlying the Chota Nagpur Raj. It has been held on numerous occasions by their Lordships of the Privy Council that the Maharaja holds a permanently settled estate. If the second party hold under the patta dated 11th December 1936, an interest in the land resumable by the Maharaja on extinction of the male heirs of Raja Baldeo Das Birla, and if the patta makes no grant of minerals, it follows that the second party are not the

owners of these minerals. It has been held by their Lordships of the Privy Council in a series of cases of which the case in 59 Cal 80⁶ is an example that holders of an interest, such as that held by the second party, are not the owners of the minerals underlying the land. In that case it was held that patni tenures, generally, are on the same footing as to subsoil rights as other permanent, heritable and transferable tenures created by a zamindar, that is to say, the subsoil rights pass to the patnidar only when granted in express terms; general vernacular words signifying "with all rights" are insufficient for that purpose. In the present case the second party hold an interest which can be described as permanent, heritable and transferable. They cannot found a title to subsoil rights on the patta when the patta does not in express terms grant them such rights. On the evidence the Magistrate rightly held the Maharaja of Chota Nagpur to be the owner of the minerals underlying Bhusar village. However that is not sufficient to conclude the case because in proceedings under Sec. 145, Criminal P. C., it is possession that matters and not ownership. In the case of unworked minerals possession follows title and the owner of unworked minerals is in possession of them though he is not actually engaged in working them. He is in a position to work them when he so desires, and he can lease them to others who may work them.

Mr. Manuk, however, has contended that such possession of unworked minerals as follows title is not sufficient to sustain an order under S. 145, Criminal P. C. He has strenuously urged that the possession which is contemplated under this Section is actual physical possession and not constructive possession which is the nature of possession which follows title to unworked minerals. Great reliance has been placed upon the case in 56 Cal 290⁷ which is a Full Bench case decided by five Judges of the Calcutta High Court. In that case the Court held that the words 'actual possession' in sub-s. (1) of Sec. 145, Criminal P. C., mean actual physical possession even though wrongful, e. g. that of a recent trespasser in actual

6. Bhupendranarayan Singha v. Rajeswarprasad Bhakat, (1931) 18 A I R P C 162=192 I C 610=59 Cal 80=58 I A 228 (P C).

7. Agni Kumar Das v. Mantazaddin, (1928) 15 A I R Cal 610=113 I C 181=30 Cr L J 69=56 Cal 290=48 C L J 193=32 C W N 1173 (F B).

5. Parthasarathy Nayanam Garu v. Venkatasami Reddy, (1911) 34 Mad 138=6 I C 398=1910 M W N 400.

possession at the time of the proceedings under S. 145. The same view was taken in this Court by Rowland J. in 13 P L T 178.⁸ Mr. P. R. Das on behalf of the first party does not question the law as laid down in these two cases, but he has contended that actual physical possession must of necessity vary with the subject-matter. The owner of land can live on or cultivate the land; he may build on it or he may use it for some other specific purpose. Such, in the case of land is actual possession; but such user of unworked minerals is impossible. According to Mr. Das, the owner of unworked minerals is in actual possession of the same if he is in a position, at any moment, to work them or to permit others to do so. That the nature of actual physical possession varies with the subject-matter has been recognized by a Bench of the Calcutta High Court in 35 C L J 456.⁹ That was a case of a dispute as to mining rights. At p. 458 Suhrawardy J., discussing an earlier case in 32 C L J 54⁹ observed :

The definition of land as given in the Criminal Procedure Code of 1908 is wide enough to cover mining rights and even prospecting or boring licenses which can only be utilized by going upon the land and exercising some rights relating to it. Nor do I assent to the proposition which seems to have been stated in that case that S. 145, Criminal P. C., is limited in its scope to disputes relating to actual possession only if by that expression is meant possession by squatting on the land. It is conceivable that actual possession in that restricted sense may be with some one else and the real dissension between the parties may be regarding the exercise of some right over it or even under, without interfering to any appreciable extent with the actual or manual possession of anyone. To this category falls the dispute relating to collection of rents or profits which is expressly included in the definition of 'land' and 'water' as given in the Section.

Here, Suhrawardy J. recognizes that there may be actual possession of minerals or mining rights though the person in such possession is not exercising such rights as a squatter or a cultivator of land. It is to be observed that Suhrawardy J. was a party to the Full Bench case in 56 Cal 290,⁷ to which I have previously referred, which laid down that in the case of land 'actual possession' meant actual physical possession. The earlier case in 35 C L J 456⁹ is not questioned in this later Full

Bench case. The possession of these unworked minerals does not depend entirely upon the evidence as to ownership. There was also evidence that the Maharaja had granted leases of or rights to work bauxite underlying the surface of adjoining lands or villages. Mr. Manuk on behalf of the second party has argued that such evidence is worthless; but, in my view, it is valuable evidence of possession of the unworked minerals. In my view, if the owner of unworked minerals under a defined area sinks a shaft and begins to work the minerals in that area, he can properly be said to be in actual physical possession of the whole of the minerals in that area. In the same way, if the owner of minerals under a defined area grants to third parties mining leases of the minerals under portions of such area, he exercises acts of ownership over those minerals and he can truly be said to be in possession of the whole of the minerals under that defined area. In 1 P L T 84¹⁰ at page 100 Das J. observed :

It has been held that if a person having title to all the seams of the coal under a defined surface enters upon one seam he will be taken to be in possession of all the seams over which he has title : (1876) 34 L T 186¹¹ and (1866) 1 Ch 410.¹²

As I have stated the Maharaja is the owner of all the minerals underlying a defined area, namely the Kairo lot. He has granted leases of the minerals in portions of this area. This evidence together with the evidence as to title does provide material upon which the learned Magistrate could come to the conclusion that the Maharaja was in actual physical possession of the unworked minerals.

Mr. Manuk has further contended that even if the Maharaja had been in actual physical possession of the unworked minerals, he has been ousted from such possession by reason of the mining operations of the second party. The learned Magistrate has found that the second party have been quarrying or mining bauxite at three points and have stacked quantities of the ore obtained at or near these sites. The second party have further built a road of about four miles in length to the nearest railway station, presumably for the purpose of cart.

8. *Raj Nandan v. Ohhedi Thakur*, (1932) 19 A I R Pat 185=1932 Cr O 418=142 I O 157=84 Cr L J 259=13 P L T 178.

9. *Indian Iron & Steel Co. Ltd. v. Banso Gopal*, (1920) 7 A I R Cal 824=59 I O 403=22 Cr L J 99=32 C L J 54.

10. *Lodna Colliery Co. Ltd. v. Bipin Behari*, (1920) 7 A I R Pat 383=55 I O 113=1 P L T 84.

11. *Low Moor & Co. v. Stanley Coal Co.*, (1876) 34 L T 186.

12. *Davis v. Shepherd*, (1866) 1 Oh 410 = 35 L J Oh 581=15 L T 122.

ing bauxite for transit by rail. Lastly, the learned Magistrate has found that the second party had built a bhandar for the use of coolies working on the site. These acts together with the geological survey mentioned previously constitute, according to Mr. Manuk, an ouster of the Maharaja from possession of the whole of the minerals under the land in dispute. A map was produced which showed the workings of the second party. The learned Magistrate has pointed out that this map does not accurately set out the limits of these workings; but from a perusal of it it is clear that the second party has only worked on one side of plot 215 in which the disputed hill is situate. The precise size of the hill is not clear; but it is obvious from the map that the second party have not worked over the whole of the area. The evidence showed that intensive working had only taken place for a very short period of time before these proceedings, and it is clear that up to the time of these proceedings, work had only taken place on the extreme western edge of the hill in dispute. As I have pointed out already, it is not clear whether the whole of this area was surveyed by geologists, but in any event the Magistrate has found that the second party have not mined bauxite at any place other than the three sites marked on the plan.

Mr. Manuk has urged that this case falls within the principle enunciated by their Lordships of the Privy Council in 10 Pat 407.¹³ In that case their Lordships of the Privy Council held that the Bengal Coal Company were in adverse possession of the minerals underlying a defined area though they were not in fact working all such minerals. It is argued that the second party by working the minerals in these three places have like the Bengal Coal Company taken possession of the whole of the minerals underlying the disputed hill. The facts of the case in 10 Pat 407¹³ are very different from the facts of the present case. In that case the company held a mukarrari lease of the area concerned and honestly believed that they were entitled to mine the minerals under the land. They had openly carried on mining operations for 12 years in various parts of the village by sinking and working coal pits and making bore holes. In short they had for more than

12 years conducted themselves as if they were entitled to work the minerals underlying the whole area. Lord MacMillan, who delivered the judgment of the Board, at page 414 observed :

In considering the character and effect of acts of possession in the case of a mineral field, it is necessary to bear in mind the nature of the subject and the possession of which it is susceptible. Owing to the inaccessibility of minerals in the earth, it is not possible to take actual physical possession at once of a whole mineral field : it can be occupied only by extracting the minerals and until the whole minerals are exhausted the physical occupation must necessarily be partial. The real question is what in fact has been possessed. . .

The workings have been commonly described as a colliery, a comprehensive term which includes both the worked and the as yet unworked minerals within a defined area. It was of the colliery in this sense that the company claim to have been in possession. The actings of the Coal Company have throughout, indeed, been consistent only with the assertion of a right to the minerals under the whole village to which they thought they had right. They openly sank at least three pits at different points, two of them being half a mile distant from the third. They selected the places at their own discretion, brought the requisite plant on to the ground and erected bungalows for their mining employees. Mr. Evans who was resident Assistant Manager of the colliery at Rajhara from 1907-08 to 1913 himself made bores in the mineral field during his time. It is nothing to the purpose that the company may not have worked any one pit for 12 years continuously, if for 12 years they have carried on operations in various parts of the mineral field. The fact that one pit in a mineral field is discontinued and another opened in a different part of the field and that bores are sunk in likely places is excellent proof of possession of the whole area. There was no concealment on the part of the company ; they behaved openly as persons in possession not of one pit but of the mineral field underlying the village as a whole, and as entitled to sink pits anywhere in the village they chose. All this they did without any challenge from the plaintiff or his predecessors, and in the bona fide belief that their lease entitled them to work the minerals anywhere in the area let.

In the present case intensive working only began a month or so before these proceedings though it is clear that some work had been done for a considerable time previously. There is nothing in the present case to show that the second party had any bona fide belief that they were entitled to work the minerals underlying the whole of this area and in any event they did not do so. In my view it cannot possibly be contended that merely by working at the three points on the western end of the disputed hill possession has been taken of the whole of the minerals underlying the hill. It is true that a bhandar was erected

13. Nageshwar Bux Roy v. Bengal Coal Co. Ltd., (1931) 18 A I R P C 186=180 I C 315=10 Pat 407=58 I A 29 (P C).

and a road made, but even so the operations, in my view, fall far short of what is necessary in order to take possession of the whole of the minerals underlying this hill. The present case is more like the case in (1909) 1 Ch 666¹⁴ where it was held that mining by a trespasser in an area of two acres only did not amount to possession of the whole of the mineral field. The second party also relies upon the case in 59 Cal 80.⁶ In that case a person who had no right to the minerals quarried stones and gravel over the whole of a certain area of land. Underneath the stone and gravel was discovered a deposit of yellow ochre. Their Lordships of the Privy Council held that the operation of quarrying the stones and gravel amounted to possession of the whole of the stone and gravel in the area concerned but did not amount to possession of the yellow ochre which formed a distinct strata. In that case it is clear that stone and gravel had been quarried over the whole of the area in question, and therefore it could truly be said that possession had been taken of the whole of the subsoil containing such stone or gravel. Mr. Manuk has contended that such is the case here; but in my view the operations of the second party in the present case fall far short of taking possession of the whole of the bauxite underlying the hill. In my view the learned Magistrate was perfectly entitled to hold that the Maharaja's possession of the unworked minerals had not been ousted by the operations of the second party. The learned Magistrate has held however that the second party are in possession of the minerals at the places which are actually being worked by them.

The application of the first party relates to that portion of the order which maintains the possession of the second party of the minerals at the actual scene of their quarrying or mining operations. It has been contended by Mr. P. R. Das that this portion of the order is clearly wrong and that the second party cannot be held to be in possession of even the minerals at the actual sites of their quarrying or mining. It has been frequently laid down that a person wrongfully working minerals is only in possession of such of the minerals as he has actually mined and that he is not in possession of any of the unworked minerals. In 1 P L T 84¹⁰ it was held by a

Bench of this Court that a trespasser wrongfully working a seam of coal from an adjacent mine acquires possession only of the coal worked, and cannot be said to be in possession of the mine itself. This case was expressly approved of in the case in 1 P L T 360¹⁵ where it was held that a trespasser, wrongfully working a seam of coal from an adjacent mine, acquired possession only of the coal worked but not of the mine or the seam itself and that a mere surface working could not give any claim by adverse possession to the whole of a coal seam or any portion of it beyond that which has already been taken. A similar decision is (1877) 6 Ch D 719.¹⁶ In that case Hall V. C. was of opinion that a trespasser might in certain cases acquire possession over a seam of coal in a defined area, but on the facts of the case he came to the conclusion that the trespasser had acquired possession over nothing more than he had actually worked. At page 726 the learned Judge observed:

I can well understand that there might be some cases in which, from the manner of working coal, a person who began to work it, and was a mere wrongdoer and trespasser, might have acquired a title to a certain seam or area of coal, and that by the mode of driving the levels and opening a certain area of coal, there might have been possession acquired to the whole thing as a mine or as a seam of coal, and not merely to the particular quantity of coal that was actually hewn and gotten. That is not however this case; and it is not necessary for me to say more than that such a case may exist.

The learned Magistrate might have come to the conclusion that the second party in this case obtained possession of nothing more than the bauxite which they had actually mined or quarried. On the other hand, it was open to the learned Magistrate to find that the methods employed did amount to possession over the minerals at the actual scene of operations. He has declined to find that the second party obtained possession over the whole of the unworked bauxite; but he has found that they have acquired possession over the bauxite at the three points where work had actually taken place. In my view he was entitled so to find and it is impossible upon the state of the authorities for me to say that such a decision is clearly erroneous. In my judgment there was abundant

15. Prematha Nath v. A. J. Meik, (1920) 7 A I R Pat 542 = 56 I C 184 = 5 Pat L J 273 = 1 P L T 360.

16. Ashton v. Stook, (1877) 6 Ch D 719 = 25 W R 862.

14. Glyn v. Howell, (1909) 1 Ch 666 = 78 L J Ch 391 = 100 L T 324 = 58 S J 269.

material before the learned Magistrate upon which he could base his findings that the first party was in actual possession of the unworked minerals and that the second party was in possession of the minerals at the points where such minerals were being worked. For the reasons which I have given, I hold that no ground has been made out for interfering with the orders made by the Courts below and accordingly I would dismiss both these applications.

Rowland J. — I entirely agree.

N.S./R.K. *Applications dismissed.*

A. I. R. 1939 Patna 216

DHAVLE J.

Maheshwari Prashad Bhagat —

Appellant.

v.

Mahadeo Roy and others —

Respondents.

Appeal No. 513 and Civil Revision No. 433 of 1937, Decided on 20th October 1938, from appellate decree of Deputy Commissioner, Sub-Judge, Palamau, D/- 7th May 1937.

(a) Civil P. C. (1908), S. 102 — Suit for recovery of price of trees alleged to have been cut from land of plaintiff landlord and misappropriated by defendants — Case against defendants, although one of wrongful cutting of trees, not necessarily one within purview of Ch. 17, Penal Code — Jurisdiction of Small Cause Court to try suit is not barred—Second appeal from suit is competent.

Where in a suit for recovery of the price of certain trees said to have been cut from the land of the plaintiff landlord and misappropriated by the defendants, upon the facts stated in the plaint, the case against the defendants is one of wrongful or illegal cutting of trees which is not necessarily penal so as to bring him within the purview of Ch. 17, I. P. C., the jurisdiction of the Court of Small Causes to try the suit is not barred and a second appeal to the High Court from such suit is barred under Sec. 102, Civil P. C., if the value of the subject-matter of the suit does not exceed Rs. 500 : *A I R 1930 Pat 575, Rel. on.*

[P 216 C 2; P 217 C 1]

(b) Civil P. C. (1908), S. 115 — Appellate Court not dealing with points raised by appellant and not making effort to understand and appreciate appellant's case — Its order is open to revision.

It is the duty of an Appellate Court to properly dispose of an appeal and this necessarily involves dealing with the points raised by the appellant and looking into the record, so far as may be necessary, after making an effort to understand and appreciate the appellant's case. Where the Appellate Court fails to do so, its failure in these respects means either that there was no more than

a colourable exercise of jurisdiction by it or that it acted with material irregularity and in either event the High Court has power to interfere in revision.

[P 217 C 2]

K. K. Banerji —

for Appellant (Petitioner).

B. C. De (in both cases) and S. S. Sinha (in S. A. No. 513) — *for Respondents.*

Judgment. — This was a suit for the recovery of the price of nine trees said to have been cut from the land of the plaintiff landlord and misappropriated by defendants 1 to 4 at the instance of defendants 5 to 9. The defence was that the trees stood in the mokarrari land of defendants 5 to 9 and that seven of them had been taken by defendants 1 to 3 with their consent and for a consideration or in accordance with custom. The plaintiff put his claim at Rs. 109. The trial Court dismissed the suit, and this dismissal was upheld in appeal by the Deputy Commissioner, Subordinate Judge of Palamau. The learned advocate for the plaintiff has filed a second appeal and also an application in civil revision against the order of the lower Appellate Court.

It has been contended on behalf of the defendants-respondents opposite party that a second appeal is barred in this case by Sec. 102, Civil P. C. That Section bars a second appeal in a suit of the nature cognizable by Courts of Small Causes when the amount or value of the subject-matter of the suit does not exceed Rs. 500. The learned advocate has contended that the present was a suit of the nature of a Small Cause Court suit, and in support of this contention he has referred, among other cases, to 11 P L T 741.¹ The principle laid down in that case is that where upon the case laid in the plaint it is clear beyond any shadow of doubt that the defendant had committed an offence punishable under Chap. 17, I. P. C., the jurisdiction of the Small Cause Court to try such a suit is barred; but where upon the facts stated in the plaint the case against the defendant is one of wrongful or illegal cutting of trees which is not necessarily penal so as to bring him within the purview of the Indian Penal Code, the jurisdiction of the Small Cause Court is not at all barred.

The learned advocate for the plaintiff does not contest this proposition of law, but has endeavoured to show that the plaint in the present case did disclose an offence punishable under Ch. 17, I. P. C. I have looked

1. Damodar Jha v. Baldeo Prasad, (1930) 17 A I R Pat 575=127 I C 843=9 Pat 569=11 P L T 741.

into the plaint and particularly para. 6 of it on which stress was laid for the plaintiff without being able to find all the ingredients of any offence coming within that Chapter. It must therefore be held that the second appeal is incompetent.

Coming now to the civil revision the learned advocate for the plaintiff points out that the trial Court has repeatedly referred to the absence of the khewat of one Janak Misser from the record and in effect blamed the plaintiff for failing to produce it. The plaintiff's possession and right to recover in this suit depended inter alia on this khewat and the decision in a title suit which was brought by plaintiff's predecessor against Janak Misser and won in the High Court. The learned advocate points to paras. 6, 7, 13, 15 and 20 of the grounds of appeal to the lower Appellate Court bearing inter alia on the mistake committed by the trial Court, for so it was, as regards the supposed non-production of the khewat of Janak Misser, which was actually on the record (Ex. C), and complains that the lower Appellate Court has nevertheless not referred to the point at all. It is clear from the judgment of the Deputy Commissioner Subordinate Judge that he fell into confusion and misunderstood the nature of the title suit in those places where he speaks of the zarpeshgidars (and not the mokarraridars), and his remark "that it is not clear how she (the plaintiff's predecessor-in-title) could eliminate the mokarraridars from the mokarrari possession" shows how he failed to appreciate the essentials of the plaintiff's case. Janak Misser's khewat No. 6, no less than the mokarraridars' khewat No. 4, is found in Ex. C under khewat No. 3 which stands in the name of Mt. Jasoda Koeri, the predecessor-in-title of the plaintiff; and the Deputy Commissioner ought to have considered the bearing on the plaintiff's title of the mokarraridars' possession after deciding whether the mokarraridars (and not the zarpeshgidars of Janak) were represented in the title suit or were otherwise bound by the decision in that suit. It has been contended on behalf of the other side that this is not a matter for interference in the exercise of the revisional powers of this Court. There can, of course, be no interference in revision merely because the decision of the Court below may be or is wrong. But what the lower Appellate Court has done here is to write two or

three paragraphs of a decision (besides the introductory paragraphs) five or six months after the hearing of the appeal without any attempt to attend to the complaint of the appellant that the trial Court had failed to notice the khewat which was on the record or even to understand the appellant's case. Mr. De has contended that Sec. 99, Civil P. C., prevents interference unless it can be said that the irregularity affects the merits of the case. The Section however applies to appeals. As regards revision, S. 115 entitles this Court to interfere when a lower Appellate Court fails to exercise the jurisdiction vested in it by law or acts in the exercise of its jurisdiction with material irregularity. It was the duty of the lower Appellate Court properly to dispose of the appeal, and this necessarily involved dealing with the points raised by the appellant and looking into the record, so far as may be necessary after making an effort to understand and appreciate the appellant's case. The failure of the lower Appellate Court in these respects means either that there was no more than a colourable exercise of jurisdiction by it or that it acted with material irregularity; and in either event this Court has power to interfere. The application in revision is therefore allowed, the decree of the lower Appellate Court set aside, and the lower Appellate Court directed to re-hear the appeal in accordance with the law. The costs of this hearing, including a hearing fee of two gold mohurs, will abide the event.

R.M./R.K.

Order accordingly.

A. I. R. 1939 Patna 217

MOHAMMAD NOOR AND DHAVLE JJ.

Mathura Prasad Singh — Appellant.

v.

Bhan Kumar Chand and another — Respondents.

Appeal No. 347 of 1938, Decided on 12th December 1938, from original order of Sub.Judge, 2nd Court, Arrah, D/- 22nd November 1938.

Bihar Money-lenders Act (3 of 1938), S. 15 — S. 15 is void under S. 107, Government of India Act.

Section 15, Bihar Money-lenders Act, being repugnant to O. 20, Rule 11, Cl. (2), Civil P. C., is under S. 107, Government of India Act, void.

[P 218 O 1]

Harians Kumar — for Appellant.

D. N. Varma and Khurshaid Husnain — for Respondents.

Judgment. — This is an appeal against an order of the Court below refusing to fix instalments for the satisfaction of a decree under execution. This order, under the Civil Procedure Code, can only be passed with the consent of the decree-holder. There is nothing to show that the decree-holder consented. In fact Mr. Khurshaid Husnain, who appears in this appeal to oppose the application for stay, intimated to the Court that his clients are not willing to allow any instalments to be fixed. The judgment-debtor relied upon S. 15, Money-lenders Act, which vested the Court with powers to fix instalments independent of the consent of the decree-holder. But this Section, being repugnant to O. 20, R. 11, Cl. (2), Civil P. C., is under S. 107, Government of India Act, void. The appeal is therefore dismissed with costs. A certificate will be issued in terms of S. 205, Government of India Act.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Patna 218

DHAVLE J.

Shaikh Mohammad Yaquooob Ally —
Appellant.

v.

Chhotey Lal Mistri and others —
Respondents.

Appeal No. 964 of 1935, Decided on 13th September 1938, from decision of Sub-Judge, Second Court, Monghyr, D/- 31st October 1935.

(a) Second Appeal — Finding of fact—Finding being inference of fact from evidence adduced is binding in second appeal.

Where a finding of fact of a lower Appellate Court rests upon evidence which has been specified and is an inference of fact from such evidence, such a finding of fact is binding in second appeal unless it can be shown that the inference is impossible in law. [P 218 C 2]

(b) Transfer of Property Act (1882), S. 54 —Value of property less than Rs. 100—Sale by unregistered sale deed — Delivery need not be contemporaneous with execution of sale deed.

In case of sale of immovable property worth not more than Rs. 100, by means of an unregistered sale deed, it is not necessary that delivery of possession should be contemporaneous with the execution of the sale deed. The sale would be valid even if possession of property is delivered in pursuance of the sale deed some time after its execution: 19 Cal 623, *Disting.* [P 218 C 2, P 219 C 1]

Nitai Chandra Ghosh and Baidya Nath Sinha — *for Appellant.*

K. N. Lal — *for Respondents.*

Judgment. — I stated the facts of this case when it was argued before me on 10th January last, and a remand was obtained by the appellant on two points. The first of these points was whether the evidence of the plaintiffs' witnesses as regards plaintiffs' purchase from Mevi establishes or points to delivery of the property by Mevi to Chhotey Lal. The lower Appellate Court has answered the point by saying that there is admittedly no evidence on the record that Mevi delivered possession to Chhotey Lal at the time of or soon after the oral sale, but that the evidence adduced by the plaintiffs points to delivery of the property by Mevi to Chhotey Lal. This is a finding of fact which is conclusive against the appellant, for under S. 54, T. P. Act, tangible immovable property of a value of less than Rs. 100 can be sold either by a registered instrument or by a delivery of the property. In the present case the appellant's story was that the judgment-debtor Mevi, from whom he purchased the disputed house in the execution sale, had purchased Chhotey's half of the house for Rs. 40, while the plaintiffs' case was (and they include Chhotey and his sons) that Chhotey had purchased Mevi's half of the house for Rs. 75. Neither of the sales was supported by any registered sale-deed. Both were said to be oral sales supported by unregistered documents, and the sale relied on by the plaintiffs was dated 1918, while that relied on by the appellant seems to have been nine or ten years later. The learned advocate for the appellant has argued that the finding of the lower Appellate Court regarding the inferential delivery of property should not be accepted. That finding rests on evidence which has been specified and is an inference of fact from the evidence set out. The learned advocate has not been able to show that the inference is impossible in law, and unless an appellant can do that, such findings of fact are binding in second appeal.

The learned advocate suggested that a sale effected by an unregistered document unaccompanied by a contemporaneous delivery of possession was no sale at all. But for this proposition he was not able to cite any authority. The sale-deed being unregistered will, of course, not operate to transfer the title; but I do not see why, if such a sale deed is executed to-day in respect of an immovable property worth not more than Rs. 100 and the property is

delivered to the purchaser some days after this in pursuance of the sale deed, which would have taken no effect by itself, the sale should not stand. The finding of the lower Appellate Court comes to this that there is no direct evidence of delivery of possession at the time of the sale or soon after it but that there is evidence at the same time, which has been accepted by the lower Appellate Court, that after the sale, which must mean the attempted sale by means of the unregistered sale deed, the plaintiffs got exclusive possession over the house and the vendor left the village and had no concern with or possession over the house, circumstances from which delivery of possession at some undetermined time after the execution of the sale deed may legitimately be inferred. It is not as if the sale, on which the appellant relies, came so shortly after the plaintiffs' sale as to make it at all material that the exact time when Mevi's purchaser got into possession under that transaction is undetermined. The learned advocate referred to 19 Cal 623.¹ But that was a case of an admitted sale by means of an unregistered instrument unaccompanied by possession. It was held that the transfer or sale was inoperative, and so it conferred no title on the vendee. But this is of no help to the appellant when it has been found as a fact that an unregistered instrument was executed in favour of Chhotey Lal and was followed though some time afterwards, by delivery of possession; appellants' purchase in execution came years after.

There was another point on which the appellant had obtained a remand, and that was whether the disputed house lay in that part of Maksuspore which is covered by Tauzi No. 429, or whether it lay in Tauzi No. 2704-C, Maksuspore Masanni Chak Bag Harihar. The answer of the lower Appellate Court is in favour of the appellant. But the point raised by the appellant on 10th January was only subsidiary to the question of plaintiffs' possession of the property. That question does not arise apart, of course, from what is implied in the delivery of possession, for there was no point about limitation raised in the lower Appellate Court, and such delivery of possession as has been found by the lower Appellate Court is sufficient to conclude

the appeal against the appellant. The appeal fails and is dismissed with costs.

N.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 219

MOHAMMAD NOOR AND DHAVLE JJ.

Rani Birja Raj Kumari — Petitioner.

v.

Rani Bishwa Nath Kumari —

Opposite Party.

Civil Revn. No. 290 of 1938, Decided on 19th December 1938, against order of Sub-Judge, Gaya, D/- 12th May 1938.

(a) Court-fees Act (1870), S. 7 (iv) (c) — Court-fee is to be paid on the relief available at the time of the institution of suit, and with subsequent change in circumstances a new relief can be added on amendment of plaint and offer to pay court-fee thereon.

Court-fee is paid on the relief available at the time of the institution of the suit, but if after its institution circumstances change and it becomes necessary for the plaintiff to ask for any further relief, it is always open to him to apply to the Court for amendment of the plaint by adding new relief and to offer to pay court-fee thereon.

[P 220 C 2]

(b) Court-fees Act (1870), S. 7 (iv) (c) — Two prayers in plaint for declaration and for possession if necessary, make one for declaration and consequential relief and require ad valorem court-fee.

Where the plaint contained two prayers, one for a declaration of title to 8 annas share in the estate and the other for joint possession of the estate in case the Court found that the plaintiff was already in possession thereof :

Held that the two prayers taken together make the one for declaration and consequential relief and that ad valorem court-fee was payable : *A I R 1926 Pat 453, Disting.*

[P 220 C 2]

P. R. Das, Sarjoo Prasad and Raj Kishore Prasad — for Petitioner.

Manuk and K. N. Lal —

for Opposite Party.

Order. — This is an application against an order of the Subordinate Judge of Gaya calling upon the petitioner, who is the plaintiff in a suit before him, to pay ad valorem court-fee under S. 7 (iv) (c), Court-fees Act, as in his opinion the suit was not only for a declaration but also for a consequential relief. Plaintiff is one of the two widows of the late Raja of Deo. The defendant is his other widow. The dispute between them is as to the succession to the estate, that is to say, whether the senior Rani, the defendant, alone succeeded to the estate or whether the junior also was a

1. *Makhan Lal v. Bunku Behari Ghose*, (1892) 19 Cal 623 (F B).

co-owner along with her. The two Ranis fought the matter in the Revenue Courts. Though the estate was recorded in the joint names of the two widows by the order of the Deputy Collector, Collector and the Commissioner, the Board of Revenue directed that the name of the senior Rani alone should be recorded. An attempt by the plaintiff to get special leave to appeal before the Privy Council failed. Thereupon she instituted the present suit on paying a court-fee of Rs. 15 only. There are two main prayers in the suit; one for a declaration of her title to an 8 annas interest in the estate, and the other is that should the Court be of opinion that the plaintiff is not in possession of her interest, that is to say, half interest in the estate, she should get joint possession of it along with the defendant. The learned Subordinate Judge held that the two prayers taken together, made the suit one for declaration and consequential relief, and ad valorem court-fee was payable. The petitioner has therefore moved this Court.

Mr. P. R. Das, who appears on behalf of the petitioner, has relied upon a decision of this Court in 5 Pat 496.¹ In that case the question came up before the High Court in a second appeal. The plaintiff had brought the suit on a court-fee of Rs. 15 only. The suit was decreed. On defendant's appeal, the learned District Judge held that the plaintiff did not seek one declaration but two declarations and he ordered the payment of court-fees on two declarations. This was done and the appeal was dismissed. The defendant preferred a second appeal. The Taxing Officer realized ad valorem court-fee on the memorandum of the second appeal to this Court. That order of the Taxing Officer was not open to interference by the Court. But the matter was placed before a Bench for orders as to the realization of court-fees on the plaint and on the memorandum of appeal to the lower Appellate Court. Two declarations were asked in the plaint, and the third relief sought was to this effect:

If during the pendency of this suit the plaintiff be dispossessed of the disputed properties, then on court-fee being taken she may be awarded a decree for recovery of possession of the disputed properties.

This Court's observations in respect of this relief were as follows:

The third relief was only a contingent one depending upon the finding of the Court that the

plaintiff was not in possession of the property and in that event she offered to pay court-fee for getting the relief for recovery of possession. That contingency has not arisen and the Courts below have held that the plaintiff has been all along in possession of the property. Therefore that relief has become unnecessary and the occasion for calling for additional court-fee has not arisen.

It is obvious that the question for the payment of court-fee arose there in second appeal when the two Courts below had already found the plaintiff to be in possession, both before the suit and also during its pendency. That is not the case here. Here, the plaintiff asks for possession, not in case she be held to have been dispossessed after the institution of the suit, but even if she be found to be out of possession at the time of institution of the suit. Thus, there is a material difference between the relief sought in the suit referred to above and in the present suit. There the contingency mentioned was not the finding of dispossession before the institution of the suit, but after its institution. Court-fee is paid on the relief available to the plaintiff at the time of the institution of the suit. If, after its institution, circumstances change and it becomes necessary for the plaintiff to ask for any further relief, it is always open to him to apply to the Court for amendment of the plaint by adding new relief and to offer to pay court-fee thereon. In fact, the third prayer was of a nature which could have been added to the plaint of that suit after its institution. The second prayer in this suit is not of such a nature. In our opinion the plaint as it stands requires ad valorem court-fee. The order of the Court below is correct.

Mr. P. R. Das however intimated to us that he should be allowed leave to amend the plaint either by striking out relief No. 2 altogether or bringing it into conformity with the third prayer in the case referred to above. Mr. Manuk who appears on behalf of the opposite party, objected to such leave being granted. He pointed out a remark of the learned Subordinate Judge in which he has referred to a petition of the plaintiff and from which he has inferred that the plaintiff was not in possession. This is however a matter which is not before us in this case. If the plaintiff was not in possession on the date of the institution of the suit and she does not ask for recovery of possession, the suit will be liable to be dismissed not on account of non-payment of court-fee but on account of the provisions of S. 42, Specific Relief Act, that is to

1. Khiri Chand Mahton v. Mt. Meghni, (1926) 19 A I R Pat 453 = 98 I C 432 = 5 Pat 496 = 8 P L T 296.

say, no declaratory relief can be granted to a plaintiff who, being entitled to further relief, fails to ask for it. We are however to take the plaint as it stands, and we see no reason why the plaintiff should not be allowed to amend it. If after this amendment the suit becomes liable to be dismissed on other grounds, it will be open to the learned Subordinate Judge to deal with it according to law.

We accordingly direct the learned Subordinate Judge to allow the plaintiff if she applies to amend the plaint, either by striking out prayer No. 2 altogether or by making the contingent dispossession confined to the period subsequent to the institution of the suit, as was the case in 5 Pat 496.¹ Thereafter he will decide the case according to law. If Sec. 42 is applicable to the case he will apply it. As the matter stood, the order of the learned Subordinate Judge was correct. Therefore we order that the petitioner will pay to the opposite party the costs of this hearing. Hearing fee two gold mohurs.

S.G./R.K.

Order accordingly.

A. I. R. 1939 Patna 221

WORT J.

*Mokhada Dasi and others —**Defendants — Appellants.*

v.

*Lakshmi Narain Das and others —**Plaintiffs — Respondents.*

Appeal No. 836 of 1936, Decided on 14th November 1938, from appellate decree of Sub-Judge, Purulia, D/- 6th July 1936.

(a) Evidence—From mere fact that judgment does not mention certain item of evidence it cannot be held that judgment cannot be sustained.

It is impossible to hold that a judgment cannot be sustained merely by reason of the fact that certain items of evidence have not been mentioned. The mere fact that the Judge has not mentioned in his judgment certain items of evidence does not entitle one to say that he dismissed that piece of evidence wholly from his consideration.

[P 221 C 1 ; P 222 C 1]

(b) Record of Rights—Evidentiary value.

The Record of Rights is of no better value than any other piece of truthful evidence. There is a presumption that the record therein found is true; but there is no presumption that it overrides every other item of evidence which both parties may call. And it is the duty of the Court in those circumstances to treat that as a piece of reliable evidence and at the same time consider the other evidence in the case.

[P 222 C 1]

Sir Manmatha Nath Mukherji, S. N. Bose and N. N. Ray—for Appellants.
Dr. Dwarka Nath Mitter, S. De and M. N. Pal — for Respondents.

Judgment.—This is an appeal from the decision of the Subordinate Judge reversing the decision of the Munsif with regard to certain property being about 60 bighas of land, and in the result the question to be determined was whether Haricharan, the father of the mother of the plaintiffs, had been in adverse possession. In the first instance those claiming through Haricharan, who were the shobdars of the deity, set up a case that the land had been purchased by Haricharan in the benami name of his daughter, but on the findings of the learned Judge in the Court below that plea has not been sustained. As I say and repeat, in the result the question came to be determined whether Hari Charan was in adverse possession. There is a long history attached to the property since 1889 when the property was first purchased, and there is no doubt that whatever view this Court may take of the evidence, it will be impossible for this Court in second appeal to say or for the learned advocate appearing on behalf of the parties to argue that there was no evidence upon which the learned Judge in the Court below could come to the conclusion that Haricharan was in adverse possession and indeed Sir Manmatha Nath Mukherji who appears on behalf of the defendant-appellants does not contend that there was no evidence, but on behalf of his clients contends that the learned Judge in reversing the decision of the trial Court had omitted to mention the most important piece of evidence, and that evidence is no less than the Record of Rights and it was upon that record that the learned Judge of the trial Court, at any rate to some extent, had relied.

Now, it has been laid down on many occasions by a number of Divisional Court decisions of this Court that it is impossible to hold that a judgment cannot be sustained merely by reason of the fact that certain items of evidence have not been mentioned. It is perfectly obvious in this case that the Record of Rights must have been mentioned to the learned Subordinate Judge unless I were to hold that the advocate who appeared in the Court below on the part of the defendants neglected his duty, and, following the decisions of this Court, it is impossible for me to say that

the learned Judge not only made no statement in his judgment regarding the record but also shut out from his mind any consideration of it. But it is not upon that, that I decide the case. As I have already stated, there was ample evidence (indeed it was not argued that there was insufficient evidence) to come to the conclusion that Hari Charan was in possession. But the appellants cannot be in any better position in this Court than if the learned Judge had deliberately held that the Record of Rights was not admissible in evidence. The Record of Rights is of no better value than any other piece of truthful evidence, if I may use the expression; there is a presumption that the record therein found is true; but there is no presumption that it overrides every other item of evidence which both parties may call. And it is the duty of the Court in those circumstances to treat that as a piece of reliable evidence and at the same time consider the other evidence in the case.

Now, had this been a piece of evidence admissible but which the learned Judge had rejected, S. 167, Evidence Act, would most certainly have applied and the Court is prohibited from ordering a new trial merely on the ground that the learned Judge has rejected the evidence which was admissible. I say and repeat the parties cannot be in any better position and in those circumstances, to repeat what I have already stated, the mere fact that the learned Judge has not mentioned in his judgment the Record of Rights does not entitle me to say that he dismissed that piece of evidence wholly from his consideration. If the learned Judge is persuaded, from the items of evidence (and there was a large number of items) to come to the conclusion that Hari Charan was in adverse possession, it would necessarily follow that he would come to the conclusion that the Record of Rights was erroneous in this respect. For either reasons which I have stated, I am of the opinion that it is impossible for me to reverse the decision of the lower Appellate Court and for those reasons I would dismiss the appeal with costs. Leave to appeal is refused.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 222

MANOHAR LALL AND CHATTERJI JJ.

Jadu Sahu and another — Defendants
— Appellants.

v.

Chamra Sahu and others, Plaintiffs
and others, Defendants —

Respondents.

Appeal No. 23 of 1937, Decided on 4th January 1939, from original decree of Sub-Judge, Ranchi, D/- 9th October 1936.

(a) Legal Practitioner — Application offering special oath to plaintiff and consenting to be bound by his statement signed by some defendants and pleader for all defendants — Pleader adding words "for defendants" after signature — Pleader will be deemed to have signed on behalf of all defendants.

Where in a suit an application is filed on behalf of the defendants to the effect that if the plaintiff takes special oath and makes a statement regarding certain items of property claimed by the defendants, the same would be binding on the defendants and such an application is signed by some of the defendants and also by the pleader appearing on behalf of all the defendants and the pleader adds the words "for the defendants" after his signature, any statement made by the plaintiff in pursuance of the application would be binding even on the defendants who may not have signed the application because in the absence of any qualifying words that the pleader is signing only on behalf of the defendants who have signed, the pleader will be deemed to have signed on behalf of all the defendants for whom he is appearing.

[P 223 C 1, 2]

(b) Legal Practitioner—Vakalatnama — Construction of—Powers given by vakalatnama in question held were wide enough to authorize pleader to file petition for special oath.

Where a vakalatnama by which the pleader was appointed empowered him to file petition of compromise in the suit, file petition for referring the case to the arbitrators with and without the signatures of the defendants, withdraw the suit by putting in petition without their signatures, and, amongst other things, to take whatever steps he thought necessary in the suit :

Held that the powers given by the vakalatnama were wide enough to authorize the pleader to file a petition for special oath: *A I R 1930 Cal 463 and A I R 1916 All 165, Rel. on; 14 Bom 455; 5 I C 514; A I R 1918 Lah 126 and A I R 1929 All 759, Disting.*

[P 224 C 1]

Rai G. S. Prasad and Rai Paras Nath —
for Appellants.

B. C. De, K. K. Banerji and K. P. Varma
— *for Respondents.*

• **Chatterji J.**—This appeal arises out of a suit for partition between two branches of a Mitakshara family represented by two brothers and their respective sons or grandsons. Plaintiff 1 and defendant 1 are the two brothers of whom the latter is the

elder. Plaintiffs 2 to 5 are the sons or grandsons of plaintiff 1 and defendants 2 to 6 are the sons of defendant 1. All the defendants filed a joint written statement, and their main defence was that certain joint family properties purchased in the name of plaintiff 1 were not included in the plaint. The nature of the defences will appear from the following issues framed in the suit:

1. Have all the joint properties been included in the suit?
2. Whether the properties claimed by plaintiffs as their self-acquired properties are really so? and
3. To what relief, if any, are the plaintiffs entitled?

When the suit came up for trial an application was filed on behalf of the defendants to the effect that if plaintiff 1, Chamra Sahu, took special oath and made statements as to the several items claimed by the defendants mentioned in the schedule attached to and filed with the written statement, they would be bound by his statements, and that those items which Chamra Sahu would thus admit together with the properties admitted in the plaint might be partitioned. This application was signed by defendants 1, 2, 4 and 5 and also by the pleader who had appeared for all the defendants. Plaintiff 1 did take special oath and the suit was disposed of on his statements and a preliminary decree was passed. Against that decree defendants 3 and 6 have preferred this appeal.

The first point urged by Mr. Rai Gurusaran Prasad on behalf of the appellants is that they did not join in the petition for special oath and are not therefore bound by the statements made by plaintiff 1 on special oath. He laid stress upon the fact that the application for special oath was signed by the other 4 defendants and not by the appellants. But the pleader who, it appears from the vakalatnama, appeared on behalf of all the defendants did sign the petition. It however appears from his endorsement on this petition that he at first signed as "Satis Chandra Ray for all defendants"; then "all defendants" were struck out and instead he wrote "defendants". From this it was argued that the pleader did not really represent the present appellants in this petition. This contention cannot be accepted, because the petition on the face of it purports to be filed on behalf of the defendants without specifically mentioning the four defendants who actually signed it, and the pleader did sign for defendants. If

really the pleader did not represent the present appellants, he should have informed the Court then and there that he signed the petition for defendants other than the present appellants. There is no doubt that the pleader signed the petition on behalf of all the defendants and the reason why it was signed by four of them only is that they happened to be present. It is then argued that the pleader, if he really signed on behalf of the present appellants, had no authority to do so. The vakalatnama by which the pleader was appointed empowered him to file petition of compromise in the suit, file petition for referring the case to the arbitrators with and without the signatures of the defendants, withdraw the suit by putting in petition without their signatures and amongst other things, to take whatever steps he thought necessary in the suit. It must be remembered that defendant 1, who is the father and obviously the managing member of the family, was present and signed the petition. The pleader must have received proper instruction before he filed the petition on behalf of the defendants. Under the circumstances he thought it prudent to sign the petition on behalf of the absent defendants, namely the present appellants, particularly when he found that the father and the other brothers also actually joined in the petition. The powers given by the vakalatnama were wide enough to authorize the pleader to file a petition for special oath.

Mr. Rai Gurusaran Prasad has referred in particular to the decision of the Bombay High Court in 14 Bom 455¹ where it was held with reference to the terms of the power of attorney adduced in evidence in that case that the agent had no authority to bind the principal by offering special oath to the opposite party and powers of the pleader were no larger than those of the agent. It was however observed in that case that

the general words implying an authority to do all that defendant 2 himself could do can only mean that the agent could do all that was necessary for the prosecution of the suit in the ordinary way

and that bringing the case to a close by offering a special oath is not a step that was necessary for the prosecution of the suit in the ordinary way. In the first place the case was decided with reference to the terms of the particular power of attorney

1. *Sadashiv Rayaji v. Maruti Vithal*, (1890) 14 Bom 455.

before the Court ; in the second place, the general observations made in the course of the judgment do not, with all respect to the learned Judges, appear to me to be quite convincing. If an agent represents the principal and his act is binding on the principal as if it was an act of the principal himself, I fail to see why, when the principal authorizes his agent to do whatever is necessary for the prosecution of the suit, the principal will not be bound if the agent in the interest of his principal offers a special oath to the other side. The decision appears to have been dissented from by the Allahabad High Court in 38 All 131² and by the Calcutta High Court in 34 C W N 310.³ The facts of these cases are very similar to those of the present. In 34 C W N 310³ it was held that though a pleader as agent on behalf of his client cannot bring a suit to a close by offering to be bound by the oath of the opposite party in a particular form, it was quite open to the Court to make an inference from the particular circumstances of the case that there was an authority on the part of the pleader because of the presence of one of the adult defendants who evidently had been put forward by the others to take all necessary steps in connexion with the suit. In 38 All 131,² the Court had to construe a special power of attorney executed by a Mahomedan wife in favour of her husband by which the latter was authorized to conduct a case on her behalf "as he should deem fit," to compromise or withdraw the suit, to refer it to arbitration and to nominate and appoint arbitrators. It was held that by these terms the husband had authority to offer special oath to the other side. In the present case, as I have already mentioned, the vakalatnama authorized the pleader to take whatever steps he thought necessary in the suit. We must presume that the pleader would never have filed the petition on behalf of the defendants including the present appellants if really he thought that he had no instructions to represent the present appellants. Under these circumstances I am inclined to hold that the pleader had authority to file a petition on behalf of the appellants offering special oath to the other side.

The last point raised is that in view of the statements of Chamra Sahu himself the learned Subordinate Judge should have excluded the Bandheya lands from partition. The statement in question is "I have not purchased Bandheya from Deochand and Rupchand Sahu." From the schedule attached to the plaint it appears that 12.96 acres of raiyati lands in village Bandheya were included in the claim for partition. The defendants in their written statement nowhere said that these lands were their self-acquired property. On the other hand it is clearly mentioned in the petition for special oath that the items already admitted by the plaintiffs in their plaint need not be put to the witness (Chamra Sahu). From the schedule filed with the written statement it appears that the defendants claimed certain proprietary interest in village Bandheya as joint family property which was not included in the plaint. It is therefore quite clear that the statement of Chamra Sahu refers not to the raiyati lands in village Bandheya but to the proprietary interest in the village. With regard to the raiyati lands it appears upon the pleadings to be the common ground that they are joint family properties. All the contentions fail and I would dismiss the appeal with costs. In the circumstances of the case hearing fee is assessed at five gold mohars.

Manohar Lall J. — I agree. I wish to add a few observations in order to impress upon the litigants that they should realize the extent to which they are bound by the acts of persons who are employed as agents having authority to act on their behalf. The learned advocate for the appellants drew our attention to a large number of authorities ; but the case upon which he particularly relied was the case of 14 Bom 455.¹ In that case a power of attorney had been given by defendant 2 to one Abaji Narayan ; the learned Judges in construing it as not conferring any extraordinary power upon Abaji pointed out :

The general words implying an authority to do all that defendant 2 himself could do can only mean that the agent could do all that was necessary for the prosecution of the suit in the ordinary way.

The power of attorney as printed at p. 455 of the report is silent as to whether the agent could refer the dispute to arbitration or withdraw the suit from trial. It appears to me that it was for this reason that the learned Judges held that the agent Abaji could not have brought the suit to a

2. Wasi-ul-zaman Khan v. Faiza Bibi, (1916) 3 A I R All 165=32 I C 348=38 All 131=14 A L J 38.

3. Mahammad Mahmud Choudhury v. Behary Lal Saha, (1930) 17 A I R Cal 463=129 I C 408=34 C W N 310.

termination in any special manner, for instance, by referring the case to arbitration, or by offering as he did "to be bound by the oath of the opposite party in a particular form." At p. 458 the learned Judges threw out a doubt whether any person but the party himself can make such an offer as is contemplated in Section 9, Oaths Act of 1873.

This matter was not argued before us ; but it is enough to state that towards the end of the judgment the learned Judges did come to the conclusion

of course, if a party specially authorizes his pleader or an agent, to make an offer to be bound by a particular oath, he might be estopped from retracing the step he had taken if his offer were acted on.

I therefore do not consider that this case is any authority for the proposition that the power of attorney in the present case printed at p. 10 of the paper book which, as my learned brother has just pointed out, distinctly authorizes the pleader to file a petition of compromise with or without the signature of his client, to withdraw the suit by putting in petition without the party's signature, and to take whatever steps the pleader may consider necessary in the suit, did not authorize the pleader in law to agree to the case being decided on the oath taken by Chamra Sahu in a special manner. The next case relied upon is that in 5 I C 514.⁴ This case merely states in two or three lines that the learned Judges are prepared to follow the decision in 14 Bom 455¹ but gives no reason whatsoever. The decision in A I R 1918 Lah 126⁵ was next relied upon ; but in that case the learned Judges pointed out that Fateh Din alone (and not the plaintiff-appellants) was bound by the result of the special oath ; the learned Judges came to the conclusion that "so far as the record shows, Fateh Din alone agreed to be bound by defendants' oath" but counsel for respondent-defendant urged that Jhandu, plaintiff, and also the pleader who represented all the plaintiffs were present when Fateh Din challenged defendant, and that Jhandu held a power of attorney from those plaintiffs who were not present. The contention was that it should be held that all the other parties were also bound. The learned Judges on the facts and circumstances of that case overruled the conten-

tion. This case is no authority for the proposition as to the effect to be given to the terms of a particular power of attorney. The power of attorney held by Jhandu in that case had not even been quoted or discussed in the judgment. The decision in A I R 1929 All 759⁶ was also relied upon, but this case merely decides :

Where a party offers to be bound by the oath of a witness and the evidence is given, the evidence so given shall, as against the person who offered to be bound, be a conclusive proof of the matter stated.

This proposition is not denied and cannot be denied by anybody. The case in 38 All 131² seems to fit in with the case before us. The power of attorney in that case, as has been pointed out at p. 132, is very similar to the power of attorney in the case before us. In that case the lady gave her husband

full powers to conduct the case as he should deem fit and in the deed she also set out that he had power to compromise the suit, to withdraw the suit, to refer the point in dispute to arbitration, to nominate and appoint arbitrators and concluded by saying that every step that he might take in the conduct of the case was to be considered as having been taken by her herself.

This is exactly how the vakalatnama in the present case at p. 10 of the paper book reads. I therefore agree with my learned brother that there is no substance in the contentions raised by the appellants and that the appeal should be dismissed with costs assessed at five gold mohurs.

N.S./R.K.

Appeal dismissed.

6. Ram Ratan v. Ram Lal Singh, (1929) 16 A I R All 759 = 118 I C 188 = 1929 A L J 1095.

A. I. R. 1939 Patna 225

FAZL ALI AND VARMA JJ.

Manki Kanak Ratan — Plaintiff —
Appellant.

v.

Sundarmunda and others —
Defendants — Respondents.

Appeal No. 660 of 1934, Decided on 6th December 1938, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 28th March 1934.

(a) Chota Nagpur Tenancy Act (6 of 1908), Ss. 211 and 214 — Sale in execution of rent decree — Necessary parties not represented — S. 211 does not apply — Civil Court is not precluded from entertaining a suit to set aside sale.

Where all the necessary parties are not joined or represented in the proceedings relating to a sale

4. Ramasami Odayan v. Ramasami Odayan, (1910) 20 M L J 386 = 5 I C 514.

5. Talawand v. Fateh Din, (1918) 5 A I R Lah 126 = 45 I C 280 = 83 P R 1918 = 115 P L R 1918.

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in execution of a decree for rent, S. 211 does not apply and the Revenue Court has no jurisdiction to order a sale and consequently Sec. 214 does not preclude the Civil Court from entertaining a suit to set it aside : *A I R 1933 P C 122, Foll.*

[P 227 C 2]

(b) *Res Judicata* — Father along with others suing for declaration and possession — Father dying pending suit — Son refusing to join as plaintiff — Son joined as pro forma defendant — Court decreeing suit — Parties compromising in appeal and admitting defendant's title — Subsequent suit for same purpose by son is not barred by *res judicata*.

Where the plaintiff in a suit to set aside a sale was not a party to a previous suit brought by his father and others for the same purpose but was joined as pro forma defendant, he having refused to join as plaintiff on father's death, which suit was compromised in appeal in which the defendant's title was admitted by others, a decree based on the compromise is not *res judicata* against him as he was no party to the compromise.

[P 228 C 1]

(c) Limitation Act (1908), Art. 144 — Plaintiff's father in possession of village through lessees losing possession on sale in 1913 — Successors of lessees suing and obtaining possession from purchaser in 1923 and continuing till 1925 and then compromising suit and admitting purchaser's title — Plaintiff suing in 1929 for possession — Possession of lessees from 1923 to 1925 is tantamount to that of plaintiff and constituted break in possession of purchaser and plaintiff's suit held not barred by limitation.

The plaintiff's father was in possession of a village through lessees till 1913 when the village was sold in rent decree, and he was dispossessed by the purchaser. Subsequently, as a result of a decree against the purchaser, the successors in interest of the lessees recovered possession from him in 1923 and continued to be in possession till 1925 when in appeal they compromised with him and admitted his title :

Held that the plaintiff's suit filed in 1929 for possession was not barred by limitation as the possession of successors of the lessees from 1923 to 1925 must be regarded as tantamount to that of the plaintiff and clearly constituted break in possession of the purchaser and limitation began from the date of the compromise of 1925.

[P 228 C 1]

(d) Civil P. C. (1908), O. 22, R. 2 — Suit by father along with others does not abate on father's death if sons refuse to be substituted as legal representatives and are joined as pro forma defendants.

Where on the death of the father who was a co-plaintiff in a suit his sons refused to be substituted as his legal representatives and are joined as pro forma defendants in the suit, the requirement of law is complied with and the suit does not abate so far as the sons are concerned.

[P 228 C 2]

(e) Civil P. C. (1908), O. 23, R. 1(3)—Father along with others suing for possession — Father dying pending suit—Sons refusing to be substituted as legal representatives — Sons not withdrawing or abandoning claim by formal appli-

cation — Suit proceeding upon plaint as it originally stood—Sons never became plaintiffs and O. 23, R. 1 is not applicable.

Where the father along with others sued for possession but died during the pendency of the suit and his sons having refused to join as plaintiffs were added as pro forma defendants and the suit proceeded upon the plaint as it originally stood :

Held that the result of the mere refusal of the sons to join as plaintiffs was that they never became plaintiffs and O. 23, R. 1 was not applicable as the sons were not brought on record as plaintiffs in the previous suit though it would have been applicable if after bringing them on record as plaintiffs, they would have abandoned or withdrawn the claim.

[P 228 C 2]

L. K. Choudhary and B. C. De —

for Appellant.

B. P. Sinha, Murli Manohar Sinha,
B. N. Mitter and Rai T. N. Sahay for
C. P. Sinha — *for Respondents.*

Fazl Ali J. — This is an appeal by the plaintiff in a suit which was decreed by the Court of first instance but was dismissed by the lower Appellate Court. The suit related to mauza Chitramo, one of the villages appertaining to a tenure known as lot Hatingchouli which consists of a number of villages and was held by one Lal Makund Nath Sahi Deo under Basargarh estate. It is common ground that in 1894 Lal Makund sold village Chitramo to plaintiff's ancestor Panreya Manki and that some time after this transaction Panreya granted a lease of the village to the ancestors of defendants 1 to 5. The Basargarh estate had been brought under the Encumbered Estates Act some time in 1895 and in 1910 or 1911 the encumbered estate brought a suit against Lal Makund for the rent of the Hatingchouli tenure and in the execution of the decree which was passed in that suit, the tenure was sold in the year 1913 and purchased by defendant 9, Hanuman Bux. In 1922 the plaintiff's father and defendants 1 to 5 brought a suit against Hanuman Bux and certain other persons to recover possession of Chitramo on the ground that the sale held in the execution of the decree obtained by the encumbered estate did not affect their title to that village. During the pendency of the suit the plaintiff's father died and as his heirs refused to join as plaintiffs, they were impleaded as pro forma defendants and the suit proceeded as between the remaining plaintiffs (that is to say, defendants 1 to 5) and Hanuman Bux and the other defendants. On 30th July 1923 the trial Court granted a decree in favour

of the plaintiffs, the operative portion of which ran as follows :

Let it be declared that the plaintiffs and defendant 9 have their rights as rent receivers under defendants 7, 8, 10 and 11 in village "Chitramo" and that the auction-purchase of defendant 1 is illegal and invalid against the plaintiff's title. Let the plaintiffs recover possession of the disputed village through defendants 7, 8, 10 and 11 only. The contesting defendant 1 alone shall pay the costs of this suit.

It may be stated here that defendants 7, 8, 10 and 11 in that suit included the present plaintiff and other members of his family and defendant 1 was Hanuman Bux who is defendant 9 in the present suit. The passages which have been underlined (here italicized) have to be stressed in view of the plea of limitation which has been raised on behalf of the defendants and with which I shall presently deal. Now, Hanuman Bux being dissatisfied with the decree of the trial Court presented an appeal before the Judicial Commissioner of Chota Nagpur and in June 1925, there was a compromise between defendants 1 to 5 of the present suit and Hanuman Bux by which the former acknowledged the validity of the sale held at the instance of the encumbered estate and agreed to pay a certain annual rent to Hanuman Bux. The present plaintiff however was not a party to the compromise. On 14th January 1929, the present suit was brought by the present plaintiff in which he challenged the title of Hanuman Bux under the sale of 1913, repudiated the validity of the compromise and prayed for recovery of possession of village Chitramo.

The suit was contested by Hanuman Bux, defendant 1 to 5 and certain other defendants. For the purpose of this appeal, it is sufficient to state that the main pleas which were raised on behalf of the contesting defendants were that the sale in question was a rent sale and therefore passed the entire tenure to Hanuman Bux, and that the suit was barred by limitation and the principle of *res judicata*. All these pleas were negatived by the trial Court which decreed the suit not only against Hanuman Bux but also against defendants 1 to 5. The trial Court gave a decree for khas possession to the plaintiff on the ground that defendants 1 to 5, having attorned to Hanuman Bux and denied the plaintiff's title and defaulted in paying rent to the plaintiff in 1983 and 1984 had forfeited their interest in the disputed village. The learned District Judge on ap-

peal reversed the decision of the trial Court and upheld the pleas of the contesting defendants. The plaintiff has accordingly preferred this second appeal.

The main question which was debated in this Court was as to whether under the sale of 1913 Hanuman Bux had acquired a good title to village Chitramo. It was conceded that this title must be held to be good, if the sale was a rent sale; but it was contended on behalf of the appellant that it was not a rent sale, firstly, because the plaintiff's father who was in possession of the village was not impleaded in the suit, and, in the second place, because the entire tenure had not been included in the application for execution. Now, there is no controversy as to certain important facts bearing on this point. It is common ground that at the time when the rent suit was brought by the encumbered estate, the disputed village was in possession of the plaintiff's ancestors and that Panreya's name was recorded in the Khewat No. 3 which was finally published in 1906. That being so, this case must be governed by the decision of the Privy Council in 12 Pat 626.¹ It was held in that case that where all the necessary parties are not joined or represented in the proceedings relating to a sale in execution of a decree for rent, S. 211, Chota Nagpur Tenancy Act, does not apply, and the Revenue Court has no jurisdiction to order a sale, and consequently S. 214 of the Act does not preclude the Civil Court from entertaining a suit to set it aside. In that case one of the tenants had died without issue and the name of his widow had been entered in the Record of Rights as a holder of his share of the lands. The landlord did not implead her in the rent suit on the ground that she had not taken any steps to have her name entered in place of that of her husband in his *sherishta*, as prescribed by S. 11, Chota Nagpur Tenancy Act, nor had she paid any rent to him in respect of the tenure. The Judicial Committee however pointed out that no such sanction as forfeiture of rights in the tenure as a result of failure to comply with the provisions of S. 11 is provided by the Act. 'Such failure', they observed, 'only affects the transferees' power to recover rent from his under-tenants as provided in sub-s. 4.' The Courts below had not the advantage of reading this decision and so they have confined them-

1. Jagdishwar Dayal Singh v. Dwarka Singh, (1939) 20 A I R P O 122 = 142 I O 781 = 12 Pat 626=60 I A 176 (P O).

selves to the question of the effect of the non-registration of the name of the plaintiff in the sherishta of the landlord. The decision of the Judicial Committee however shows that that question was not a very material one. It also appears upon the facts of this case that all the villages comprising the tenure were not included in the sale, but in view of what I have already said, it is unnecessary to pursue the matter further.

The learned District Judge is also clearly wrong in holding that the present suit is barred by the principle of *res judicata*. As has been already stated, the suit of 1922 ultimately ended in a compromise, and the plaintiff being no party to the compromise, was not bound by it, nor can the decree passed and appeal based as it was on the compromise, operate as *res judicata* against him in this action. The appellant must also succeed on the question of limitation. It is true that the plaintiff lost possession in the year 1913 when the disputed village being purchased by Hanuman Bux, he proceeded to take possession of it. But, it also appears that as a result of the decree passed in the suit of 1922 by the trial Court, defendants 1 to 5 recovered possession from Hanuman Bux about the year 1923. This decree specifically stated that possession was granted to defendants 1 to 5 through the present plaintiff's father and so at least until the date of the compromise of 1925, the possession of defendants 1 to 5 must be regarded as tantamount to the possession of the plaintiff and this clearly constituted a break in the possession of Hanuman Bux. As I have already stated under the compromise, Hanuman Bux's title was acknowledged by defendants 1 to 5 and therefore from that date it cannot be said that the plaintiff was in possession through defendants 1 to 5. Properly speaking, therefore, the limitation began to run from the date of the compromise and as the present suit was instituted in 1929, it was not barred by limitation. Thus the main points upon which the suit has been dismissed by the learned District Judge fail. I have however yet to deal with two other points which were raised in the course of the argument. It was contended on behalf of defendants 1 to 5 that the suit of 1922 brought by the plaintiff's father had abated so far as the plaintiff is concerned, because on the death of the former no substitution was made and the present plaintiff refused to continue this suit. This point however has been answered by the learned Subordinate Judge

who tried the suit. O. 22, Rule 2, provides that where on the death of one or two plaintiffs the right to sue does not survive to the surviving plaintiff or plaintiffs alone, the Court shall cause the legal representative of the deceased plaintiff to be made a party and proceed with the suit. In the present case the legal representative of the deceased plaintiff was added as defendant in the suit and, in my opinion, the requirement of law was thereby complied with.

A more serious point was raised by the learned advocate for defendant 10 who contended that the plaintiff could not maintain the present suit by reason of what is provided in Cl. 3 of O. 23, Rule 1. This Rule relates to the effect of the withdrawal of a suit and sub-r. (3) provides that where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-r. (2), he shall be precluded from instituting any fresh suit in respect of the same subject matter or part of the claim. The point to be considered is whether the plaintiff had withdrawn the suit or abandoned part of his claim. In this connexion, it has been pointed out by the learned advocate for the appellant that no portion of the claim or suit was in fact withdrawn and even after the death of the plaintiff's father, the suit proceeded upon the plaint as it originally stood. The only thing which happened was that the heirs of the deceased plaintiff refused to join as plaintiffs. It must be remembered that the latter made no formal application for withdrawing the suit or abandoning any part of their claim but merely refused to join as plaintiffs and the result of their refusal was that they never became plaintiffs. O. 23, R. 1 was clearly not applicable to this case, because the present plaintiff was never brought on the record as a plaintiff in the previous suit. It would have been applicable if after being brought on the record as a plaintiff he had withdrawn from the suit or abandoned part of his claim. In my opinion therefore the plaintiff's suit must succeed as against Hanuman Bux (defendant 9).

The only point which remains to be dealt with is whether the plaintiff is entitled to a decree for khas possession by evicting defendants 1 to 5. Now, one of the difficulties which the plaintiff has to face in this connexion is that the ground on which he claims khas possession in this Court is not clearly set out in the plaint and in

para. 25 of the plaint he bases his right to relief only on the ground of non-payment of the rent in Jeth 1983 and 1984. The matter does not rest there. The repudiation of tenancy which is the only ground of forfeiture urged in this Court is said to have occurred in the year 1925 when defendants 2 to 5 were minors and when Sundar Munda, the only major defendant, entered into compromise with Hanuman Bux on his own behalf and as guardian of the other defendants. This compromise was clearly to the prejudice of the minor defendants 2 to 5, not only because it ignored the decree of the trial Court but also because it exposed the minors to the risk of a serious litigation which followed soon after the compromise. Defendant 1 himself in the written statement does not repudiate the original tenancy and the other defendants who were minors at the time of the compromise have stated in their written statement as follows:

These defendants had made no collusion or compromise with defendant 9; nor have they agreed to pay rent to him in respect of the property in suit; that if defendant 1 who was then the head member of these defendants' family and was in charge of the suit against defendant 9 and who used to pay rent to the superior landlord on behalf of the family, had attorned to defendant 9 in the appeal terminating in the compromise as alleged by the plaintiff, these defendants were not aware of it and they submit that the judgment in appeal has not in any way affected their title to the tenure in suit.

The plaintiff also did not serve any notice of eviction on any of the defendants before he brought this suit and, so in my opinion, in the circumstances of the case, no decree for ejectment can be passed against them. I would therefore allow this appeal in part and while decreeing the plaintiff's suit against the heirs of defendant 9 who have been substituted after his death, dismiss it as against defendants 1 to 5. The parties will bear their own costs throughout.

Varma J.—I agree.

S.G./R.K.

Appeal allowed.

A. I. R. 1939 Patna 229

HARRIES C. J. AND AGARWALA J.

Haladhar Mahto —

Defendant — Appellant.

v.

Kesar Mahto and others —

Plaintiffs — Respondents.

Appeal No. 509 of 1936, Decided on 18th November 1938, from appellate decree of Sub-Judge, Purulia, D/- 18th May 1936.

Second Appeal—Finding of fact—Question whether entry in Record of Rights is correct is one of fact—Mere fact that there are features in case from which different conclusions can be drawn does not entitle High Court to interfere with finding of fact.

The question whether an entry in the Record of Rights is correct or not is purely one of fact and the mere fact that there are features in the case from which different conclusions might be drawn as to the status of the defendant does not entitle the High Court to interfere with the findings of fact arrived at by the Court below. [P 230 C 13]

R. S. Chatterjee — *for Appellant.*

S. C. Mazumdar and A. A. Khan Warsi
for Respondents.

Agarwala J.—This second appeal is by the defendant against a decision of the Subordinate Judge of Purulia reversing a decision of the Munsif. The question that arises is with regard to the status of the defendant who has been recorded in the Record of Rights as a settled raiyat. The Court below has found that the defendant is a bhagidar and that he is liable to be ejected on notice by the plaintiff, and that the entry in the Record of Rights describing the defendant as a settled raiyat is incorrect; that decision is challenged in second appeal. The Court below has referred to various circumstances which led it to conclude that the entry in the record was incorrect. Some of those circumstances are that the agreement between the parties contemplated that the landlord might be required to furnish seeds, that the landlord was entitled not only to half the produce but also to half the straw of the produce and that the defendant was not entitled to reap the crop without the landlord's permission. Now, all these circumstances are not inconsistent with the status of the defendant being that of a tenant; but they are also consistent with his status being that of an employee whose remuneration consisted of a part of the produce of the land. That is the view which the Court below has taken and it cannot be denied that there was evidence on which the finding could have been arrived at. The only difficulty is with respect to two decisions of the Calcutta High Court.

In those two cases, which were from Districts in Bengal, it has been held that a person cultivating land on terms similar to those in the present case was not a mere employee but a tenant. The first of these cases is 19 C W N 1205.¹ The other is

1. *Deb Nath Das v. Ram Sundar Barman*, (1916) 3 A I R Cal 621=31 I O 579=19 C W N 1205.

21 C W N 505.² In 28 C W N 848³ Mukerji J. sitting singly held with regard to a case in which the facts were precisely similar to the present, that the expressions 'settlement' and 'holding the land' are consistent with the defendant being either a tenant or an employee remunerated by part of the produce. In A I R 1934 Pat 53,⁴ a case which came before me sitting singly, I held that a person holding under a Melabagh agreement is not an occupancy raiyat and cannot acquire occupancy rights. That was a case from the District of Manbhum and I relied upon observations in the District Gazetteer. The question however whether an entry in the Record of Rights is correct is purely one of fact, and we must accept the finding of the Court below that the entry is incorrect. The mere circumstance that there were features in the case from which a different conclusion might have been drawn as to the status of the defendant does not entitle us to interfere with the finding of fact arrived at by the Court below. There is no other point in this second appeal which must therefore be dismissed with costs.

Harries C. J.—I agree.

R.M./R.K.

Appeal dismissed.

2. Secy. of State v. Gobinda Prasad, (1917) 4 A I R Cal 382=39 I C 934=21 C W N 505.
3. Jadab Chandra v. Gopal Chandra, (1924) 11 A I R Cal 837=82 I C 94=28 C W N 848.
4. Niranjana Chakravarti v. Mukunda Mohan, (1934) 21 A I R Pat 53=150 I C 987.

A. I. R. 1939 Patna 230

VARMA AND ROWLAND JJ.

Lal Inderjit Nath Sahi Deo —

Appellant.

v.

Maharaja Pratap Udai Nath Sah Deo and others—Respondents.

Appeal No. 152 of 1938, Decided on 11th January 1939, from appellate order of Sub-Judge, Ranchi, D/- 27th April 1938.

(a) **Res Judicata**—Objection that transfer by Rent Court of application for execution to Civil Court was without jurisdiction agitated and decided in previous execution — Same parties cannot agitate that matter again even if Court before whom previous execution was presented had taken wrong view of law.

Where an objection that the transfer by Rent Court of application for execution to Civil Court was without jurisdiction was agitated and was decided against the judgment-debtors in the earlier

execution and an appeal was presented from that decision and failed, it is no longer open to the judgment-debtors to raise it, the principle of res judicata being a bar to the contention even though the Court before whom the previous execution was presented may or may not have taken a wrong view of the law: *A I R 1936 P C 46, Rel. on.* [P 231 C 1]

(b) **Chota Nagpur Tenancy Act (6 of 1908), Ss. 182, 181 and 231** — Decree passed by Deputy Commissioner can be legally transferred to Civil Court for execution — But on transfer of execution to Civil Court limitation for execution would be that provided by Sec. 181 and application to renew old execution would be governed by Sec. 231.

Section 182 and the notification regarding maintainability of an execution case in a prescribed Court must be given a wider meaning. It is impossible to say that only a Rent Court or a Deputy Commissioner can hear proceedings under the Act. Hence the transfer of decrees of Deputy Commissioner to Civil Court for execution is legal. But when an application for execution is transferred to a Civil Court it will not lose its character as a proceeding under the Act and will not be governed by the rules and statutes which regulate the procedure of the Civil Court, including the Civil Procedure Code, and the Limitation Act. The limitation for an application to execute a decree would be that provided by Sec. 181, Chota Nagpur Tenancy Act, even if the decree has been lawfully transferred to a Civil Court for execution and an application to renew old execution would be governed by S. 231: *A I R 1928 Pat 144; A I R 1917 Cal 7 and A I R 1936 Pat 615, Foll.; A I R 1929 Pat 188 and A I R 1933 P C 122, Expl.* [P 232 C 1, 2; P 234 C 1; P 235 C 2]

(c) **Landlord and Tenant—Rent suit**—Several tenants joint promisors — Suit for rent can be instituted against one or more of them (*Obiter*).

Every suit to recover money due on account of rent is in one sense a rent suit; where several tenants are joint promisors, such a suit can be instituted against one or more of them and decreed for the entire sum due: *A I R 1926 Pat 504, Rel. on.* [P 233 C 1]

(d) **Execution—Limitation—Order of executing Court that execution case be dismissed on part satisfaction with costs—Order is final—Subsequent application for execution must be regarded as fresh application.**

When the order of executing Court was to the effect that the execution case be dismissed on part satisfaction with costs and the Court was not moved to review that order, nor was any appeal presented to any superior Court to revise or vacate it, the order is an order finally disposing of execution case and a subsequent application for execution must be considered to be a new application: *A I R 1936 All 820 (F B), Rel. on; 27 All 334, (P C), Expl.* [P 234 C 2; P 235 C 1]

L. K. Choudhury — *for Appellant.*

B. C. De — *for Respondents.*

Rowland J.—This appeal by the judgment-debtors arises out of an application to execute a decree, against which objection was taken and allowed by the Munsif. On appeal the decision was reversed and execution directed to proceed. The decree in

question was obtained in the Rent Court on 11th July 1932 by the Maharaja of Chota Nagpur in respect of the rent of a tenure held by a number of cosharers. On application by the decree-holder, the decree was transferred to the Munsif of Ranchi for execution, and execution proceedings were started on 19th January 1933, against nine judgment-debtors, seeking a sale of five properties. The properties under attachment were proclaimed for sale; but on 16th April 1934 an order of the Commissioner under Sec. 2, Chota Nagpur Encumbered Estates Act, 1876, protecting from sale the property of judgment-debtor 9, Lal Gokulnath Sahi Deo, was received in the Court. In the meantime some amounts of cash had been realised in the course of the execution, and the Munsif ordered on the same date that the execution case be dismissed on part satisfaction with costs. The next step taken was the presentation on 23rd December 1935 of the application to execute the decree out of which the present appeal arises. Notices were issued to the judgment-debtors named in the application under O. 21, R. 22, Civil P. C. Thereafter the names of five of the judgment-debtors named in the application were expunged from it.

It is contended that the Civil Court had no jurisdiction to execute the decree at all, the order of transfer to the Civil Court having been incompetent. As against the objection that the transfer of the application to the Civil Court was without jurisdiction, Mr. De, for the respondent, points out that this very matter was agitated and was decided against the judgment-debtors in the earlier execution, that an appeal was presented from that decision and failed, and therefore he contends that it is no longer open to the judgment-debtors to raise it, the principle of *res judicata* being a bar to the contention. On this point Mr. De's argument must be accepted. It is supported by the decision of the Privy Council in 15 Pat 203.¹ The Court before whom the previous execution was presented may or may not have taken a wrong view of law, but the same parties are not entitled to agitate that matter again between themselves.

The next and principal objection taken is that the application to execute the decree having been presented on 23rd December

1935, whereas the decree was obtained on 11th July 1932, is barred by limitation under the provisions of S. 181, Chota Nagpur Tenancy Act, which prescribes a three years' period from the date on which the decree or order is signed. The Munsif allowed this objection holding that the application was a fresh application in execution presented after the period of three years laid down in the statute. As to this point, Mr. De, for the respondent, has contended that S. 181, Chota Nagpur Tenancy Act, has no application to this case. He argues that the suit having been transferred to the Civil Court, the decree-holder is entitled subject to the provisions of Art. 182 of the Schedule to the Limitation Act, to execute his decree at any time within 12 years of its passing, under S. 48, Civil Procedure Code.

It is necessary therefore to say something on the question of the legality of transferring decrees of the Deputy Commissioner to the Civil Court for execution and the consequences of such transfers. The transfer purported to be made under S. 182, Chota Nagpur Tenancy Act, the terms of which are

a decree or order passed by a Deputy Commissioner under this Act may be executed either by his own Court or by any other prescribed Court.

"Deputy Commissioner" in this Section includes any Deputy Collector trying a rent suit; and a 'prescribed Court,' under the Government notification, includes the successor in office of the Deputy Commissioner who passed the decree, and includes any Court to which the "Deputy Commissioner of the District" transfers the application for execution; "Deputy Commissioner of the District" is explained as meaning the actual Deputy Commissioner for the time being. For the appellants, it is contended that this power of transferring only extends to transferring an execution application to a revenue officer having powers under the Chota Nagpur Tenancy Act. A doubt was expressed by Macpherson J. in 15 Pat 439² whether the Deputy Commissioner of the District himself had power to transfer the decree of a revenue officer to the Court of a Munsif; but the point was not directly before him, as in that case the Deputy Commissioner of the district had not passed any such order of transfer. I may however point out that if nothing more than transfer from one Revenue Court to another is

1. Bindeswari Charan Singh v. Bageshwari Charan Singh, (1936) 23 A I R P O 46=160 I O 68=15 Pat 203=68 I A 53 (P O).

2. Pratap Uday Nath Sahi v. Baraik Lal, (1936) 23 A I R Pat 615=165 I O 959=15 Pat 439=18 P L T 36.

authorized by S. 182 and the notification, these provisions appear superfluous, for such transfers can be made under other Sections of the Act. The expression "Deputy Commissioner" is used generally in the Act in referring to the Court dealing with suits and applications under the Act and is thus defined in S. 3 (viii) :

"Deputy Commissioner," in any provision of this Act, includes :

(a) any Revenue Officer or Deputy Collector who is specially empowered by the Local Government to discharge any of the functions of a Deputy Commissioner under that provision ; and

(b) any Deputy Collector to whom the Deputy Commissioner may, by general or special order, transfer any of his functions under that provision.

In S. 137 a general power is given to the Deputy Commissioner to withdraw any suit (application or proceeding) from any Deputy Collector or revenue officer who is exercising power of the Deputy Commissioner under this Act, and may try it himself or transfer it to any Deputy Collector. Perhaps "the Deputy Commissioner" in this context means the Deputy Commissioner of the District ; if not, there would seem to be some overlapping of this Section with S. 269 which runs :

A revenue officer may at any time transfer any pending suit, application or proceeding under this Act from the file of any revenue officer acting under this Act to the file of any other revenue officer so acting who is duly authorized to entertain and decide such suit, application or proceeding.

When there is such abundant power of transfer to a "Deputy Commissioner", Deputy Collector or Revenue Officer, it would appear that S. 182 and the notification regarding maintainability of an execution case in a prescribed Court must be given a wider meaning. In 18 C W N 170³ reference was made to possible execution proceedings "in the ordinary Civil Court" or "in a Civil Court competent to execute such a decree" and although the words there used may be considered to be of the nature of obiter dicta, it is said to be the ordinary practice that the Civil Court accepts and deals with execution cases transferred to it by the Deputy Commissioner of the District. It is impossible to say that only a Rent Court or Deputy Commissioner can hear proceedings under the Act for the Act itself provides instances to the contrary. S. 87 (1), Proviso 1, empowers the Revenue Officer, subject to S. 264 and rules, to transfer certain cases to a competent Civil Court

for trial ; S. 182 and the notification thereunder do not in terms restrict the power of transfer to a power of transfer to a revenue Court ; S. 139 which gives to the Deputy Commissioner exclusive jurisdiction (save as otherwise provided in the Act) over certain classes of cases, contains a proviso (inserted in 1920) that the Deputy Commissioner, may subject to rule, transfer suits or applications to a competent Civil Court. It does not therefore appear that the judgment debtors could have succeeded in their objection to the jurisdiction of the Civil Court to entertain the execution, even if this objection had been open to them in the present proceeding.

Mr. De further argued that the result would be that once an application is before a Civil Court, it will lose its character as a proceeding under the Act and will be governed by all the rules and statutes which regulate the procedure of the Civil Court, including the Civil Procedure Code (S. 48), the Limitation Act (Arts. 182 and 181), rather than the Chota Nagpur Tenancy Act (Sec. 181 and S. 231 to which I shall come later). He presses on our notice the difficult position which might arise for a decree-holder, should a different view be taken, and refers to 8 Pat 620=10 P L T 125,⁴ a decision affirmed by the Judicial Committee of the Privy Council in 12 Pat 626=14 P L T 289.⁵ In that case the plaintiffs who were among the persons interested in the tenure not having been impleaded in a rent suit, recovered possession of their shares which had been sold at an auction sale purporting to be held under S. 208. In the course of his judgment Das J. (with James J. concurring) had said :

Now if I am right in saying that a rent suit could not be instituted against defendants 2, 3 and 4, then it must follow that the Deputy Commissioner's Court had no jurisdiction to pass a rent decree against defendants 2, 3 and 4.

The above decision was affirmed by the Judicial Committee of the Privy Council in 12 Pat 626⁵ and at one place in their judgment their Lordships have referred to the sale as being "not made under this Chapter" (Ch. 16) and outside the jurisdiction of the Court." Following that decision Macpherson J. in 12 Pat 799=14 P L T

4. Harbans Singh v. Jagdishwar Dayal Singh, (1929) 16 A I R Pat 188=116 I C 538=8 Pat 620=10 P L T 125.

5. Jagdish Dayal Singh v. Dwarka Singh, (1933) 20 A I R P C 122=142 I C 781=12 Pat 626=60 I A 176=14 P L T 289 (P C).

3. Chandra Nath Tewari v. Pratap Uday Nath, (1914) 1 A I R Cal 611=23 I C 105=18 C W N 170.

670⁶ said that a sale of a tenancy purporting to be under S. 208, but in a case in which the conditions of that Section were not satisfied was entirely without jurisdiction and he said :

The sale of the tenancy under S. 208 being without jurisdiction did not affect the interest of any of the judgment-debtors.

Mr. De says that if these words are given their full meaning, then a decree obtained by a landlord in circumstances which did not entitle him to proceed to sale of the tenure under S. 208, would appear not to be executable under Ch. 16 of the Act at all, and that if taken in the character of a decree for money it should be executable according to the procedure of the ordinary Civil Courts in executing money decree. That contention seems to be founded in part on the language used in 18 C W N 170³ above cited but mainly on the words I have cited from the judgment of Das J. But the expressions "rent suit" and "rent decree" are popular expressions which can be used in more than one sense; and before pressing the dictum of Das J. to what may appear its logical conclusion we must be sure what the words mean in this context. Rent is defined in the Act, S. 3 (23) :

"Rent" means whatever is lawfully payable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant, and includes all dues (other than personal services) which are recoverable under any enactment for the time being in force as if they were rent.

Every suit to recover money due on account of rent is in one sense a rent suit; where several tenants are joint promisors, such a suit can be instituted against one or more of them and decreed for the entire sum due as held in 5 Pat 233⁷ and many other cases. Such a suit is cognizable by the Rent Court only, S. 139 (3), and it is impossible to believe that the learned Judge thought that such a suit could not be instituted or could not be decreed. What he was dealing with was the consequences of the decree passed, which might be a decree both against the judgment-debtor and against the holding or tenure, or a decree against the judgment-debtor only. The context makes it clear that by the words "rent decree" a decree binding on the tenure was intended, and he meant that the Court

could not pass a decree executable under Section 208.

It does not follow that the Court's decree is not executable under the Rent Act, because it is a decree against the judgment-debtor and not against the holding or tenure, and is found to be not executable by sale of the tenure under S. 208. The claim for money due on account of rent, which was the cause of action in the suit is one in respect of which S. 139, Chota Nagpur Tenancy Act, confers exclusive jurisdiction on the Deputy Commissioner, i. e. on the Rent Court. But, it is not the only kind of suit over which that Court has exclusive jurisdiction. Suits for arrears of anything payable in respect of pasturage, forest produce, fishery etc. are exclusively cognizable by the Revenue Court; but decrees passed in such suits may in many, if not all, cases be only executable as personal decrees. Suits against agents employed in the management of land for money received or for accounts are also exclusively cognizable in the Revenue Court. These suits can only in the last resort issue in the passing of a decree for payment of money. S. 142 (1) (a) permits a cosharer landlord to sue to recover from a tenant his share of the rent. In such a suit the remedy under S. 208 is not open to him, but the decree does not cease to be a decree under the Act. I need not multiply instances but may turn next to the provisions of the Act dealing with execution. There are a number of remedies provided, besides the special remedy given in Sec. 208.

The first Section dealing with the method of execution is Sec. 184, which enacts that processes may be issued "against either the person or the property of a judgment-debtor but shall not be issued simultaneously against both person and property;" succeeding Sections provide exemption of certain particulars from attachment (Sec. 186), methods of seizure and sale of moveable property (Ss. 187 etc.), and of execution by arrest (S. 191). It therefore by no means follows that because a decree can only be executed as a money decree its execution is not governed by the provisions of Ch. 16. There is, furthermore, provision in S. 198 permitting execution of a decree of the Deputy Commissioner for payment of money (not being money due or recoverable as an arrear of rent) to be under certain conditions carried out by bringing to sale the immovable property of the debtor in accordance with the provisions of S. 210.

6. *Jyoti Prasad Singh v. Tarasankar Chatterji*, (1933) 20 A I R Pat 537=148 I C 168=12 Pat 799=14 P L T 670.

7. *Kesho Prasad Singh v. Shamnandan Rai*, (1926) 18 A I R Pat 504=94 I C 28=5 Pat 288=7 P L T 628.

If the permission of the Deputy Commissioner is obtained under this Section, it would seem that a sale could be held under Sec. 210 notwithstanding that sale under Sec. 208 had not been or could not be first resorted to.

Except for the observations of Das J. which, as we have seen, can be explained, there is nothing in the decisions of this Court and of the Privy Council in 8 Pat 620⁴ and 12 Pat 626⁵ bearing on the matter before us. We were shown a number of decisions regarding sales held in execution of decrees passed in rent suits against some only of the tenants, and the interpretation placed on the Privy Council's pronouncement by Macpherson J. in 12 Pat 799⁶ was referred to. Whether that interpretation is warranted by the earlier decision seems to have been doubted by James and Dhavle JJ. in 16 Pat 643,⁸ and the precise effect of a non-joinder on a rent sale may require to be further examined, when necessary. But, on any view as to the validity of a sale purporting to be under S. 208, I can find nothing in any of these decisions to support the proposition that unless the decree-holder is allowed to execute his decree by a procedure foreign to the Act he is left without a remedy at all. There are other remedies under the Act.

Moreover, we are not without direct authority as to the procedure governing execution of a decree passed under the Act when it has been transferred to a Civil Court for execution. In 9 P L T 678,⁹ the contention was raised that by getting his decree transferred to the Civil Court a decree-holder could avoid the restrictions and limitations governing execution under the Act, in particular Sec. 181-A. The contention was negatived. The decision in 41 I C 542¹⁰ supports the view there taken. In 15 Pat 439² above cited, Macpherson J. was of opinion that the limitation for an application to execute a decree would be that provided by S. 181 of the Act even if the decree had been lawfully transferred to a Civil Court for execution. Following these decisions, I hold that S. 181 bars the execution if it is a fresh application.

But it is contended by Mr. De that this is no fresh application but merely a continuation or revivor of the execution previously instituted in which proceedings were taken up to 16th April 1934. Mr. De relies on 27 All 334¹¹ in which it was held that a decree-holder, who had for a longish period been prevented from pursuing an execution owing to objections which had been allowed in the Court below, but of which he finally obtained the dismissal in appeal, was not compelled to institute a fresh execution but could be permitted to revive the proceedings which might be regarded as being suspended while the parties were litigating as to their maintainability, notwithstanding that an order had been passed by the executing Court which was represented as being an order finally disposing of the execution. Their Lordships considered the terms of that order and said that it was in no sense a final order. The decision of their Lordships therefore was based partly on the terms of the order and partly on the circumstances of the case.

We have been referred to a number of cases in which a prayer to treat previous executions as being merely suspended and revived has been either allowed or refused; but most of these cases seem to lay down no new principle and it will be sufficient to refer to the Full Bench decision of the Allahabad High Court in A I R 1936 All 820.¹² The Full Bench considered an order passed in the following terms: "Execution struck off for partial satisfaction of the decree; costs on judgment-debtor." This order was read by the Judges as being a final order, and it was held that limitation applied accordingly and that the succeeding application to execute the decree was to be treated as a fresh application. I think the circumstances of that case are more analogous to those before us than the circumstances of the Privy Council decision which I have cited. The order of 16th April 1934 was to the effect that the execution case be dismissed on part satisfaction with costs; and it is difficult to distinguish the form of this order from that which was before the Full Bench in the Allahabad High Court. A similar order was considered by a Division Bench of this Court in Misc. Appeal

8. *Bhagwat Prasad v. Sudarsan Bhagat*, (1937) 24 A I R Pat 621=172 I C 115=16 Pat 643=18 P L T 753.

9. *Nayamat Ram v. Rameshar Nath*, (1928) 15 A I R Pat 144=108 I C 432=6 Pat 807=9 P L T 678.

10. *Sudhanya Kumar v. Gouranga Chandra*, (1917) 4 A I R Cal 7=41 I C 542.

11. *Qaruddin Ahmad v. Jawahir Lal*, (1905) 27 All 334=32 I A 102=8 Sar 810=1 C L J 381=9 C W N 601 (P C).

12. *Mohammad Taqi Khan v. Raja Ram*, (1936) 23 A I R All 820=166 I C 106=1936 A L J 1140=I L R (1937) All 272 (F B).

No. 267 of 1937¹³ decided on 22nd April 1938, by Fazl Ali and Chatterji JJ. Here, as in the case before us, the occasion for stopping the execution proceedings was that the Commissioner had passed an order prohibiting the sale under Sec. 2 (b), Chota Nagpur Encumbered Estates Act, the holder of the property having applied for protection. The Deputy Collector, before whom the execution proceedings were pending, passed an order striking off the execution. Against that order an appeal was preferred to the High Court, because if that order stood, it was apprehended that the execution proceedings having been finally disposed of, a subsequent application to execute would be considered to be barred by limitation. Their Lordships in this Court thought it necessary to interfere and vacated the order passed by the Deputy Collector. In lieu thereof they directed the proceedings will be restored and will remain pending till the final order is passed upon the application made by the judgment-debtors under S. 2, Chota Nagpur Encumbered Estates Act.

No such thing was done in the case before us. The order of the Munsif, dated 16th April 1934, on its face was an order finally disposing of the execution case. The Munsif was not moved to review that order, nor was any appeal presented to any superior Court to revise or vacate it. In my opinion, it was a final order disposing of the execution, and the application presented on 23rd December 1935 must be considered to be a new application and to be barred by limitation. Assuming that we took another view and held that the former execution was merely suspended from 16th April 1934 onwards, then on that view it would be necessary to see what was the period of limitation governing an application to revive and resume the old execution proceeding. According to Mr. De the proceedings of the Civil Procedure Code and the Limitation Act having become applicable to this case by virtue of its transfer to the Munsif, he would have three years from 16th April 1934 to present an application to renew the old execution. But if the whole of these proceedings are governed by the Chota Nagpur Tenancy Act, then limitation also will be in accordance with that Act. In the Limitation Act an application of this nature is dealt with under the residuary Art. 181, in which the period is three years. Sec. 230, Chota Nagpur

Tenancy Act, applies the provisions of the Limitation Act to suits etc. under the Act "so far as they are not inconsistent with this Act." Where the two Acts differ, intention clearly is that the special and local Act is to prevail. There is a residuary provision in the Chota Nagpur Tenancy Act—S. 231. Subject to certain exceptions entered in the proviso, the Section enacts that all suits and applications under the Act, for which no period of limitation is provided elsewhere in the Act, are to be commenced and made respectively within one year from the date of the accruing of the cause of action.

I need not repeat my reasons for holding that the present proceedings are proceedings under the Tenancy Act and are governed by its provisions, including those fixing special periods of limitation. It is clear that S. 231 must apply; that the last date for the respondent to present an application was 16th April 1935, and that on this computation he is more than six months beyond time, even if this can be treated as an application to restore the previous execution. The result is that I would allow the appeal, set aside the order of the Subordinate Judge and restore that of the Munsif. The appellant will have his costs here and below.

Varma J.—I agree. On the two points urged by Mr. Chaudhury, one on the question of limitation and the other that the decree by a Rent Suit Deputy Collector cannot be executed by a Munsif of a Civil Court. I do not want to take much time over the latter question, because as has been pointed out by my learned brother, the appellant is estopped by the principle of *res judicata*. So far as the question of limitation is concerned, Mr. Choudhury has relied upon Ss. 181 and 231, Chota Nagpur Tenancy Act. In order to meet the argument of Mr. Choudhury, Mr. De has tried to show that the procedure before the Munsif would be governed by the Civil Procedure Code and not the Chota Nagpur Tenancy Act, and for that purpose he has relied in his argument to a very great extent upon the interpretation placed on the Privy Council decision in 12 Pat 626⁵ and 12 Pat 799⁶ in this Court. In that case their Lordships of the Judicial Committee were dealing with the facts of that particular case and also with the decision of this Court which went in appeal before them. All the parties were not represented in the suit and their Lordships came to

¹³ *Pratap Uday Nath Sahi Deo v. Jagat Uday Nath*, Misc. Appeal No. 267 of 1937.

the conclusion that the sale that took place was not a sale under S. 208, Chota Nagpur Tenancy Act, on the principle that the tenure was not fully represented before the Court. I would like to quote the observations of their Lordships as to the result of a decree in which the tenure is not fully represented. Towards the latter portion of their judgment they say, after giving their opinion, as follows :

If, as already stated, it is not competent to order a sale of the tenure under S. 208 unless the whole interests in the tenure are represented before the Court, it is clear that the order for sale of the tenure in the present case was ultra vires of the Revenue Court, and it follows that the sale was not "made under this chapter" and was outside the jurisdiction of that Court. This view is confirmed by an examination of the terms of the decree of 1920 for arrears of rent, for the claim decreed is "on account of arrears of rent and cesses with interest in respect of khorposh held by the defendants in mauza Madan Bindra, Rano and Chareya.

Then comes the important portion of the decision, as to what would be the result of a decree in which the tenure is not fully represented.

And the decree is thus only apt to attach the interest of the defendants in the tenure, and is no sufficient warrant for a sale of the whole tenure under S. 208.

I was a party to the decision in Second Appeal No. 660 of 1934¹⁴ in which this case was referred to, but that appeal was decided especially with reference to S. 11, Chota Nagpur Tenancy Act, as to what the effect will be if a landlord's name is not registered. I agree that the appeal should be allowed and the judgment of the lower Appellate Court set aside and that of the learned Munsif restored.

D.S./R.K.

Appeal allowed.

14. Manki Kanak Ratan Singh v. Sundar Munda, Reported in (1939) 26 A I R Pat 225=179 I C 834.

A. I. R. 1939 Patna 236

WORT J.

Kali Prasad Sinha, Chairman, Buxar Municipality — Defendant —
Appellant.

v.

Badri Narain Sahu and others —
Plaintiffs — Respondents.

Appeal No. 39 of 1938, Decided on 22nd December 1938, from appellate decree of Addl. Sub.Judge, Arrah, D/- 20th September 1937.

(a) Bihar and Orissa Municipal Act (7 of 1922), S. 117 — Cases of one Ward heard by Committee directed to hear cases of different Ward — This does not affect jurisdiction.

All that the Act provides is that the objections should be heard by a committee consisting of not less than three Commissioners. It may be a domestic or internal arrangement of the Municipality in assigning cases of one Ward to one committee and another Ward to another Committee. But it is purely domestic and in no way affects the jurisdiction. There is nothing in the Act to prevent the Municipal Commissioners from arranging their business in whatever way they desire so long as they comply with the provisions of the Act, and the fact that the objections regarding cases of one Ward were heard by the committee which was directed to hear cases regarding different Ward does not go to the root of the jurisdiction. [P 237 C 1, 2]

(b) Bihar and Orissa Municipal Act (7 of 1922), S. 117 — Mere fact that objection was heard by committee consisting of only two Commissioners does not affect validity of assessment.

Section 117 is quite clear that the objection should be heard and determined by a committee consisting of not less than three Commissioners. The mere fact that the decision was by majority and that the two members of the committee who heard the objection were unanimous in their decision makes no difference. But again it does not go to the root of the validity of the assessment but merely entitles the plaintiff to a declaration that the particular objection to the assessment which is objected to is invalid. [P 237 C 2]

(c) Bihar and Orissa Municipal Act (7 of 1922), S. 115 — S. 115 relates to latrine taxes also.

Section 115 relates not only to taxes on persons but also to latrine taxes; in other words, it is a "general provision" as stated at the head of S. 113 "relating to assessment." [P 238 C 1]

(d) Corporation — Proceedings — Attack on validity of proceedings must be clearly defined and proved.

Any attack on the validity of proceedings of a statutory body such as the Municipal Committee must be clearly defined and proved and particulars of the matters complained of must be given: A I R 1934 P C 62, Rel. on. [P 238 C 1]

(e) Bihar and Orissa Municipal Act (7 of 1922), S. 12 — Suit regarding validity of proceedings of Municipal Commissioners cannot be brought in name of Chairman — Such mistake is not merely of form but goes to very root of action.

By Sec. 12, the Commissioners become a legal entity which legal entity is not represented by the Chairman; although reference is made to the Chairman from time to time in the Act, he is a person who apart from such reference is unknown to the law, is not a legal entity but is merely a person. If the Chairman is sued, the plaintiff is entitled to relief only against him. In no sense of the word can he be held to be the representative, for the purpose of the proceedings, of the Municipal Commissioners, and there is no justification on principle or on authority or under the Act itself to entitle a party to seek his relief against the Commissioners by bringing an action against the Chairman. It is not merely a mistake of form but it goes to the very root of the action : S. A. No. 108 of 1933 ; (1873) 8 Ch A 204 and 16 Mad 296, Rel. on; A I R 1939 Cal 178, Dissent. [P 238 C 2; P 239 C 1]

B. P. Sinha — *for Appellant.*

S. N. Bose and Kanhayaji —
for Respondents.

Judgment. — The appeal by the defendant and the cross appeal by the plaintiffs arise out of an action against what is said to be the Buxar Municipality for a declaration that the imposition of latrine taxes on the plaintiffs' holdings were illegal and ultra vires and for recovery of the sums which had been paid with respect thereto by the plaintiff-respondents. These sums are said to have been recovered by the Municipality under a distress warrant. It appears that there were three holdings of the plaintiffs in Ward No. 2 and one in Ward No. 1. It appears that by some mistake of the plaintiffs themselves in the first instance one of these holdings was described as being in a Ward other than the Ward in which in fact it was situate. It also appears from the judgment that at the time the objection was filed under S. 116, Bihar and Orissa Municipal Act, a clerk or some person in office of the Municipality made a note correcting the mistake with regard to the number of the Ward. But although that note had been made, yet the case, it is alleged by the plaintiff, was put before a wrong committee and therefore the objection was not considered. Under S. 117 of the Act, provision is made for the hearing of these objections to assessment by a committee of not less than three Commissioners with the proviso that no Commissioner from the Ward for which he was elected was to be appointed a member of the committee to hear such objections. No question arose as regards that matter. The Section also provides for the method of hearing these objections such as taking evidence etc. In my judgment there is no substance in the point. All that the Act provides is that the objections should be heard by a committee consisting of not less than three Commissioners. It may be, what I might describe, a domestic or internal arrangement of the Municipality in assigning cases of one Ward to one committee and another Ward to another committee. But, it is purely domestic and in no way affects the jurisdiction. There is nothing in the Act to prevent the Municipal Commissioners from arranging their business in whatever way they desire so long as they comply with the provisions of the Act, and the fact that the objection was heard by the committee which was directed to hear Ward No. 2 cases instead

of the committee directed to hear Ward No. 3 cases or Ward No 1 cases does not go to the root of the jurisdiction.

But there is another point which perhaps is somewhat more serious. It is said that the committee hearing one of these objections at the time consisted of two members only and not three. This is not a case of vacancy occurring under S. 37 of the Act. Had it been so, a nice point would have arisen, namely whether the fact, that two only of the Commissioners formed a committee to hear the objection, made their action invalid. But the Section seems to me to be quite clear that the objection should be heard and determined by a committee consisting of not less than three Commissioners. The mere fact that the decision was by a majority and that the two members of the committee who heard the objection were unanimous in their decision makes no difference. But again it does not go to the root of the validity of the assessment but merely entitles the plaintiff to a declaration that the particular objection to the assessment which is objected to is invalid. He (the plaintiff) would be much in the same position if the Court were to issue a prerogative or a writ of mandamus or prohibition writ, and if it were made absolute, it would go to affect the validity of the particular matter with regard to which the writ was issued but not the assessment itself. Therefore in this case if the plaintiffs succeed they would be entitled to have their objection re-heard or heard and determined according to law in accordance with S. 117, Bihar and Orissa Municipal Act. Whether the plaintiff would be entitled to recover the sums already paid would be perhaps not a very substantial question, because although for the time being he might be entitled to recover such sums, but if his objections were ultimately overruled he would be liable for the latrine taxes which were the subject-matter of his objections under Sec. 117. The learned Judge in the Court below has come to the conclusion that, as the Revisional Committee (as he describes it) was entitled to decide by a majority, therefore, as I have already said, on that ground the objection in this case must be overruled. The reason given by the learned Judge is not, in my opinion, a valid one.

A further point made by the plaintiffs was that there was no notice under S. 115 of the Act. It was contended by Mr. Sinha on behalf of the defendant Municipality that Sec. 115 had no reference to latrine

taxes. S. 115 refers to assessment lists under Ss. 89 and 105 of the Act. Now S. 89 finds a place in that part of the Act dealing with assessment of taxes on persons and S. 105 finds place in that part of the Act which deals with assessment of taxes on the annual value of holdings, and I do not think it is disputed that the latrine tax is based on the annual value of the holdings. This I think is clearly established by reference to S. 100 of the Act which provides:

Any tax which is assessed on the annual value of holdings, other than the latrine tax, shall, subject to the provisions of Ss. 133 and 134, be payable by the owners of the holdings within the Municipality.

I repeat that there can be no dispute about that point in my judgment. Sec. 115 therefore relates not only to taxes on persons but also to latrine taxes: in other words, it is a "general provision" as stated at the head of S. 113 "relating to assessment." So far as the other objections are concerned, that is to say, notices of meetings and so forth, the learned Judge has, in my opinion, correctly decided the case against the plaintiffs on two points: first, that it was for the plaintiffs to establish to his satisfaction that no such notice was served; and secondly, that particulars of the matters complained of had to be given in view of the decision of their Lordships of the Judicial Committee of the Privy Council in 61 I A 125.¹

For the purpose of dealing with this question as to the value of the proof of these matters given by the plaintiffs I perused the evidence which was given in this regard. It must be made clear that my perusal was for no purpose of deciding the question of fact but for deciding whether the learned Judge in point of law was wrong in the conclusion at which he arrived. The passage to which I refer is found at p. 131 of the report, 61 I A 125,¹ where it is said that:

It is well established that any such attack on the proceedings on a statutory body, such as the committee, must be clearly defined and clearly proved.

First, as regards the other objections to which reference has been made, they have neither been clearly defined, nor have they been clearly proved as the learned Judge holds. I have dealt generally with the appeal and the cross appeal without stating specifically each of the points taken.

Now I come to a very substantial question raised by the appellants the Municipal Commissioners. I have used the expression 'Municipal Commissioners' although strictly speaking Municipal Commissioners are not before the Court: in this case the plaintiffs sued the Chairman of the Buxar Municipality. It is contended by Mr. Sinha on behalf of the appellant that the action is not maintainable. The point seems to me to be perfectly clear and is unarguable. In support of the contention I have been referred to the decision of my brother James in an unreported case, Second Appeal No. 108 of 1933.² There the action was against the Chairman for an alleged tortious act. James J., in the course of his judgment, made this statement:

For Mr. Sinha's second point the plaintiffs should have instituted their suit either against the District Board or against the Chairman who actually sanctioned the prosecution. The suit was in form a suit against the Chairman personally. It is the Chairman's personal failure to visit the place which is imputed as implying malice in the plaint. It is the Chairman's personal liability which is dealt with in the written statement; but the Chairman himself could no more be personally liable for the torts of his predecessor than the overseer who may have succeeded Sukhdeo Narain, the defendant in this case, could be personally liable for Sukhdeo Narain's tort.

Section 12 of the Act provides:

There shall be established for each Municipality a body of commissioners who shall be a body corporate by the name of the municipal commissioners of the place by reference to which the Municipality is known, having perpetual succession and a common seal, and may by that name sue and be sued.

I am not concerned here with the exact meaning or significance of the word 'may' in the sentence "and may by that name sue and be sued." It is unnecessary for me to decide whether the 'may' as in some statute, must be construed as 'shall'. But taking the meaning at its face value it certainly would connote this that the plaintiff in an action of this kind has the option of suing the Municipality as a body corporate. If he fails to do that, his only other alternative would be (I do not decide this point expressly) to sue each one of the commissioners, joining them as party defendants. But the real point is that by the Section the commissioners become a legal entity which legal entity is not represented by the Chairman; although reference is made to the Chairman from time to time in the Act, he is a person who apart from such reference is unknown to the law, is

1. *Radha Kishan Jaikishan v. Khandwa Municipality*, (1934) 21 A I R P C 62=147 I C 894=61 I A 125=30 N L R 121 (P C).

2. *Chairman Dt. Board, Saran v. Ambica Rai*, Second Appeal No. 108 of 1933.

not a legal entity but is merely a person. If the Chairman is sued the plaintiff is entitled to relief only against him and that is clearly not the plaintiff's case here. In no sense of the word could he be held to be the representative for the purpose of the proceedings of the municipal commissioners, and there is no justification on principle or on authority or under the Act itself to entitle a party to seek his relief against the commissioners by bringing an action against the Chairman. In my judgment it is not merely a mistake of form but it goes to the very root of the action. In (1873) 8 Ch A 204,³ a similar point was decided. There the secretary of a company took out debtor's summons against one Hodges. The summons read that, unless within three weeks Hodges paid to B. Leathley, the Secretary of the Leeds & County Loan and Investment Company Limited, the sum claimed, he would have committed an act of bankruptcy. The objection was taken that no debt was due to B. Leathley and that the summons could not be taken out by a servant for a debt due to his master even although he was authorised to collect: in other words, he in no sense represented, for the purposes of the litigation, the Leeds & County Loan and Investment Company Limited. Lord Selborne pointed out in his judgment that summons is a special statutory proceeding involving important consequences, and all proper forms must be complied with, and allowed the objection. It was treated as an unarguable point that if an incorporated company was to take out proceedings it was to do so in its own name. Likewise, if an incorporated body is to be sued, both on principle and by reason of S. 12 of the Act the corporate body must be sued and not the Chairman. There is a decision of the Calcutta High Court in 42 C W N 768⁴ where the following observations were made:

As to the first point, namely that the suit is bad inasmuch as the plaintiff sued the Chairman of the Municipal Corporation, we are of opinion that it is a technical flaw and no importance should be attached to it.

With great respect to the learned Judges, I do not agree with that view. If you have a cause of action against A, you cannot succeed by bringing an action against B. It is not a technical flaw but it goes to the very root of the matter. The learned

Judges of the Madras High Court have held accordingly in 16 Mad 296,⁵ a case brought under the Local Boards Act (Madras), 1884. In my judgment the objection taken by Mr. Sinha on behalf of the Municipal Commissioners must prevail. It was contended by Mr. Bose on the other hand that in the proceedings in the form in which they were taken the commissioners appeared. Exactly what was meant by that I fail to understand. Whether they filed vakalatnamas and were represented by advocates or whether they appeared physically in Court or whether they appeared in the proceedings is quite immaterial. The question is, whether in fact the body against whom relief was sought had been sued. There is only one answer to that question that they had not.

In my judgment therefore the suit fails and the appeal is allowed and the cross appeal is dismissed. There will be no costs either in the appeal or in the cross appeal in any of the Courts, as the point might have been taken in the trial Court and the plaintiffs would have had an opportunity to put the proceedings in order. Leave to appeal is refused.

D.S./R.K.

Appeal allowed.

Cross-appeal dismissed.

5. Syed Ameer Sahib v. Venkatarama, (1893) 16 Mad 296.

A. I. R. 1939 Patna 239

HARRIES C. J. AND VARMA J.

Firm Laduram Sagarmal — Plaintiff
— Appellant.

v.

Jamuna Prasad Chaudhuri and others
— Defendants — Respondents.

Appeal No. 734 of 1937, Decided on 28th October 1938, from decision of Addl. Sub-Judge, Bhagalpur, D/. 22nd July 1937.

Partnership Act (1932), S. 69 — Suit which is not maintainable by reason of non-compliance with S. 69 cannot become maintainable at later stage by reason of subsequent registration.

A suit which is not maintainable by reason of non-compliance with S. 69 cannot become maintainable at a later stage by reason of subsequent registration. Subsequent registration cannot cure the initial defect. A plaint filed by an unregistered firm is in effect no plaint at all because Sec. 69 makes claims arising out of a contract unenforceable if the firm is unregistered at the date of the suit. An unregistered firm has no right to sue and a plaint filed by it has no legal effect. If at the time the plaint is filed the claim is bound to fail, subsequent registration cannot improve the position. The crucial date is the date of the suit:

3. In re Hodges, (1873) 8 Ch A 204.

4. Jogendra Nath v. Tollygunj Municipality, (1939) 26 A I R Cal 178=68 C L J 267=42 C W N 768.

A I R 1935 Lah 893; A I R 1938 Lah 767; A I R 1936 Mad 991 and A I R 1935 All 898, Foll.; 41 C W N 534 and A I R 1937 Mad 767, Not foll.

[P 241 C 2]

S. N. Bose and K. Dayal —

for Appellant.

B. N. Mitter, Harinandan Singh and
Yasin Yunus — *for Respondents.*

Harries C. J. — This is a plaintiff's second appeal against concurrent decrees of the Courts below dismissing his claim. The suit out of which this appeal arises was for the recovery of money due on certain bahi-khata accounts. The plaintiff firm carried on business as wholesale cloth dealers, whereas the defendants carried on a retail cloth business. Over a period of time the defendants had made purchases of cloth from the plaintiff firm, and eventually the parties adjusted the accounts. It was the plaintiff's case that a sum of Rs. 1693 was due from the defendants to the plaintiff firm upon this account. The defendants raised a number of defences, but it is only necessary for me to deal with one of them. Defendants contended that the suit as instituted was not maintainable as at the date of the institution of the suit the plaintiff firm had not been registered in accordance with the provisions of the Partnership Act. The other defences, namely limitation and denial of the accuracy of accounts, do not arise in this appeal.

The trial Court dismissed the suit on the ground that it was not maintainable by reason of S. 69, Partnership Act. The lower Appellate Court was of opinion that the suit was not maintainable when instituted but that it became maintainable at a later date when the plaintiff firm was registered. It further held that part of the claim was barred by limitation and that the remainder had been satisfied by payment. It accordingly upheld the decision of the trial Court though upon different grounds. It has been strenuously argued by Mr. Bose in this appeal that the suit was maintainable and that the lower Appellate Court was right in treating the suit as having been instituted on the date when the firm was registered. The suit was instituted on 21st November 1935, and it is common ground that upon that date the firm was an unregistered one. On 10th December 1935, the plaintiff firm applied for registration under the Partnership Act and on 18th January 1936 registration was effected. It has been contended on behalf of the appellant that though the suit was not main-

tainable when instituted, the Court was entitled to treat the suit as properly instituted on 18th January 1936.

On behalf of the respondents it has been contended that as the suit was not maintainable when instituted, nothing that happened afterwards could affect the maintainability of this particular suit. Reliance has been placed by the advocate for the appellant upon the case in 41 C W N 534.¹ In that case a suit was instituted by an unregistered firm on 25th May 1934, and no exception was taken in the written statement on the ground of non-registration of the firm. The suit proceeded to trial and was decreed on contest against the answering defendant and ex parte against the others. The answering defendant appealed, but that appeal was not proceeded with, as there was an application to have the ex parte decree set aside by those defendants against whom the ex parte decree was passed. That ex parte decree was set aside and the suit came on for hearing afresh. At that hearing a plea was taken that the suit was not maintainable under S. 69 (2), Partnership Act, on the ground of non-registration of the firm at the date of the institution of the suit. The firm was as a matter of fact registered on 20th June 1934. The objection was upheld by the Courts below and the suit dismissed. On appeal Mitter J. held that the suit ought not to have been dismissed merely on the ground of non-registration of the firm at the date of the institution of the suit but that it ought to have been deemed to have been instituted on the date when the firm was registered.

This case was followed by Horwill J. of the Madras High Court in *A I R 1937 Mad 767*.² In that case an unregistered firm had instituted a suit and during the course of the proceedings had registered itself in accordance with the Partnership Act. On objection being raised that the firm was not registered at the date of the institution of the suit, the suit was dismissed though registration had taken place before the hearing. Horwill J. held that it would be most inequitable for the firm to have its suit dismissed and be forced to file another after paying fresh court-fee. Accordingly

1. *Radha Charan Saha v. Matilal Saha*, (1937) 41 C W N 534.

2. *Varadarajulu Naidu v. Rajamanika Mudaliar*, (1937) 24 A I R Mad 767=176 I O 916= (1937) 2 M L J 273.

he allowed the suit to be treated as instituted at the date when the firm was registered.

These two single Judge cases undoubtedly support the argument of the appellant. But Mr. Mitter on behalf of the respondents has cited a large number of authorities of various Courts which take the opposite view. In A I R 1935 Lah 893³ a Bench of the Lahore High Court held that a suit instituted by an unregistered firm must be dismissed. According to the learned Judge S. 69, Partnership Act, clearly said that no suit falling within its purview should be instituted. It was the institution of the suit that was barred; hence an unregistered firm could not file a suit, nor could it after filing get the suit stayed till it got itself registered. Such a suit would have to be dismissed, though the dismissal of such suit would be no bar to a fresh suit after registration, if such was within time. In this case the Bench certainly took the view that a suit instituted by an unregistered firm was bound to fail and that registration after the filing of the suit could not possibly affect the maintainability of that particular suit. A similar view was expressed by learned single Judge of the Lahore High Court in A I R 1938 Lah 767.⁴ In that case it was held that a suit by an unregistered firm was invalid and that registration of the firm after the suit had been instituted did not relate back so as to make the suit valid.

Another case to the same effect is the case in A I R 1936 Mad 991.⁵ In that case an unregistered firm instituted a suit and after objection was raised, obtained registration under the Partnership Act. Thereafter it applied for amendment praying that the suit should be treated as having been instituted on the date of the application for amendment. It was held that any subsequent amendment of the petition after getting the firm registered under the Partnership Act could not relate back to the date of the institution of the suit so as to cure the defect which existed at the time of institution, as the plaint was not a plaint

at all, hence the order of amendment could not be granted.

In A I R 1935 All 898⁶ Kendall J. held that before instituting a suit by a partner against a firm, the firm must be duly registered and the Registrar must have recorded the person suing as a partner in the firm. Subsequently registering the firm and amending the plaint did not make a valid institution; merely making an application for registration before suit was not sufficient. S. 69 was mandatory.

It is therefore clear that the trend of authority is in favour of the respondents' contention in this case, namely that a suit which is not maintainable by reason of non-compliance with Sec. 69, Partnership Act, cannot become maintainable at a later stage by reason of registration. In my view subsequent registration cannot cure the initial defect. A plaint filed by an unregistered firm is in effect no plaint at all because Sec. 69 makes claims arising out of a contract unenforceable if the firm is unregistered at the date of the institution of the suit. An unregistered firm has no right to sue, and therefore a plaint filed by it has no legal effect. If at the time the plaint is filed the claim is bound to fail, I cannot see how subsequent registration can improve the position. The single Judge of the Calcutta High Court held that there was no reason why the Court should not treat the plaint as filed on the date of registration. That is possibly a very fair view to take; but I know of no provision of law which permits a Court to treat the plaint as filed on a date subsequent to the date upon which it was actually filed. In neither of the cases cited on behalf of the appellant is any authority cited which would enable a Court to treat a suit as being instituted months later than the date upon which it was in fact instituted. In my view the crucial date is the date of the institution of the suit. If on that date the suit was bound to fail, nothing that happens subsequently can give the plaintiff a right to sue. The case is very similar to a case where a plaintiff brings a suit prematurely. If it is held that he had no cause of action at the date of the institution of the suit, then it does not avail him in the slightest to show that his cause of action did come into existence a few days after the filing of the suit. If the plaintiff had no cause of action when

3. Krishen Lal Ram Lal v. Abdul Ghafur Khan, (1935) 22 A I R Lah 893=160 I O 513=17 Lah 275=38 P L R 693.

4. Chhagan Lal v. Mangal Sain Raj Narain, (1938) 25 A I R Lah 767 = 179 I O 363 = 40 P L R 667.

5. Subramania Mudaliar v. East Asiatic Co. Ltd., (1936) 28 A I R Mad 991 = 165 I O 989=71 M L J 668.
1939 P/31 & 32

6. Ram Prasad Thakur Prasad v. Kamta Prasad Sita Ram, (1935) 22 A I R All 898 = 157 I O 154 = 1935 A L J 1248.

the suit was filed, then such a suit is bound to fail, though a cause of action might come into existence within a very short time after the institution of the suit. For the same reason, I cannot understand how an unregistered firm can file a suit and the defect be cured by subsequent registration. It appears to me that if the suit as filed was not maintainable, then it must be dismissed.

For the reasons which I have given, I am satisfied that this suit was not maintainable. In my view the lower Appellate Court rightly dismissed this suit though I am unable to agree with the reasons which it gave for doing so. In my judgment the learned Munsif and not the lower Appellate Court gave the true grounds for dismissing this claim. I would therefore dismiss this appeal with costs.

Varma J. — I agree. Mr. S. N. Bose for the appellants has laid great stress upon the decision in 41 C W N 534¹ and I should like to examine the reasons given in that judgment for allowing the suit to be deemed to have been filed after the date of registration. The reasons which I gather from the judgment are these; that the plea of non-registration was not taken till the second hearing began, that the plaint was allowed to remain on the file till the date of registration and that the view which the learned Judge took in holding that the plaint should be deemed to have been filed after the date of registration was in accordance with justice. Looking at all these reasons separately and collectively, I find that they may be very good grounds for creating sympathy in favour of the plaintiff, but they do not supply any legal reasons for getting round the provisions of Sec. 69 (2), Partnership Act, which have been declared to be imperative. No reason appears to have been given in that judgment for the proposition that a plaint which is filed on one date may under certain circumstances be deemed to have been filed on a subsequent date. The case which has been referred to in that judgment is the case in 21 C W N 209.⁷ But that was a case under the Bengal Tenancy Act. The reasons given in that judgment would be applicable to the facts of the present case only by analogy and it is needless to say that arguments by analogy are not always safe. For these reasons, I fail to see any

reason in that judgment for extending the Provisions of Sec. 69 (2), Partnership Act, which are imperative. I agree with the view expressed in A I R 1935 Lah 893,³ A I R 1935 All 898,⁶ A I R 1938 Lah 767⁴ and A I R 1936 Mad 991⁵ and dismiss the suit. The trial Court dismissed the suit on this ground but the lower Appellate Court relying on the Calcutta Weekly Notes decision held that although the suit was not maintainable, it should be deemed to have been filed on a date subsequent to the date of registration. For the reasons given in the earlier part of this judgment I would uphold the view of the trial Court on this point. The appeal is dismissed with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1939 Patna 242****ROWLAND AND CHATTERJI JJ.***Bansidhar Shroff and others —**Appellants.*

v.

Thakur Ashutosh Deo Ghatwal and another — Respondents.

Appeal No. 89 and Civil Revn. No. 260 of 1937, Decided on 23rd November 1938, from original order of Sub-Judge, Deoghar, D/- 6th April 1937.

(a) Civil P. C. (1908), S. 47—Profits of Ghatwali Estate attached by decree-holder—Order rejecting decree-holder's objection to certain items in budget of estate falls under S. 47 and is appealable.

An order passed in disposing of an objection by creditors-decree-holders at whose instance the surplus profits of Ghatwali Estate are attached against certain items in the revised budget of receipts and expenditure for the estate is an order passed under S. 47 determining matters in issue between decree-holders and judgment-debtors in the course of execution proceedings and is therefore appealable.

[P 243 C 1]

(b) Civil P. C. (1908), S. 60—Profits accruing to ghatwal is not salary — Surplus profits of Ghatwal Estate after making certain deductions can be attached.

The profits accruing to a ghatwal from his estate are not a salary within the meaning of S. 60 and are not therefore protected from attachment. The surplus profits of the ghatwali left after paying the Government revenue, the wages of chowkidars and other like charges can therefore be attached and made available for the satisfaction of debts of the holder for the time being : A I R 1924 Pat 269, Ref.; 23 Cal 873; 28 Cal 488 and 39 Cal 1010, Rel. on.

[P 244 C 1, 2]

(c) Land Tenure—Ghatwali Estate — Profits of estate attached in execution of decree—Distinction between procedure for ascertaining

7. Pran Krishna Saha v. Kripa Nath, (1919) 6 A I R Cal 755 = 35 I C 76 = 29 C L J 17 = 21 C W N 209.

and realizing rents and profits when decree is passed by Revenue Court and Civil Court—Civil Court has to appoint receiver for preparing budget which is to be finally approved by Court—Receiver in functioning his duties is to act under direction of Court.

In determining the procedure for ascertaining and realizing the surplus rents and profits of a Ghatwali Estate for the satisfaction of decree there is a distinction between the methods of administering the estate of which the profits are under attachment in execution of a decree of a subdivisional officer or inferior Court and the procedure in similar proceedings when the executing Court is a Civil Court. In the former, the budget is prepared by the revenue authorities and is to be submitted to the commissioner for settlement and final sanction. In the latter case, the Civil Court has to appoint a receiver to make an estimate of collections and expenditures of the estate which he is to submit to the Court for approval and it is the duty of the Court to pass final orders settling the budget. In collecting and disbursing the income the receiver must be acting under the directions of the Court which appointed him and not of the executive authorities : *A I R 1925 P C 176, Rel. on.*

[P 245 C 2 ; P 246 C 1 ; P 247 C 1]

S. N. Bose and Mustafi—*for Appellants.*

Dr. Sir Sultan Ahmad, Nitai Chandra Ghosh, Sudhir Chandra Ghosh and Basanta Chandra Ghosh—

for Respondents.

Rowland J.—This appeal and application arise out of execution proceedings in the Court of the Subordinate Judge of Deoghar in the Santhal Parganas. The order complained of, which is dated 6th April 1937, was passed in disposing of an objection by creditors-decree-holders at whose instance the surplus profits of the Rohini Ghatwali Estate had been attached against certain items in the revised budget of receipts and expenditure for the estate. The Subordinate Judge was of opinion that the responsibility of the preparation of the budget and the determination of the surplus available for attachment lay with the revenue authorities and not the Civil Court. Accordingly he rejected the objection without recording definite findings on its merits. Aggrieved by this decision the decree-holders have presented this appeal and application in revision, in case it is held that an appeal does not lie. We are of opinion, that the order of the Subordinate Judge being an order passed under S. 47, Civil P. C., and determining matters in issue between decree-holders and judgment-debtors in the course of execution proceedings was appealable. In Civil Revision No. 260 of 1937, the rule will be discharged. We shall proceed to consider the appeal.

The history of the case is that the prin-

cipal respondent has been the ghatwal of Rohini since 1911, and it seems that he lost no time in incurring more debt than he was in a position to pay. In 1914 he made an arrangement with Major Agabeg whereby in consideration of an advance from the latter of money to pay off his creditors, he appointed Major Agabeg as his manager. On 5th April 1917, on taking a further advance from Major Agabeg he gave him an *ijara* of the Basourhi Mahal consisting mainly of house property in Deoghar and Jasidih. The appellants are the holders of decrees against the ghatwal for debts, for the re-payment of which arrangement had not been made. They applied for the appointment of a receiver to realise the debts due to them out of the surplus income of the estate and Major Agabeg objected to this. The matter came before this Court in Miscellaneous Appeals Nos. 242 and 215 of 1918 and on 25th May 1919, this Court framed a scheme of the nature of a composition in which the principal terms were that instead of putting the estate under a receiver, Major Agabeg should be placed in charge of the entire estate without remuneration ; that for his own debts he would be entitled to appropriate the usufruct of the Basourhi Mahal and that as for the income and collections in respect of the rest of the estate, he should keep accounts and render them six-monthly to Babu Ramesh Chandra Sinha, Receiver, and make over to him the balance remaining, after deducting the collection expenditure of the rest of the estate other than the Basourhi Mahal, the Government revenue and road cess payable for the talukas other than Taluka Rohini (the latter items being payable by Major Agabeg himself). The surplus proceeds were to be distributed by the receiver to the creditors pro rata under the orders of the Subordinate Judge subject to a maintenance allowance of Rs. 350 per month to Thakur Ashutosh Deo, the ghatwal, and a remuneration of 6 per cent. to the receiver on the amount received by him for rateable distribution. This arrangement continued until 1928 when Major Agabeg reported to the Court that his dues had been satisfied and he would be prepared to continue looking after the estate as a manager and not as an *ijaradar*. He died however on 15th April 1928, and thereafter further arrangement had to be made. During the above period, the case came before this Court again in 1923 in connexion with an objection by the credi-

tors to payments having been made by the receiver on behalf of the ghatwal for charities. I shall have to refer to this matter later. In 1928 on Major Agabeg's death the Subordinate Judge made a reference to the High Court for instructions regarding the scheme and the High Court directed that one man should be appointed as manager and receiver who should give security to the Subordinate Judge. The Subordinate Judge made an appointment which was on appeal reversed by the High Court and Babu Ramesh Chandra Sinha was appointed receiver. In succeeding years, it seems that budgets were prepared in consultation with the revenue authorities and the provisions of these do not appear to have been the subject of any serious objection by the creditors until we come to this budget of the year 1937-38 which has given rise to the present appeal.

The points raised by the creditors are that the budget makes excessively liberal provisions for maintenance and other expenditure of the ghatwal himself and that the scheme having been framed by this Court, alterations should not be made in it without the consent of all parties. Objection is also taken to a passage in the judgment of the Subordinate Judge in which he compares the ghatwal's maintenance allowance to the salary of a public officer and regards it as being protected from attachment by S. 60, Civil P. C.

I will first deal with the last objection. The observation of the Subordinate Judge cannot be supported. The profits accruing to the ghatwal from his estate are certainly not a salary and S. 60, Civil P. C., does not enter into the matter at all. The question of attachability is to be decided with reference to the law regarding ghatwalis of the Birbhum type and the remedies of the creditors against them. The statutory provision regarding these ghatwalis is contained in Bengal Regulation 29 of 1814 and the incidents of such ghatwalis have been examined in a number of decisions, both of High Courts and of the Privy Council, such as in this Court in 3 Pat 339.¹ It has been long ago established that such a ghatwali is inalienable and cannot be put up to sale for the debts of its holder but it was held in 23 Cal 873,² that a decree-holder can be

allowed to attach for the satisfaction of his decree so much of the rents as may be left "after the payment of the Government revenue, the wages of the chaukidars employed by the ghatwal and other like charges." The Court held that the surplus profits, after all necessary outgoings, were to be regarded as the personal property of the ghatwal, and as such, liable to be seized and appropriated by the decree-holder. That case was followed in 28 Cal 483.³ In this case the Court below had allowed an attachment of the rents and profits and had made a prohibitory order to the ghatwal not to receive any rents and profits from the raiyats and also to the raiyats not to pay their rents to the ghatwal. The High Court held that future rents and profits could not be attached but that there would be no objection to making an order appointing a receiver to take charge of the rents and profits as they fell due from time to time. The receiver would, in that case, receive the rents as they fell due from time to time and make provision for the payment of the wages of the chaukidars and other incidental expenses. This case was followed by 39 Cal 1010,⁴ where an order appointing a receiver to collect rents and profits was affirmed. Therefore it is indisputably the law that the surplus profits of a ghatwali can be attached and made available for satisfaction of the debts of the holder for the time being.

I have next to examine the procedure in ascertaining and realising the surplus rents and profits. It is manifest that in all the above cases the Courts were careful to secure in the first instance the discharge of the obligation of the ghatwal to provide for the payment of "the Government revenue, the wages of the chaukidars and similar outgoings" before anything could become available to the creditors; but there is nothing in the decisions of this Court to indicate that the receiver would be acting under the orders and control of any authority other than that of the Subordinate Judge from whom he held his appointment. In order that the decision in 23 Cal 873² might be carried out by the local Courts and officers, a letter was issued by Mr. W. B. Oldham, the Commissioner of Bhagalpur Division, on 21st March 1897, which is reprinted in Mr. Heard's book on "Ghat-

1. *Tikait Damodar Narain Singh v. Ganga Ram*, (1924) 11 A I R Pat 269=76 I C 8=3 Pat 339=5 P L T 34.

2. *Raj Keshwar Deo v. Bunshidhur Marwari*, (1896) 23 Cal 873.

3. *Uday Kumari Ghatwalin v. Hari Ram Saha*, (1901) 28 Cal 483.

4. *Keshobati v. Mohan Chandra Mandal*, (1912) 39 Cal 1010=14 I C 227=16 C W N 802.

wali and Mulraiyyati Tenures" and is referred to by the learned Subordinate Judge as laying down the procedure which is to be followed in such cases. The letter deserves careful reading; it deals with two classes of cases; one comprises those in which the decree sought to be executed has been obtained in one of what are called the Santhal Civil Courts. These are Courts from whose decision appeal lies to the Deputy Commissioner and in respect of whom the functions of a High Court are discharged by the Commissioner of Bhagalpur Division. In that class of cases the Subdivisional Officer, the Deputy Commissioner and the Commissioner are the sole authorities both for securing the necessary outgoings, the safeguarding of the performance by the ghatwals of their duties and also for the execution of the decree. It was considered sufficient to direct in the letter that the Subdivisional Officer shall discharge his duty in the customary way. The other class is of cases in which the decree is made or attachment ordered by a Court under the Calcutta High Court, i. e. the Subordinate Judge's Court. Here the Commissioner's letter directs another course to be taken. It is said :

The Subdivisional Officer will at once file before it (the Court) an attested copy of this order with prayer that no proceedings might be taken till it is ascertained what part of the proceeds of the ghatwali mahal is the 'necessary outgoings' referred to by the High Court's decision above quoted and what part under the same decision, his profits or personal properties.

It is also the duty of the Subdivisional Officer to report the case to the Deputy Commissioner who will, in turn, report it to the Commissioner. Para. 3 of the letter directs the Subdivisional Officer to ascertain and inform the Civil Court what are the proceeds of the ghatwali mahal and what portion of them is required for the performance of the police duties and for the 'necessary outgoings', and what portion is 'profits' or personal property.

To ascertain what portion of the proceeds is "required", reference is to be made to the actual expenditure incurred annually by the ghatwal in discharging the duties specified in his muchalka and for the support of the Police. Mr. Oldham's letter goes on to state that :

The Subdivisional Officers have no concern with the stipulated rents assessed on the ghatwali mahals or with cesses due by them to Government, and in the present connexion, these dues are considered to belong to the profits of the ghatwals and not to that portion of their proceeds which is required for the efficient performance of the Police duties and which cannot be the subject of a private decree or attachment.

It would seem that what Mr. Oldham contemplated was something very different from the preparation of a complete budget by the revenue authorities; on the contrary, his instructions limit the function of the Subdivisional Officer to reporting to the Court the amount of the Government demands for which the Court in dealing with the rents and profits is bound to make provision and the amount of which is not deemed to be private property of the ghatwal. It is particularly to be noticed that even stipulated rents or cesses are to be excluded from the public demands reported by the Subdivisional Officer to the Court which means they are expected to be arranged for by the Court itself out of the profits or personal property of the ghatwal. I have referred already to the scheme sanctioned by the High Court in 1919 and it may be pointed out that it contains special directions for the particular case and not anything in the nature of general rules and procedure governing similar attachments. But in that connexion a question of procedure did arise in 1923 when the creditors appealed to the High Court against the order of the Subordinate Judge overruling their objections to the accounts submitted by the receiver. It was observed in this Court that various sums of monies were said to have been paid by the receiver for charities and it was stated that "the learned Subordinate Judge must exercise some control over the ghatwal and over the receiver."

Whenever the ghatwal does make any application for grant of any sum of money to him for any particular purpose, the Court before acceding to the application must examine the circumstances with care and attention. There are various creditors to the estate and it is necessary that justice, if possible, should be done to the creditors before generosity is shown.

This passage makes it perfectly clear that the responsibility lay on the Subordinate Judge, that is to say, the Civil Court, under the directions of this Court, for permitting any sums to be paid for charitable and similar objects. Between 1923 and 1928 it appears that the practice was to submit the budget to the Deputy Commissioner and the Commissioner for sanction and that in some of these years alterations were apparently directed by the Commissioner to be made in the budget and the budget was amended accordingly. It is possible that the distinction was not clearly borne in mind between methods of administering an estate of which the profits were under

attachment in execution of a decree of a Subdivisional Officer or inferior Court and the procedure in similar proceedings when the executing Court is a Subordinate Judge. The procedure followed in referring the budget to the Commissioner for settlement and final sanction appears to be the procedure "appropriate" to the former class of cases. In 1928, when after Major Agabeg's death fresh arrangement had to be made, an order was passed by the Subordinate Judge on 18th September 1928, appointing a receiver, vesting him with certain powers, fixing his remuneration and giving him the following directions for the administration of the property.

The receiver will, as soon as possible, ascertain the profits and necessary outgoings and submit to this Court for approval at once and subsequently every year an estimate of collections and expenditure including (1) pay and uniform of village Police; (2) other Government dues, (3) dues decreed against the ghatwal, and (4) maintenance of ghatwal and his family including maintenance in proper condition of the residence of the ghatwal. Items 1 and 2 are of course the first charge upon the estate.

From this order an appeal was presented to the High Court, which is Miscellaneous Appeal No. 176 of 1928 and was disposed of on 28th January 1929. The terms of the appointment of the receiver would, it was said, be settled by the Subordinate Judge. These instructions make it clear that it is for the receiver to make an estimate of collections and expenditure which he is to submit for the approval of the Court and it is the duty of the Court to pass final orders settling the budget. In 1930 there appears to have been some difference of opinion between the creditors and the receiver as to the amounts which should be allowed in the budget under certain heads. The Subordinate Judge passed orders on 11th January 1930, dealing with these objections on merits. With the consent of the majority of the creditors the personal allowance of the ghatwal was raised from Rs. 350 to Rs. 400 per month. It does not seem to have been doubted so far that the Subordinate Judge was the proper authority for dealing with the objections and for settling the budget or that the amount of the ghatwal's allowance could be raised without the creditors being heard in the matter. As far as I can ascertain, it is for the first time in the order now under appeal that the view is put forward that the Court as a Court has no authority and no responsibility in settling details of the budget and determining the amounts to be paid to the ghatwal as

maintenance and to be expended on religious, charitable and other objects connected with the management of the estate. The contention of the creditors is thus stated in the order under appeal :

The expression 'necessary outgoings' according to the petitioners ought to include only chaukidar's dues and other dues incidental for the proper performance of the duties imposed on the ghatwal by his muchalka and kabuliyat. According to the argument put forth, the Sub-Divisional Officer and other officers are not concerned with other sums required to be spent such as ghatwal's allowance, receiver's remuneration, etc. Their contention is that these are matters for the Subordinate Judge to decide and not for the revenue or executive authorities.

Sir Sultan Ahmad in the course of his argument for the respondent, the ghatwal, pointed out that the Government or the Commissioner was not represented before us in the hearing of this appeal and suggested that an opportunity should be given to Government or the Commissioner to be heard before any finding or decision adverse to the jurisdiction of the executive authorities was recorded. I do not think it necessary to stay our hands in the disposal of the appeal before us. If Government had wished to enter an appearance in these proceedings, they could have done so as the proceedings have been pending for a year and a half. It is not suggested that there has been any authoritative pronouncement on behalf of Government or the Commissioner modifying the letter of Mr. Commissioner Oldham, on which the Subordinate Judge relied and we rely also. I may say that Sir Sultan Ahmad in the course of the argument for the respondent appears to have placed before us all the considerations which it was likely to be possible for the Government itself to raise. In my opinion the contention of the appellants is well founded. The Commissioner, Mr. Oldham's letter on which the Subordinate Judge relies, does not support his conclusions. I must invite the particular attention of the Subordinate Judge to the direction that the Sub-Divisional Officer is to have regard to "the actual expenditure incurred annually by the ghatwal in discharging the duties specified in his muchalka and for the support of the police" and to the passage where it is explained that "the portion of the proceeds which is required for the efficient performance of the police duties" is not considered to include even cesses due to Government or the stipulated rents assessed on the ghatwali mahals, with which it is said: "the Sub-Divisional Officers have

no concern", these being expenses to be met by the ghatwal out of his personal income.

Perhaps the lower Court has been impressed with the idea that all the rents and profits capable of being attached in execution will have to be distributed to creditors, and that expenditure on such matters as cesses, cost of collection maintenance of the ghatwal himself and of property, such as, bungalows, tanks, roads etc., which are by law or custom to be maintained by the estate will be impossible unless the necessary funds are exempted from attachment. This is not the correct view. On the attachment of so much of the income of the property as represents the surplus income of the ghatwal, over and above the matters excluded under Mr. Oldham's letter, it is the duty of the Court to make provision for the appropriate expenditure under these heads, out of the attached income. The procedure in dealing with the attached income may be compared with that approved by the Privy Council in 47 All 385,⁵ where the property sought to be attached was the rents and profits of sixteen villages which had been assigned to the judgment-debtor in lieu of maintenance. The procedure which their Lordships approved was the appointment of a receiver for realising the rents and profits of the property paying out of the sum a sufficient and adequate sum for the maintenance of the judgment-debtor and his family and applying the balance to the liquidation of the creditor's debts. In this case also the receiver was spoken of as taking the place of the debtor and acting as an officer subject to the directions of the execution Court in collecting and disbursing the debtor's income. If any other authority was necessary, this confirms us in the view that in collecting and disbursing the income, the receiver must be acting under the directions of the Court and not of the executive authorities.

It is now clear that the order of the Subordinate Judge in so far as he refused to enter into the merits of the objections of the creditors to particular items in the budget was erroneous and cannot be supported. He should have examined and dealt with the objections of the creditors on the merits. The principal objections taken were first to the allowances made to the ghatwal personally for his maintenance and expenses. Whereas his allowance was fixed at

5. (1925) 12 A I R P O 176=87 I O 295=47 All 885=52 I A 262 (P O).

Rs. 350 per month in the scheme sanctioned by this Court in 1919 and was raised to Rs. 400 in 1930 with the consent of the majority of the creditors, it has now been budgeted for at Rs. 700, together with additional grants for Poojah Rs. 500, Holi Rs. 250, Mansik and Basanti Rs. 100, unforeseen expenditure Rs. 1420, medical Rs. 580 and house rent Rs. 300, total Rs. 11,550 per annum. Secondly, that whereas the allotment for upkeep of tanks, bandhs, roads, etc., was in former years Rs. 1000, it has been raised to Rs. 2500. Thirdly, that the general collection and administration expenses absorb 31 per cent. of the gross income and the estate ought to be more economically managed. And generally whereas in former days out of a gross income of about Rs. 41,000 the creditors used to get about Rs. 23,000, the present budget allows them out of a gross income of Rs. 67,000, a dividend of less than Rs. 20,000 with an expectation of its being still further reduced. The figures, if correct, are disquieting: the more so as they appear to have been arrived at in some ex parte proceeding in which the creditors did not even get a hearing. At the same time, we find ourselves in this difficulty that the materials on which the propriety of each particular item of expenditure can be determined are not before us, and therefore we are not in a position to come to a finding as to which items ought to be reduced or excluded. Ordinarily, in such a case, the proper course would be a remand to the Court of first instance for the necessary findings of fact but to do that in the present case would be substantially infructuous, because, the budget, the preparation of which has given rise to this appeal, was for the year 1937-38 and realisation and disbursements must presumably have been already made and completed in pursuance of this budget. All we can do in the present case, therefore, is to set aside the judgment of the Subordinate Judge and direct that in future, he should proceed with the preparation of the budget in accordance with the observations contained in this judgment and in the earlier judgments of this Court to which reference has been made. In the circumstances of this case, parties will bear their own costs; any order that we may make for costs against the judgment-debtor would be substantially infructuous.

Chatterji J.—I agree.

N.S./R.K.

Order accordingly.

* A. I. R. 1939 Patna 248

FULL BENCH

HARRIES C. J., WORT, JAMES, AGARWALA
AND MANOHAR LALL JJ.

Brij Behari Lal — Petitioner.

v.

Firm Srinivas Ram Kumar and others
— Opposite Party.

Civil Revn. No. 649 of 1937, Decided on
9th March 1939, from order of Addl. Dist.
Judge, Shahabad, Arrah, D/- 17th Septem-
ber 1937.

* Civil P. C. (1908), O. 21, R. 90 (1), Proviso
(i), Cls. (a) and (b) (Patna) — Scope of Proviso
explained — “Unless applicant deposits with
his application such amount etc.”—Meaning of
— Deposit made after presentation of applica-
tion but before admission is deposit made with
the application — Application if not accom-
panied by deposit cannot be rejected — Oppor-
tunity must be given to applicant— On facts
application held was properly admitted on date
of deposit — Court held should have heard ap-
plication on merits and adjudicated upon it.

The substituted Proviso (i) to sub-rule 1 of R. 90
places conditions not upon the presentation of the
application for setting aside sale but upon its ad-
mission. Admission of application presumably
means that stage when Court decides to issue
notices to the opposite parties. By the terms of
the Proviso such application cannot be admitted
unless the provisions of sub-cls. (a) and (b) of
Proviso (i) are complied with. Those sub-clauses
contemplate that an application cannot be ad-
mitted until some inquiry, no matter how per-
functory, is made by the Court. [P 249 C 2 ;
P 250 C 1]

The words “unless the applicant deposits with
his application such amount, etc.” do not mean
“unless the applicant deposits at the time of mak-
ing the application, 12½ per cent. of the sale pro-
ceeds, or such other sum or security as the Court
has previously directed,” nor do the terms of the
Proviso make it clear that an application to dis-
pense with the deposit or for leave to deposit less
than 12½ per cent. of the sale proceeds or to give
some other security, must be made before an appli-
cation for setting aside the sale. [P 250 C 2]

The applicant can be said to deposit with his
application a sum of money or other security even
if he does it after he has presented the application
and there is no justification for the view that an
application to set aside the sale unaccompanied
by a deposit is a defective application which de-
fect cannot be cured unless the deposit is made
within 30 days of the sale, because there is noth-
ing in the Rule to suggest that admissions must
take place within limitations nor does the wording
of the substituted Proviso suggest that if no depo-
sit is made at the time of presenting the applica-
tion, the application should be accompanied by a
further one to dispense with deposit or for leave
to deposit a lesser amount or other security.
Therefore a deposit made after an application is
filed and after 30 days from sale but before admis-
sion of application would be deemed to be a depo-
sit made with the application within the meaning
of the Clause (b) of the substituted Proviso (i).
[P 250 C 2 ; P 251 C 1]

Where no deposit accompanies an application to
set aside a sale the Court has no power to reject
such application forthwith. On the other hand,
it must give the applicant an opportunity to urge
that the deposit should be dispensed with or to
deposit the full or lesser amount or other security
before some date fixed for admission. If the orders
of the Court are complied with, the application
must be admitted and heard upon the merits pro-
vided that it complies also with the substituted
Proviso (i) (a). [P 250 C 1 ; P 252 C 1]

An execution sale was held on 4th August 1936.
Application for setting aside the sale was made on
2nd September 1936 but without deposit. The ap-
plication was forthwith registered as a miscellane-
ous application and notices were issued to the
opposite parties. On 10th October 1936 the appli-
cant applied to the Court to accept a deposit of
12½ per cent. of the proceeds of sale. On 14th
October 1936 the sum was deposited in Court. The
Court actually accepted the deposit. At a later
stage the opposite party raised an objection that
as no deposit was made along with the application
as required by Cl. (b) of the substituted Proviso,
the application was time-barred. The Court upheld
the objection and dismissed the application :

Held that even though the original admission
of the application could not be justified, the ac-
ceptance of the deposit by the Court and the
subsequent proceedings thereon clearly showed that
the application was properly admitted on the date
of deposit. Hence the Court was thereafter bound
to hear the application on merits and adjudicate
upon it. [P 251 C 2]

Mahabir Prasad, Tarkeshwar Nath and
P. N. Gaur — *for Petitioner.*

Sir Sultan Ahmed and B. N. Rai —
for Opposite Party.

Harries C. J. — This is a petition for
revision of an order of the learned District
Judge of Shahabad affirming an order of
the learned Munsif of Sasaram dismissing
the petitioner's application to set aside a
certain auction sale which was held on 4th
August 1936. The petition came in the
first place, before Wort J., who referred it
to a larger Bench. James and Agarwala JJ.
being of opinion that the points involved
were of considerable importance, referred
the matter for the constitution of a larger
Bench. Accordingly the petition was heard
by this Full Bench of five Judges. The ap-
plication to set aside the sale, which is
dated 2nd September 1936, was made by
Brij Behari Lal who was a person entitled
to share in a rateable distribution of the
sale proceeds and was an application under
O. 21, R. 90, Civil P. C. The application
was registered in the Court of the learned
Munsif as a miscellaneous case, and notices
were served on the opposite party. On 14th
October 1936, the petitioner Brij Behari
Lal deposited in Court a sum amounting to
12½ per cent. of the sale proceeds, and on
25th May 1937, the application came on

for hearing before the learned Munsif. The opposite parties took a preliminary objection that as no sum was deposited with the application to set aside the sale as required by the Rule within 30 days from the date of the sale, the application was barred by time. The learned Munsif upheld this preliminary objection and on appeal the learned District Judge affirmed the decision of the Court below and dismissed the application. It has been contended before this Court that in dismissing the application the Courts below were clearly wrong and that this is a case in which revision lies. As I have stated, the application to set aside the sale was one under O. 21, R. 90, Civil P. C. This Rule has been amended by this Court, and the amended Rule, under which the application was made, is in these terms :

(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it :

(i) Provided that no application to set aside a sale shall be admitted unless

(a) it discloses a ground which could not have been put forward by the applicant before the sale was concluded, and

(b) the applicant deposits with his application such amount not exceeding $12\frac{1}{2}$ per cent. of the sum realized by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit.

(ii) Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(2) In case the application is unsuccessful the costs of the opposite party shall be a first charge upon the deposit referred to in Proviso (i) (b), if any.

The present Provisos have been substituted by this Court for the original Proviso to the Rule. It will be seen that by reason of Proviso (i) (b) no application to set aside a sale is to be admitted unless the applicant deposits with his application, such an amount not exceeding $12\frac{1}{2}$ per cent. of the proceeds of the sale or such other security as the Court in its discretion may fix unless the Court dispenses with the deposit altogether. In the present case the petitioner deposited neither a sum of money nor gave any security nor did he on or before making the application apply to the Court to dispense with the deposit. On 10th October 1936 however the petitioner applied to the Court to accept a deposit of $12\frac{1}{2}$ per cent.

of the sum realized by the sale, and upon this application the Court made an order to issue a chalan. On 14th October 1936 the sum was actually deposited in Court. An application to set aside a sale must be made within thirty days from the date of the sale: see Limitation Act, 1908, Sch. 1, Art. 166. The sale took place on 4th August 1936, and as the application to set aside the sale was made on 2nd September 1936, it was within thirty days of the sale. The deposit however was not made until 14th October 1936, which was long after the expiry of the period of thirty days from the date of sale. It was urged by the opposite parties in the Courts below that where the deposit had not been dispensed with by the Court, an application accompanied by no deposit was no application at all within amended O. 21, R. 90, and that the defect in the application could not be cured by a deposit made on 14th October 1936, because an application on that date was clearly barred by limitation. As I have stated, the Courts below accepted this contention and dismissed the application. Counsel for the petitioner has contended before us that the application to set aside the sale in this case was within time and should have been decided on the merits. Alternatively, he has contended that the amendment made by this Court to O. 21, R. 90, Civil P. C., requiring a deposit is ultra vires the rule-making power of the Court and therefore void. If Proviso (i) (b) which is part of the amendment made by this Court is void, then clearly the application was within time, as the Rule as it originally stood required no deposit to be made with the application.

In the first place, I shall deal with the contention that the present application complied with the provisions of amended O. 21, R. 90, Civil P. C., and was within limitation. At the outset it must be observed that the substituted Proviso (i) to sub-rule (1) of O. 21, R. 90, Civil P. C., places conditions not upon the presentation of an application to set aside a sale but upon its admission. The words of the substituted Proviso are "provided that no application to set aside a sale shall be admitted unless . . ." Admission of the application presumably means the stage when the Court decides to issue notice upon such application to the opposite parties concerned. By the terms of the substituted Proviso such application cannot be admitted unless the provisions of sub-cl. (a) and (b) of Proviso

(i) are complied with. In my view this substituted Proviso contemplates that after an application to set aside a sale has been presented, an inquiry must be made by the Court, because the Proviso directs that (a) no such application shall be admitted unless it discloses a ground which could not have been put forward by the applicant before the sale, and (b) the application must be accompanied with a deposit of 12½ per cent. or such less sum or other security as the Court may direct, unless, for reasons to be recorded, the Court has dispensed with security. It appears to me that an application cannot therefore be admitted until some inquiry, no matter how perfunctory, has been made by the Court. If a deposit of 12½ per cent. has been made at the time of presentation of the application, the Court must admit the application provided Proviso (i) (a) has been complied with. If, on the other hand, the application has not been accompanied by any deposit, must the Court refuse forthwith to admit it and accordingly reject it, or should the Court direct, unless it dispenses with the security altogether, a deposit to be made or security to be given before a date fixed for admission? In my view the Court must follow this latter course. Substituted Proviso (i) (b) requires that no application shall be admitted unless the applicant deposits with the application such amount not exceeding 12½ per cent. of the proceeds of the sale or such other security as the Court may fix unless the Court dispenses altogether with any such deposit. Do the words "unless the applicant deposits with his application such amount" mean that the applicant must deposit the amount at the time he makes his application or do they mean that at some stage or another, unless the Court dispenses with the deposit, a sum must be deposited with the application which has already been made? The learned District Judge appears to have thought that Proviso (i) (b) is very similar to the provisions of the Proviso to the amended Sec. 17 (1), Provincial Small Cause Courts Act. That Proviso is in these terms :

Provided that an application for an order to set aside a decree passed *ex parte*, or for a review of judgment, shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed.

By the terms of this Proviso it is clear

that the deposit must be made at the time the application is presented, because it is expressly stated that such must be the case. Further, it is expressly provided that if the applicant wishes to give security instead of depositing money, a previous application must be made to the Court in this behalf and the applicant must deposit such security as the Court directs when presenting his application. It is to be observed that no such express words appear in the substituted Proviso (i) (b) to O. 21, R. 90, Civil P. C. It has been contended that the wording of this substituted Proviso (i) (b) contemplates a deposit of 12½ per cent. of the sale proceeds with the application unless the Court has directed on a previous application that a deposit be dispensed with or that a smaller deposit or some other security be given. The terms of the substituted Proviso however do not make it clear that an application to dispense with the deposit or for leave to deposit less than 12½ per cent. of the sale proceeds or to give some other security must be made before the application to set aside the sale is made. It must be inferred, if such contention be sound, that the words "unless the applicant deposits with his application such amount &c." mean unless the applicant deposits at the time he makes his application 12½ per cent. of the sale proceeds or such other sum or such other security as the Court has previously directed. I am not prepared to place such a construction upon these words. In my view the applicant can be said to deposit with his application a sum of money or other security even if he does it after he has presented the application. In my judgment if a sum of money or other security is deposited with a view to ensuring the admission of an application, such can be said to be deposited with the application, provided such deposit is made before the date of admission. The learned Munsif appears to have thought that the deposit need not be made at the time the application is presented. In his view if no deposit is made at the time of presentation of the application to set aside the sale, then a further application to dispense with the deposit or for leave to deposit a smaller sum or other security should accompany the application to set aside the sale. Further, he was clearly of opinion that an application to set aside a sale unaccompanied by a deposit was a defective application and that such defect could not be cured unless a deposit was made within 30 days of the sale. In

his view admission of the application was bound to take place within the period of limitation.

In my judgment there is no justification for this view as there is nothing in the Rule to suggest that admissions must take place within the period of limitation. Further, the wording of the substituted Proviso in no way suggests that in the event of no deposit being made at the time the application is presented, the application should be accompanied by a further one to dispense with the deposit or for leave to deposit a lesser sum or other security. The view of the learned Munsif that admission must take place within the period of limitation is further open to a very grave objection. The point of time when the application is admitted depends upon the Court, and if admission must be within limitation, an applicant might find his application dismissed by reason of the failure of the Court to deal with it within 30 days of the sale. Such can never have been the intention of the framers of this Rule. The learned District Judge appears to have thought that the substituted Proviso contemplated a deposit of 12½ per cent. in every case at the time when the application to set aside the sale was presented. In his view, if the applicant desired that the deposit should be dispensed with or that he should be permitted to deposit a lesser sum or other security, an application should be made to the Court to that effect. In other words, the learned District Judge appears to have thought that 12½ per cent. of the proceeds must first be deposited and then an application made for leave to dispense entirely with the deposit or to reduce the amount of such deposit or to substitute some other security for it. In my judgment this view also cannot be sustained. Obviously, the framers of the substituted Proviso contemplated that nothing need be deposited in cases in which the Court thought that no deposit was necessary and that a lesser sum or other security could be deposited when the circumstances warranted the Court taking that view. Clearly, the framers of the Rule never contemplated that in every case a deposit of 12½ per cent. should first be made and then steps should be taken to have such deposit dispensed with or reduced.

Unless the view which I have expressed of the meaning of the words "deposits with his application" is accepted, extraordinary results might ensue. If the substituted

Proviso means that the applicant must in every case deposit at the time he makes his application 12½ per cent. of the proceeds or such other sum or security as the Court may direct, then if an application is made without any deposit and a deposit of 12½ per cent. is subsequently made within thirty days of the sale and before admission, such application would have to be rejected, because the deposit was not made at the time the application was presented. In my view, if a deposit of 12½ per cent. is made after the application is filed but within thirty days of the sale, such would clearly be a deposit made with the application. Why, therefore, should not a deposit, made after thirty days of the sale but before admission be a deposit made with the application? In my judgment all that this substituted Proviso requires is that before admission the necessary sum of money or security unless dispensed with must be deposited. The applicant can then be said to have deposited with his application such deposit or security within the meaning of the substituted Proviso. The Limitation Act only requires that the application be made within thirty days of the sale, and in my view there is nothing in the substituted Proviso to suggest that the money or other security must be deposited within limitation. The substituted Proviso is complied if such is made before actual admission and the date of admission cannot be governed by the Limitation Act. As I have stated earlier in this judgment, this application was registered as a miscellaneous case immediately upon presentation, and it has been argued that rightly or wrongly the application was admitted and that it was not open to the learned Munsif at a later stage to question his own order. There is some force in this contention; but it is unnecessary to decide the point because at a later stage the trial Court actually accepted a deposit of 12½ per cent; on 10th October 1936, the present petitioner applied for leave to deposit a sum equal to 12½ per cent. of the sale proceeds and the Court issued a chalan and the money was actually deposited. Even if the original admission of this application could not be justified, the acceptance of this deposit and the subsequent proceedings clearly show that the application was properly admitted at the date of the deposit and the Court was bound thereafter to adjudicate upon it.

For the reasons which I have given, I am satisfied that where no deposit accom-

panies an application to set aside a sale, the Court has no power to reject such application forthwith. On the other hand, it must give the applicant an opportunity to urge that the deposit should be dispensed with or to deposit the full or lesser amount or other security before some date fixed for admission. If the orders of the Court are complied with, the application must be admitted and heard upon the merits provided that it complies also with the substituted Proviso (i) (a). In the present case the Courts below should have exercised the jurisdiction vested in them and heard this application upon its merits. Having regard to the view which I have taken, it is unnecessary for me to consider the second contention of the petitioner, namely that the amendment made by this Court to O. 21, R. 90, Civil P. C., is ultra vires the rule-making powers of this Court, as the question does not arise. Counsel for the petitioner relied upon a Full Bench case of the Rangoon High Court in I L R (1937) Rang 268.¹ For the reasons which I have given, I prefer to leave the consideration of this question open and to decide the matter in a case where the decision of such point is essential. The result therefore is that I would allow this petition, set aside the orders of the Courts below and remand the case to the Court of the learned Munsif through the Court of the District Judge with a direction that the application should be heard and determined on the merits according to law.

Wort J.—I agree.

James J.—I agree.

Agarwala J.—I agree.

Manohar Lall J.—I agree.

N.S./R.K.

Petition allowed.

1. O. N. R. M. M. Chettyar v. Central Bank of India Ltd., (1937) 24 A I R Rang 419=172 I C 102=1937 R L R 268 (F B).

A. I. R. 1939 Patna 252

MOHAMMAD NOOR AND DHAVLE JJ.

Haluman Prasad Mahaseth —

Petitioner.

v.

Puran Tatma — Opposite Party.

Civil Revn. Petn. No. 384 of 1938, Decided on 16th December 1938, from order of Munsif, Second Court, Madhubani, D/- 30th April 1938.

Abwab—Law as to abwab is not changed by amendment of Bihar Tenancy Act—Kathiari is not abwab and is not illegal.

The law as to abwab has not been changed by the recent amendment of the Bihar Tenancy Act. What was abwab before, is abwab now and what was not an abwab before has not been made an abwab by the new Act. The only modification in this connexion has been as to the nature and amount of punishment for exacting an illegal abwab. Kathiari is payable by the weavers to their landlords not on the basis of land occupied by them but on the basis of looms which they work on the land. In other words, it is a rent payable not on the basis of the area of the land occupied but on the basis of the work which is to be done on that land. Kathiari is not an abwab and is therefore not illegal : *A I R 1917 Pat 652, Ref.*

[P 252 C 2]

Badri Prasad Mahaseth and B. B. Saran
— *for Petitioner.*

Order.—This application in revision is directed against a decree of the learned Munsif of Madhubani passed in a suit for rent of 1341 to 1344 Fasli. As the value of the suit was less than Rs. 50 and the learned Munsif was vested with powers under S. 153, Ben. Ten. Act, no appeal lay against the decree and the petitioner who was the plaintiff in the suit has come up in revision. The plaintiff claimed rent at the rate of Re. 1-15-0 per annum including cess and also including 12 annas per annum as kathiari. The defendant admitted that he had been paying 12 annas as kathiari but asked the Court that if he could get relief under the law from the payment of kathiari he should get it, otherwise he had no objection in paying it. The learned Munsif has held kathiari to be an abwab and has therefore disallowed it and passed a decree at the rate of Re. 1-3-0 only. The learned Munsif seems to be under an erroneous impression that the law as to abwab has been changed by the recent amendment of the Bihar Tenancy Act. This is not so. What was abwab before is abwab now and what was not an abwab before has not been made an abwab by the new Act. The only modification in this connexion has been as to the nature and amount of punishment for exacting an illegal abwab. The question therefore for consideration is whether kathiari is an abwab.

Kathiari is payable by the weavers to their landlords not on the basis of land occupied by them but on the basis of looms which they work on the land. In other words, it is a rent payable not on the basis of the area of the land occupied but on the basis of the work which is to be done on that land. It comes in the same category as the money realized by the landlords for the use and occupation of land at fairs at the rate of so many annas per animal

according to whether the animals exposed for sale are horses, camels, elephants or bullocks. In some cases the Settlement Department after investigation as to the history and nature of kathiari have entered it in the Record of Rights. A case like this came up before this Court where it was held to be an amount which was legally payable to the landlord. (See the case in 37 I C 813.¹) The Glossary of the Survey and Settlement Department published by Government describes kathiari as the synonym of bithouri or mutarfa. In the remarks column it is mentioned that literally it is a consideration for settling. Mutarfa is ground rent and kathiari profession-tax according as the settlor takes up cultivation or merely trade. Bithouri may be either mutarfa or kathiari. It is practically rent for homestead land based on the profession which is carried on, on that land. The learned Munsif has not approached this case from this point of view. He has started with an idea that kathiari is illegal. In the plaint the plaintiff clearly stated that under the Record of Rights he was entitled to get Re. 1-15-0 which included kathiari also. The learned Munsif apparently did not examine the Record of Rights, and had he done so and if the statement of the plaintiff was borne out by the Record of Rights, it would have been obvious to him that this was not an abwab.

The case is therefore remanded to the learned Munsif. He will call upon the plaintiff to produce the Record of Rights, and if the rent there is Re. 1-15-0, whether the kathiari be mentioned or not, the decree will be at that rate. If it appears that the homestead land was otherwise belagan and that the kathiari is payable in respect of it, the plaintiff will be entitled to a decree for it. If the tenancy was created after the Record of Rights was published and this kathiari was one of the terms on which the land was settled, the plaintiff is obviously entitled to it. If these conditions do not exist, the plaintiff will not be entitled to a decree, not on the ground that it is an abwab but on the ground that it is in excess of the settled rent. The application is allowed, but as there has been no appearance on behalf of the opposite party, there will be no order for costs.

D.S./R.K.

Application allowed.

1. Bhagwati Prasad v. Mahbub Momin, (1917) 4 A I R Pat 652=87 I C 813.

A. I. R. 1939 Patna 253

WORT AND AGARWALA JJ.

Badrul Hassan and others—Petitioners.
v.

Bibi Hakeemunnissa and others—

Opposite Party.

Civil Revn. Petn. No. 249 of 1938, Decided on 11th October 1938, from order of Munsif, Sitamarhi, D/- 5th April 1938.

Civil P. C. (1908), O. 21, R. 100—Purchaser of transferable holding can apply under O. 21, R. 100.

A purchaser of a transferable holding is not a representative of the judgment-debtor and therefore prima facie has a right to apply under O. 21, R. 100: *A I R 1938 Pat 559, Rel. on.* [P 253 C 2]

Janak Kishore—for Petitioners.

Hareshwar Prasad Sinha and Rajeswari Prasad—for Opposite Party.

Wort J.—This rule is directed against the order of the Munsif dated 5th April 1938, allowing an application under O. 21, R. 100, Civil P. C. The applicant was purchaser of a part of a holding and, having regard to the decision of the Privy Council we must hold that it was a holding which was transferable by reason of the retrospective nature of the Bihar Tenancy Act, the holding was transferred in 1920. Quite apart from the question whether any point of jurisdiction arises, it is much too late in the day to contend that the decisions of this Court to the effect, that a purchaser of a non-transferable holding or a portion thereof is a representative of the judgment-debtor but a purchaser of a transferable holding is not a representative of the judgment-debtor, are wrong. Therefore having regard to the decision of the Judicial Committee, it must be taken as law that the applicant in this case was not a representative of the judgment-debtor and therefore prima facie had a right to apply under O. 21, R. 100. The question to some extent was gone into by a decision to which I was a party: 17 Pat 333.¹ Mr. Janak Kishore on behalf of the petitioner frankly admits that that decision is one which he cannot distinguish so far as the law is applicable in this case. He contends however that the only right the applicant had was to be put into possession or to resist the possession of the landlord under O. 21 R. 100, but to pay off the judgment-debtor under S. 74, Bihar Tenancy Act. On the plain provisions of that Section however, it is clear to me that the Section does not apply. That being so and having regard to

1. Thakur Rai v. Issardayal Pershad, (1938) 25 A I R Pat 559=179 I C 104=17 Pat 333.

the decision of this Court that the purchaser of a transferable holding is not the representative of the judgment-debtor, it is impossible for us to hold in this revisional application that the learned Judge had no jurisdiction to entertain the application under O. 21, R. 100. For those reasons I would discharge the rule with costs; hearing fee one gold mohur.

Agarwala J.—I agree.

D.S./R.K.

Rule discharged.

A. I. R. 1939 Patna 254

JAMES J.

Dwarka Prosad — Petitioner.

v.

Krishna Chandra and others —

Opposite Party.

Civil Revn. No. 488 of 1938, Decided on 16th November 1938, from order of Munsif, Arrah, D/- 3rd August 1938.

Court-fees Act (1870), S. 7 (iv) (c)—Classification—There is no distinction between recovery of possession and confirmation of possession—Suit to set aside sale in execution and confirmation of possession—Value of suit is value of land.

For purposes of classification under S. 7 (iv) (c) no distinction is to be drawn between a suit for confirmation of possession and a suit for recovery of possession : *A I R 1923 Pat 137, Rel. on.*

[P 254 C 2]

Therefore in a suit for a declaration that a decree is obtained by fraud and for a consequential relief that the sale in execution of the decree should be set aside and that possession of the plaintiff may be confirmed, the value of the suit is the value of the land: *A I R 1931 Pat 195, Expl.; A I R 1932 Pat 9, Ref.*

[P 254 C 2]

Sarjoo Prasad and Tarkeshwar Nath —
for Petitioner.

H. P. Sinha and K. P. Varma —
for Opposite Party.

Order.—In this case we are concerned with the question of jurisdiction, and as affecting the question of jurisdiction with questions of classification under S. 7, Court-fees Act, and S. 8, Suits Valuation Act. Certain villages, formerly the property of the plaintiffs' family, have been sold in execution of a decree, and I am told that delivery of possession has been made though on this point the plaint is silent. The suit is instituted by members of the family other than the person who took the loan, praying for a declaration that the decree was obtained by fraud and for the consequential relief that the sale in execution may be set aside and the plaintiffs' possession confirmed. The plaintiffs have valued their suit at the amount which was realized at the court sale, which would place the

suit within the jurisdiction of the Munsif. The Munsif has accepted this valuation; but the defendants object that on a proper valuation of the suit, the Munsif would not have jurisdiction.

The suit is a suit praying for confirmation of possession of certain land. It was held in 4 P L T 71¹ that such a suit is to be regarded as a suit for possession that is to say, for purposes of classification under S. 7 (iv) (c), Court-fees Act, no distinction is to be drawn between a suit for confirmation of possession and a suit for recovery of possession. In a suit in which the consequential relief is confirmation or recovery of possession of land, the value of the suit is the value of the land, though a question may arise as to how the value of the land is to be calculated after the recent amendment of sub-s. 5 of S. 7, Court-fees Act. The learned Munsif was gravely in error in imagining that the rule followed in the Patna High Court is that in a suit falling under S. 7 (iv) (c), Court-fees Act, the plaintiff may place his own value on the suit without any regard to the real value of the relief which he claims. The very case which he cites as supporting this view, *A I R 1931 Pat 195*² lays down the rule that the value of a suit under S. 7 (iv) (c) is the value of the relief claimed and that the plaintiff is not entitled to place on that relief any value which may please him. He is mistaken in supposing that in that case the plaintiff was permitted to value his suit at Rs. 40, the original value which he placed on it. The value was placed by this Court at Rs. 300 and court-fee had to be paid on that amount. The attention of the Munsif should have been drawn also to the decision in 11 Pat 161³ wherein the question was discussed by Scroope and Macpherson JJ. The rule affecting suits instituted for the purpose of setting aside decrees is simple. Where the suit is instituted before execution, the value of the suit is the value of the decree. Where the suit is instituted after property has passed by execution proceedings, the value of the suit is the value of the property. In the present case the first two villages described in the plaint if

1. *Ram Sekhar Prosad v. Sheonandan Dubey*, (1923) 10 A I R Pat 137=68 I O 316=2 Pat 198=4 P L T 71.

2. *Sitaram Singh v. Kesho Prasad Singh Bahadur*, (1931) 18 A I R Pat 195=131 I O 808=12 P L T 550.

3. *Ramcharitar Pandey v. Basgit Rai*, (1932) 19 A I R Pat 9=133 I O 687=11 Pat 161=12 P L T 656.

they were valued under S. 7 (v) would have a value of Rs. 6346 without any reference to the third village which is there mentioned. The suit is therefore not within the jurisdiction of the Munsif, and he should return the plaint for presentation to a Court having jurisdiction after the plaintiffs have properly amended the valuation. This application is allowed with costs: Hearing fee two gold mohurs.

N.S./R.K.

Application allowed.

A. I. R. 1939 Patna 255

JAMES J.

Bindeshry Singh — Appellant.

v.

Pergas Singh and others—Respondents.

Appeal No. 218 of 1937, Decided on 22nd November 1938, from decision of Sub-Judge, Patna, D/- 10.12.1936.

Promissory Note — Hand-note, executed in satisfaction of previous hand-note, altered — Promisee cannot sue on basis of original consideration— Admission that hand-note originally executed satisfied previous one cannot be used to revive his right to sue on original hand-note.

Where a hand note, executed in satisfaction of a previous hand-note, is altered by the promisee, he is not entitled to sue on the basis of original consideration and cannot utilize the admission that a hand-note as originally executed satisfied the previous hand-note as in any way reviving his right to sue on the original hand-note. The promisor must be treated as exonerated from all liability : 33 Cal 812, *Rel. on.* [P 255 C 2; P 256 C 1]

S. N. Rai and B. N. Rai—*for Appellant.*

B. N. Mitter and Ajit K. Mitter —

for Respondents.

Judgment.—The suit out of which this appeal arises was instituted for recovery of the amount due on two hand-notes, one for the sum of Rs. 100 and the other for Rs. 1460. The defendants' liability on the hand-note for Rs. 100 was admitted, and in respect of that amount with interest the suit was decreed. We are not concerned with that hand-note.

For the claim on the hand-note for Rs. 1460, the defence was that on 30th Assin 1340, a hand-note had been executed for Rs. 460, and Rs. 325 had been paid in cash by which the plaintiff's dues on two hand-notes of 1338 had been satisfied. The defendants claimed that the amount payable under the hand-note of 1340 had been altered to Rs. 1460 and that the date had been altered to 1341. The plaintiffs endeavoured to prove the authenticity of the hand-note which they produced by proof of the existence of debts amounting to Rs. 1460 for which it was executed; but in

this they failed; and the Courts have found that the hand-note on which the plaintiffs sued was the hand-note of Rs. 460 subsequently altered by the plaintiffs in such a manner as to amount to forgery. The trial Court dismissed the whole claim on this hand-note; but on appeal the Subordinate Judge allowed the plaintiffs' claim for Rs. 460 on the ground that the defendants had admitted that the sum was due and that by admitting the execution of the hand-note of 1340, they had proved that they had given a written acknowledgment of liability under the hand-notes of 1338. The defendants appeal from that decision, while the plaintiffs prefer a cross-objection against the findings that there had been alterations in the hand-note and that the debts amounting to Rs. 1460 had not been proved. Regarding the plaintiffs' cross-objection, it may be said at once that these points are concluded by the findings of fact of the Court below and the questions cannot again be agitated in second appeal.

For the defendant-appellants, Mr. S. N. Rai argues that when it was found that the hand-note had been fraudulently altered, the plaintiffs should have been granted no relief, and the description by the defendants of the manner in which the original hand-note had been executed could not properly be treated as an admission that they were still liable on the hand-note of 1338. Mr. S. N. Rai relies principally on the decision of this Court in 11 Pat 782¹ which followed a decision of the Calcutta High Court in 33 Cal 812.² Mr. B. N. Mitter suggests that the account given by the defendants in their written statement should be treated as an admission that by an acknowledgment in writing made in 1340 they gave further life for the purpose of limitation to the hand-notes executed in 1338 but as Mr. S. N. Rai points out, there is nothing in the written statement which amounts to an admission that the defendants did this. The defendants described how the hand-notes of 1338 were satisfied by the hand-note which they executed for Rs. 460 but they claim that in view of the alteration in the hand-note, they must be treated as exonerated from all liability. It appears to be clear that the argument of Mr. S. N. Rai must prevail, and the deci-

1. *Ram Autar Sukul v. Baldeo Sukul*, (1932) 19 A I R Pat 352=140 I O 895=11 Pat 782.

2. *Gour Chandra Das v. Prasanna Kumar Chandra*, (1906) 38 Cal 812 = 3 C L J 368 = 10 C W N 789.

sion of the learned Subordinate Judge on this point was not correct. The question of whether a person who had altered an instrument could be entitled to succeed on the basis of the original consideration and to rely upon the altered bond as embodying an acknowledgment sufficient to save the bar of limitation was considered in 33 Cal 812² where it was held that this could not be done. The hand-notes of 1338 were satisfied by the hand-note which was executed in 1340 and after the execution of the hand-note of 1340 the plaintiffs could no longer sue on the hand-notes of 1338. The plaintiffs by their own fraudulent act chose to destroy their promissory note of 1340 and they cannot utilise the admission that a hand-note as originally executed satisfied the hand-notes of 1338 as in any way reviving their right to sue upon those original hand-notes. The appeal must therefore be allowed and the cross-objection dismissed. So much of the decrees of the lower Courts as direct the payment of Rs. 460 with interest and of corresponding costs will be set aside. The appellants are entitled to their costs in this Court and corresponding costs in the Courts of the Subordinate Judge and the Munsif.

D.S./R.K.

*Appeal allowed;
Cross-objection dismissed.*

A. I. R. 1939 Patna 256

AGARWALA J.

*Lalbehari Singh and others
Petitioners*

v.

Emperor.

Criminal Revn. No. 700 of 1938, D/- 16th January 1939, against order of Dist. and Sess. Judge, Darbhanga, D/- 5th November 1938.

Penal Code (1860), S. 341—In searching for kidnapped girl persons coming across covered cart and stopping it bona fide believing girl to be in it—Owner of cart accused of kidnapping girl and police called for—On search girl not found in cart—Persons are not guilty of wrongful restraint.

Where police are searching for a girl who is alleged to have been kidnapped, persons assisting the police must be careful not to interfere with the rights of other people. But where such persons coming across a covered cart, stop it on a bona fide belief that the girl is in it and so accuse the owner of the cart and insist upon calling for the police, but upon search the girl is not found in the cart, such persons are not guilty of wrongful restraint because their action is a bona fide attempt to prevent the girl being kidnapped and they cannot therefore be said to have intended any harm.

[P 256 C 2]

S. M. Gupta and S. P. Srivastava —
for Petitioners.

Hasan Jan — *for the Crown.*

Order. — The three petitioners have been convicted under S. 341, I. P. C., and sentenced to pay a fine of Rs. 20 each or to undergo simple imprisonment for three weeks each in the following circumstances. The police were looking for a girl who was alleged to have been kidnapped. The complainant was seen accompanying a covered bullock cart out of the village where the parties reside, on 25th May 1938. As a matter of fact he was taking his wife, sister-in-law and two children to another village to attend a marriage of his sister-in-law's daughter. The petitioners stopped the cart accusing the complainant of having the kidnapped girl under the covering. The complainant denied this but the petitioners insisted upon sending for the police and, when the latter arrived, the brother of the kidnapped girl was sent for and he was permitted to look inside the complainant's bullock cart but reported that his sister was not there; the complainant was then permitted to proceed. On these facts the petitioners have been convicted and sentenced as stated above. It is contended on their behalf that this is a case to which S. 79, I. P. C., applies, namely that they acted bona fide and with due care and with no intention of committing any offence. At their trial they endeavoured to prove that it was a constable who stopped the complainant's cart and that they merely took a subsequent part in the affair. But that evidence has not commended itself to the Courts below. There is no enmity alleged between the petitioners and the complainant, although it appears that the master of the petitioners has had civil litigation with the complainant. There is no doubt that the police were looking for a girl who was alleged to have been kidnapped and, although persons assisting the police must be careful not to interfere with the rights of other people, I find it difficult to believe in the circumstances of this case that the petitioners intended any harm. To me it seems that their action was a bona fide attempt to prevent what they genuinely believed to be the taking away of the girl whom the police were looking for. In the circumstances therefore I would set aside the convictions and sentences.

N.S./R.K.

Convictions set aside.

A. I. R. 1939 Patna 257

WORT J.

*Akhju Pandey and others —**Defendants — Appellants.*
v.*Rameshwar Pershad Singh and others*
— Plaintiffs — Respondents.

Appeals Nos. 246 and 284 to 286 of 1937,
Decided on 16th November 1938, from
appellate decrees of Dist. Judge, Monghyr,
D/- 23rd December 1936.

**Landlord and Tenant — Suit for rent — All
tenants made parties—Claim by one tenant for
abatement of rent enures for benefit of all.**

Where in a suit for rent all the tenants are
made parties, one tenant is capable of advancing
the claim for abatement of rent on behalf of
others and if he establishes his case, the benefit of
that case enures to other tenants as well : *A I R*
1933 Pat 607; A I R 1928 Cal 548 and A I R
1920 Cal 168, Expl. and Disting. [P 258 C 1]

G. P. Shahi — *for Appellants.*B. C. Sinha — *for Respondents.*

Judgment. — These are a number of
appeals both by the landlords and tenants,
that is to say appeals and cross-appeals.
The actions out of which the appeals arise
were actions for rent for the years 1339 to
1342; and although all the tenants were
made parties, one of the tenants alone
advanced the case that the tenants were
entitled to an abatement of rent by reason
of the fact that the irrigation system of the
village had been neglected and that the
land had consequently deteriorated. It,
I should think, went without saying that
if it were established that the irrigation had
been neglected the land would necessarily
suffer until proper repairs were effected;
and I suppose to that extent, it could not
be said that the deterioration was of a
permanent character.

The trial Judge on the plea of the ten-
ant-defendant I have spoken of, allowed an
abatement of 8 annas but on appeal to the
District Judge that was reduced to 2 annas
in the rupee. The learned District Judge
advanced many reasons for coming to his
conclusion amongst which were the facts
that the tenants had not complained until
the rent suit had been brought which was
a matter of surprise to him if the Com-
missioner's report could be accepted; and
secondly, on his view of the evidence as
I understand the judgment, the irrigation
system was not quite in the state of dis-
repair which the trial Judge seemed to
think.

1939 P/33 & 34

It is abundantly clear to me that in the
Court below the main question was whether
the tenants were entitled to the 8 annas
which had been allowed by the trial Court
or not. Perhaps that is the reason why the
Judge did not expressly state any conclu-
sion as to whether the land had deterior-
ated. But, as I have already stated, if the
case is once established that the necessary
irrigation scheme had been neglected, it
would necessarily follow that the land
deteriorated. I see no ground for inter-
fering with the decision of the Judge in
the Court below and I agree with the
reasons which he has advanced for reducing
the rent from 8 annas to 2 annas in the
rupee. There was hardly anything else
which the Judge could have done in the
circumstances of the case.

Mr. Sinha on behalf of the landlords
contends in his cross-appeals that the ten-
ants were not entitled to any abatement at
all not only for the reason that the facts
did not justify any abatement, a matter
with which I have already dealt, but also
because only one out of a number of ten-
ants had advanced this case of abatement.
Mr. Sinha relies for his contention on the
decision in 14 P L T 603¹: I say he relies
upon that case and a number of cases
quoted in that decision, a decision of my
brother Dhavle for the proposition he
advances. All I need say is that the case
has nothing to do with the point. That
was a case in which there were a number
of persons who were tenants of the holding,
and during the pendency of the appeal one
of the tenants had died and there had been
no substitution. It in no way dealt with
the question whether one tenant on behalf
of himself or on behalf of other tenants
was entitled to raise the question of abate-
ment; it merely discussed the question
whether the right which the tenants had
was joint or several or what was it. If it
was a joint right and in the circumstances
the right of action did not survive, then it
was perfectly clear that in the Appellate
Court no relief could be given: otherwise,
there would be two conflicting judgments.
The cases upon which Dhavle J. relied
were similar cases, the chief one being the
decision of the Calcutta High Court in 55
Cal 676² where Page J. in delivering the

1. *Kesho Prasad Singh v. Mahesardayal Misir*,
(1938) 20 A I R Pat 607=148 I O 1087=14
P L T 603.

2. *Rishee Case Law v. Golam Ali*, (1928) 16
A I R Cal 548=111 I O 111=55 Cal 676.

judgment of the Court stated that some only of the tenants were parties. In course of the judgment he states :

One of the two tenant-defendants has not appeared. The other has pleaded that he is entitled to an abatement of rent on account of diluvion. The fact of diluvion has been established. It appears however that there are two other co-tenants of the holding who are not parties to the suit.

Page J. does not dispose of the point as to what would happen if they all were parties and indeed it would be, in my judgment, a foregone conclusion; a co-sharer landlord suing for rent, it has been held, must join his co-sharer landlords. If he were not entitled to join them as defendants to the suit, they refusing to be joined as plaintiffs, the landlord's right would be frustrated and he could not obtain the remedy which he would otherwise be entitled to. The same with the tenants; as long as they are parties to the suit, one is capable of advancing the case of abatement at all. A suit may be dismissed although the defendants do not appear. It is the duty of the Court to decide what are the facts of the case and if there is anybody to put forward the case that the land has deteriorated on account of neglect of the irrigation scheme, the benefit of that fact, if it be established, enures to all the tenants and not merely those who have advanced the case. In my judgment, neither does the decision of this Court nor of the Calcutta High Court nor that in the case in 30 C L J 203³ which again was a case in which one of the parties had died, supports the proposition that one tenant cannot on behalf of the others put in a plea of abatement. When I say 'on behalf of others', I do not refer to the question of agency, but merely to the fact that if one tenant establishes his case, the benefit of that case enures to other tenants as well.

In my judgment for the reasons I have stated, the appeals and the cross-appeals must both be dismissed with costs.

D.S./R.K.

*Appeals and
cross-appeals dismissed.*

3. Narendra Nath v. Satyadhan Ghosal, (1920)
7 A I R Cal 168=54 I C 396=30 C L J 203.

A. I. R. 1939 Patna 258

MANOHAR LALL J.

*Rup Narain Pandey and another —
Appellants.*

v.

*Sheo Sagar Tewari and others —
Respondents.*

Appeal No. 680 of 1937, Decided on 5th January 1939, from appellate decree of Sub-Judge, Arrah, D/- 17th July 1937.

(a) Gift—Unregistered gift of land does not create title in donee's favour—By non-payment of rent for 12 years donee cannot claim prescriptive right to hold land rent free.

An unregistered gift deed cannot be used to create a title to land in favour of the donee nor does the fact that donee has not paid rent for more than 12 years create a prescriptive right in the donee to hold the land as rent free. [P 259 C 1]

(b) Landlord and Tenant — Landlord mortgaging holding with possession cannot create right in tenant to hold land rent free.

A landlord who mortgages the holding with possession has no right whatsoever left in him to create, even if he did want to create a right in the tenant to hold the land rent free as a tenant. Such a right can be given only by a mortgagee in possession but even that would not be binding against the mortgagor unless the settlement is made bona fide in the ordinary course of management. [P 259 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 153 — Question in suit as to amount of rent annually payable or as to liability to pay rent—Suit falls under Sec. 153—Second appeal is competent.

Where the question between the parties to a suit is as to the amount of rent annually payable for a holding or as to the title to hold land free from liability to pay rent, the landlord asserting that certain amount of rent is due while the tenant in reply asserting that no amount of rent is due as he is holding the land rent free, such a case falls under S. 153 and does not therefore bar a second appeal : *A I R 1916 Pat 138 ; A I R 1936 Cal 328 and A I R 1925 Pat 294, Rel. on.* [P 260 C 1]

Harians Kumar — for Appellants.

*D. N. Varma and Akhauri Badri Nath
Sinha — for Respondents.*

Judgment. — This is an appeal by the plaintiffs arising out of a suit for recovery of bhaoli rent for the plaintiffs' share for the years 1339 to 1342 Fasli in respect of the holding situated in village Ahraw in which the plaintiff is a rehandar by virtue of a rehan created in his favour in the year 1916. The defence is that the lands are bishunprit rent-free lands and no rent is payable to the maliks on the basis of an unregistered danpatra deed bearing date 25th Chait 1326, Fasli, corresponding to 1919, and since then the defendant is in

possession of the suit lands without payment of rent to the maliks. It will be noticed that the lands are alleged to have been created free from the liability to pay rent after the rehan was executed. The trial Court granted a decree to the plaintiffs fixing the quantity of paddy at the rate of 10 maunds a bigha and paira keraw at the rate of $1\frac{1}{2}$ maunds a bigha on the sale rates given by the plaintiffs. Damages were also awarded at $6\frac{1}{4}$ per cent. with future interest at six per cent. The defendant then appealed to the learned Subordinate Judge of Arrah who rightly held that the claim for the years 1339 to 1340 was barred by limitation. The learned Subordinate Judge however held that the lands were rent-free. Hence the appeal before me.

It was admitted before me that no valid gift could be founded on an unregistered document and that the unregistered deed of danpatra was inadmissible in evidence. The learned Judge himself came to the same conclusion but he relied upon a number of cases which he has quoted in the judgment for the proposition that the unregistered deed could be used in evidence for a collateral purpose. That is undoubtedly correct, but the learned Judge has used the unregistered deed not for a collateral purpose but for the very purpose for which the statute forbids the user. The only collateral purpose to which this unregistered deed could be used was to show that the defendant entered into possession in 1326; but this is not denied. I fail to understand how the unregistered danpatra could be used to create a title in favour of the defendant nor does the fact that the defendant has not paid any rent for more than 12 years create a prescriptive right in the defendant to hold the disputed land as rent-free. In the present case, it is unnecessary to consider this matter any further because upon the finding that the plaintiff was a rebandar and therefore in possession from 1916, the mortgagor had no right whatsoever left in him to create, even if he did want to create a right in the defendant to hold the land rent-free as a tenant. Such a right could be given only by the mortgagee in possession but even that would not be binding against the mortgagor unless the settlement was made bona fide in the ordinary course of management. For these reasons, the decision of the learned Subordinate Judge cannot be upheld. The plaintiffs will be entitled to a decree for the bhaoli rent for the years 1341 and 1342 Fasli only.

Regarding the quantity of produce, the trial Court, as already pointed out, had fixed the rate of paddy at 10 maunds a bigha and paira keraw at $1\frac{1}{2}$ maunds a bigha. Instead of remanding the case and putting the parties to unnecessary harassment, I have, on hearing the parties, decided that for the years in suit, the quantity of paddy should be fixed at 6 maunds a bigha and paira keraw at $1\frac{1}{2}$ maunds a bigha. The sale rates will be as fixed by the trial Court. The decree will be prepared accordingly.

The learned advocate for the respondents took a preliminary objection that no second appeal was maintainable because the amount of rent for the years in suit was far below Rs. 100. He relied upon S. 153, Bengal Tenancy Act. A large number of cases were cited before me but I am unable to agree with this contention. The question between the parties in the present case was as to the amount of rent annually payable for the holding. The plaintiffs asserted that a certain amount of rent was due and the defendants asserted in reply that no amount of rent was due because it was rent-free. In this view, the case appears to fall under S. 153, Bengal Tenancy Act, which, in such a state of affairs, does not bar a second appeal. But, it was argued that the question here is not as to the amount of rent but as to the liability to pay rent. Now, if that is so, it makes no difference, because, then the question would appear to be a question as to title to hold the land free from liability to pay rent. A similar question was decided by a Division Bench of this Court in 20 C W N 1352.¹ In that case the plaintiff had brought a suit for rent, the value of which was less than Rs. 100 against the defendants on the ground that she, the plaintiff, was a raiyat of the land and that the defendants were her under-raiyats and liable to pay rent to her. The defendants denied that they were under-raiyats under the plaintiff but pleaded that their father had purchased the land from the heir of the admitted previous raiyat of the land and had been holding the land as the raiyat of the landlord. In other words, they denied liability to pay rent. The Courts below concurrently held that the plaintiff was in possession for a large number of years and that the defendants failed to prove that they ever held the land as raiyat of the landlord. In these circumstances, it was argued that no

1. *Babua v. Sarli*, (1916) 3 A I R Pat 138 = 39 I C 233 = 20 C W N 1352.

second appeal was maintainable. The learned Chief Justice pointed out that:

It seems to me that the Courts below decided a question of title to land between parties having conflicting claims thereto and that a second appeal did lie to this Court.

In another case which was cited on behalf of the appellants reported in A I R 1936 Cal 323² the identical question which arises in the present case has been decided. The learned Judges in that case pointed out that:

Where the Court will have to decide whether rent payable is a certain amount, or in the alternative, nothing at all, the question is of the amount of rent payable annually by the tenant, and as such second appeal is competent.

In another case decided by this Court reported in A I R 1925 Pat 294³ a Letters Patent Bench of this Court presided over by the learned Chief Justice pointed out that:

Where, in defence to a suit for rent, it is pleaded by the tenant that the rent claimed by a landlord in respect of fruit trees is not payable, the question is one relating to the amount of rent payable and second appeal is allowable.

For these reasons the appeal is allowed and the decision of the trial Court is restored subject to the variation pointed out above. The plaintiffs will be entitled to interest till the date of realization and proportionate costs throughout.

N.S./R.K.

Appeal allowed.

2. Sabaratulla Sheikh v. Manikjan Bibi, (1936) 23 A I R Cal 323=166 I C 750.

3. Rameshwar Singh v. Wazul Haque, (1925) 12 A I R Pat 294=78 I C 463.

A. I. R. 1939 Patna 260

JAMES AND CHATTERJI JJ.

Jugal Kishore Prasad Singh and others
— *Plaintiffs* — Appellants.
v.

Manaka Singh and others —
Defendants — Respondents.

Appeal No. 449 of 1935, Decided on 8th November 1938, from appellate decree of Addl. Dist. Judge, Muzaffarpur, D/- 14th December 1934.

Civil P. C. (1908), S. 47—Bar of suit—If execution of decree for possession is barred by limitation, fresh suit by decree-holder for same purpose is also barred—Mere inundation of land does not amount to dispossession of judgment-debtor or constructive possession of decree-holder so as to create fresh right to sue.

Where the plaintiffs, who obtain a decree for possession of land which is submerged under water during rainy season due to inundations of a river but can be cultivated in the rest of the year, do not take possession of it until execution of the

decree is barred by limitation but file a fresh suit for the same purpose, it cannot be said that when the land becomes submerged under water there is any dispossession of the defendants by vis major or that the plaintiffs enjoyed constructive possession of the land which can give them a right to institute a new suit which is barred under S. 47: 29 Cal 518 (P C) and A I R 1917 P C 18, *Dist. ing.*; A I R 1925 P C 334, *Foll.*; A I R 1922 Pat 407, *Ref.* [P 261 C 1]

P. R. Das, S. M. Mullick and Harihar Prasad Sinha — *for Appellants.*

P. C. Manuk, N. K. Prasad II, Rajkishore Prasad, M. Yasin Yunus and Ram Anugrah Prasad — *for Respondents.*

James J.—On 23rd December 1924, the plaintiffs obtained a decree for recovery of possession of certain land on the banks of the Ganges. The defendants were left in possession until execution of the decree was barred by limitation: and the plaintiffs then in September 1932 instituted the suit out of which this appeal arises, praying again for recovery of possession of this land. On the face of it, the suit appeared to be barred by the provisions of S. 47, Civil P. C., but the plaintiffs alleged in their plaint that their right had remained intact, because the land in suit was submerged under water during the rainy season in almost every year. The Courts have found that the land was subject to annual inundation which interfered with the cultivation of the land during the rainy season but the suit has been dismissed on the ground that the plaintiffs had never actually recovered possession and therefore the provisions of S. 47, Civil P. C., barred the suit.

Mr. P. R. Das on behalf of the plaintiff-appellants argues that on the findings of the Appellate Court, it ought to have been held that whenever inundation occurred, the plaintiffs actually acquired possession of the land in suit so that it was not necessary for them to enter upon the land or to obtain execution of their original decree. He relies upon the decision of the Judicial Committee in 29 Cal 518¹ wherein it was held that when possession of alluvial land was interrupted by the destruction of the land by fluvial action, the adverse possession of the occupiers ceased, and it was remarked that then the constructive possession of the land was in the true owner. Their Lordships were in that case dealing with an instance of the washing away of land for a considerable time by fluvial

1. Secy. of State v. Krishnamoni Gupta, (1902) 29 Cal 518=29 I A 104=8 Sar 269=6 C W N 617 (P C).

action. But on behalf of the appellants reference is made to the decision of the Judicial Committee in 44 I A 104² wherein the Judicial Committee was dealing with alluvial land in the course of re-formation *in situ*. It was held then that the possession of the person who occupied the land when it re-appeared *in situ* was interrupted so long as submergence occurred for several months in each year. In the present case, it does not appear from the pleadings or the findings that there was anything of these annual inundations to attract the operation of the provisions of Regn. 11 of 1825 or calling for the application of the law regarding alluvion and erosion. All that has been pleaded and proved is that since 1924 the river has, during the rainy season, overflowed its banks and flooded this land in such a manner as to make agricultural operations impossible during the period of inundation. The learned District Judge has pointed out that one of the crops of the year has been spoilt on account of those submersions; but, it appears that for the rest of the year, the land has been cultivated in the ordinary course. The principles laid down in these decisions which have been quoted which apply to land affected by changes in the course of rivers, cannot, in our judgment, be properly applied to land lying on the banks of a river which merely spills over its bank during the annual rainy season in times of flood. It cannot, in our judgment, be properly held in such circumstances that there was any dispossession by vis major of the defendants, or that the plaintiffs at that time enjoyed constructive possession such as would give them a right to institute a new suit.

That being so, the suit is barred by the provisions of S. 47, Civil P. C. The only proper remedy open to the appellants was by proceedings in execution of their decree; and that remedy was barred by the provisions of the Limitation Act: 52 Cal 314.³ I would dismiss this appeal with costs.

Chatterji J.—I agree. The grounds on which the plaintiffs want to get over the bar of S. 47, Civil P. C., is that when the lands in suit became submerged under water, the plaintiffs came into constructive

possession and thereby the decree was satisfied. To my mind, when a decree for recovery of possession has been obtained, it cannot be satisfied unless the decree-holder gets actual possession of the land. Take, for instance, a case where under a decree a plaintiff is entitled to recover actual possession of the land but by process of execution he takes what is called symbolical possession only, although he could recover actual possession through Court. In such a case he cannot subsequently bring a fresh suit on the allegation that he has been dispossessed from the land. In this connexion I may refer to a decision of this Court in 1 Pat 157,⁴ where the plaintiff having already got symbolical possession of land in execution of a previous decree brought a fresh suit on the allegation that he was dispossessed and his allegation not being proved, it was held that the fresh suit was barred by S. 47, Civil P. C. It is not the plaintiffs' case here that since the decree was passed on 23rd December 1924, the lands in suit became altogether diluviated or, in other words, became derelict. In that case different considerations perhaps might have arisen but the plaintiffs' clear and distinct allegation in para. 1 of the petition for amendment of the plaint was that the land in suit remained submerged under water during rainy season almost every year for certain period of time. On this allegation it is impossible to hold that the land became derelict, so that it was not at all necessary for the plaintiffs to apply for execution in order to recover possession of the land decreed to them in the previous suit.

S.G./R.K.

Appeal dismissed.

4. Sovani Jena v. Bhim Ray, (1922) 9 A I R Pat 407=87 I C 251=1 Pat 157.

A. I. R. 1939 Patna 261

FAZL ALI J.

Firm Nokhlal Sarju Prasad —

Petitioner.

v.

Mt. Bibi Mojihan — Opposite Party.

Civil Revn. No. 196 of 1938, Decided on 15th September 1938, from order of Small Cause Court Judge, Patna, D/. 21st February 1938.

Limitation Act (1908), Art. 60—Plaintiff's father depositing money with defendant—After his death plaintiff obtaining succession certificate and suing defendant for her share in deposit—Defendant alleging transaction to be

2. Basanta Kumar Roy v. Secy. of State, (1917) 4 A I R P O 18=40 I C 387=44 Cal 858=44 I A 104 (P O).

3. Sasi Sekhakeswar Ray v. Lalit Mohan Maitra, (1925) 12 A I R P O 34=86 I C 245=52 Cal 314=52 I A 79 (P O).

loan — Trial Court finding that amount was deposited for fixed period — Claim held governed by Art. 60—After expiry of fixed period, amount deposited was to be deemed amount payable on demand—Court had jurisdiction to decide real nature of transaction.

The plaintiff after the death of her father obtained a succession certificate and brought a suit to recover her share in money alleged to have been deposited by her father with the defendant. The defendant alleged that the amount in dispute represented a loan and was not a deposit and relied upon a statement made by one of the plaintiff's witnesses to that effect in a previous suit. It was found by the trial Court that the amount was deposited for a fixed period :

Held that after the expiry of the fixed period, the amount deposited was to be deemed payable on demand by the depositor and the claim for recovery of the money was governed by Art. 60. That even if the plaintiff's witness took a mistaken view of the transaction and described it as a loan, that did not in law prevent the trial Judge from determining whether the money in question represented a loan or a deposit, nor did it alter the legal rights of the parties. *A I R 1935 Mad 734, Rel. on ; A I R 1931 All 59, Not foll.* [P 262 C 2]

C. P. Sinha — *for Petitioner.*

Safdar Imam and M. Rahman —
for Opposite Party.

Order. — This application is directed against a decree passed by the Small Cause Court Judge of Patna in favour of the plaintiff. The plaintiff is admittedly the daughter of one Ulfat Hossain who appears to have deposited a certain sum of money with the defendant during his lifetime. The plaintiff after the death of her father obtained a succession certificate and brought this suit to recover her shares in the deposit. The main plea which was taken up in the suit by the defendant was that the suit was barred by limitation. In order to determine this plea, the Court had to decide whether the suit was governed by Art. 50 or Art. 60, Limitation Act. The learned Judge held that it was governed by Art. 60 and that it was not barred by limitation. Another point which was raised on behalf of the defendant and which also had a bearing on the question of limitation was whether the suit had been brought within three years of the time when "the demand was made." This point also was decided by the learned Judge in favour of the plaintiff.

The learned advocate for the petitioner contends that the finding of the learned Sm. C. Court Judge on both these issues is not correct. As to the application of Art. 60, it is contended that the money which is in dispute represented a loan and not a depo-

sit and reliance is placed on the statement made by one of the witnesses for the plaintiff in a previous suit to the effect that the plaintiff's father had lent the money to the defendant. But when that witness was examined in the present suit, his attention was not drawn to that statement, nor was he asked to explain it. In his deposition in the present suit he has clearly stated that the plaintiff's father had deposited the money in respect of which the suit had been brought and the learned Small Cause Court Judge has definitely found that it was a deposit and not a loan. It must be observed that even if the plaintiff's witness took a mistaken view as to the nature of the transaction and misdescribed it as a loan, that would not in law prevent the Judge from determining whether the money in question represented a deposit or a loan, nor would it alter the legal rights of the parties. The first point raised by the petitioner therefore fails.

It was also contended that as the learned Judge has found that the amount in question was deposited by Ulfat Hossain for a fixed period, it was payable after the expiry of that period and not on demand and therefore Art. 60 did not apply. This view is supported to some extent by the decision of the Allahabad High Court in *A I R 1931 All 59*¹ where it was held that Art. 60 does not apply to a suit for recovery of money deposited under an agreement that it shall be payable at a specified time. The learned Judges who decided that case did not however indicate what other Article would be applicable. On the other hand, in *A I R 1935 Mad 734*,² it was held in circumstances similar to those which are to be found in this case that after the expiry of the fixed period, the amount deposited must be deemed to be payable on demand to the depositor and therefore the claim for such money was governed by Art. 60, Limitation Act.

The next point which was urged on behalf of the petitioner was that the suit was barred by limitation because the plaintiff's witness had admitted in his statement in the previous suit that the money had been demanded by Ulfat Hossain during his lifetime. Ulfat Hossain admittedly died more than three years before the suit, but

1. *Bank of Upper India v. Arif Husain*, (1931) 18 A I R All 59=128 I C 772=1930 A L J 1157.

2. *Murugappa Chetti v. Ramanathan Chetti*, (1935) 22 A I R Mad 734=157 I C 274.

the plaintiff's witness has explained in his present deposition that what he meant by the statement was that the plaintiff's father had demanded interest only. The learned Small Cause Court Judge has on a consideration of the entire evidence found that there is no evidence to show that any demand was made more than three years before the institution of the suit and that the real demand was made by a notice dated 7th May 1937. This finding cannot be reversed in revision and if this finding is correct, there can be no doubt that the suit was correctly decided by the Small Cause Court Judge.

I therefore dismiss this application with costs. Hearing fee one gold mohur.

R.M./R.K. *Application dismissed.*

*** A. I. R. 1939 Patna 263**

VARMA J.

Paryag Sahu — Petitioner.

v.

Babu Chandrachur Deva and others —
Opposite Party.

Civil Revision No. 200 of 1938, Decided on 4th November 1938, against order of Munsif, Second Court, Beguserai, D/- 25th January 1938.

* (a) Civil P. C. (1908), O. 21, Rr. 100 and 101 — Mortgagee of tenant is not his legal representative and is not bound by litigation against mortgagor—He can apply under O. 21, Rule 100.

A mortgagee of a tenant cannot be said to be a legal representative of the tenant within the meaning of R. 101, Civil P. C., and is not bound by the results of litigation against the mortgagor tenant. The mortgagee is therefore entitled to maintain an application under O. 21, R. 100 : *A I R 1914 Cal 580, Foll.; Case law discussed.* [P 268 O 2]

(b) Civil P. C. (1908), S. 115—Failure to exercise jurisdiction owing to wrong interpretation of law—High Court whether will interfere depends on facts of each case.

It depends upon the facts of each particular case whether or not the High Court will interfere in revision on the ground that by a wrong interpretation of law the lower Court has failed to exercise its jurisdiction : *A I R 1924 Pat 506 and A I R 1935 Pat 385, Ref.* [P 264 O 1, 2]

R. S. Chatterjee — *for Petitioner.*

L. K. Jha and Phulan Prasad Varma —
for Opposite Party.

Order. — This is a petition against an order passed by the learned Munsif of the Second Court at Begusarai in Miscellaneous Case No. 208 of 1937. The case of the petitioner was that he was a mortgagee and therefore he was not bound by the decree

passed against the mortgagor, or by the proceedings arising under that decree. The decree-holder contested the suit on the ground that the application was not maintainable. The Court below held that the application was not maintainable although it came to the conclusion that the petitioner was in possession of the property at the time of the delivery of possession.

In order to understand the point arising in this case, it is necessary to give a short history of the litigation. The decree-holder filed three suits for a declaration of their title and for recovery of khas possession. We are here concerned with the suit against Sipahi Paswan and others. The trial Court dismissed that suit. In the Appellate Court Sipahi Paswan compromised the suit as will be apparent from Ex. C, which is a copy of the judgment. As a result of the decree, the decree-holder took delivery of possession. The present petitioner urges that he was in possession of the property in his own right as a mortgagee by virtue of a bond Ex. 1, which was executed by one Nandlal whose heir Sipahi is. The lower Appellate Court decided that the mortgagor had no interest in the land, and therefore a mortgagee who steps into the shoes of the mortgagor is not entitled to file an application under O. 21, R. 100, Civil P. C.

Mr. Radha Shyam Chatterjee has contended referring to the wording of R. 100, O. 21, Civil P. C., and to the decision in 19 C L J 13¹ that a mortgagee cannot be said to be a legal representative of a tenant within the meaning of R. 101, O. 21, Civil P. C. He has further drawn my attention to a decision of this Court in 10 Pat 234,² where it was held that a mortgagee is not bound by the results of a litigation against the mortgagor. Mr. Lakshmi Kant Jha, appearing on behalf of the opposite party, contends that the Calcutta view has not been accepted by the Patna High Court, and he has drawn my attention to the case reported in 2 Pat L J 478,³ where it was held that a transferee of a non-transferable holding was a legal representative of the transferor. In that case their Lordships held that the word "judgment-debtor" occurring in Rules 100 and 101, O. 21, of the Code

1. Kedar Nath Bag v. Saday Chandra Nandi, (1914) 1 A I R Cal 580=22 I O 707=19 O L J 13.

2. Ghanshyam Das v. Ragho Singh, (1931) 18 A I R Pat 64 = 130 I O 257 = 10 Pat 234 = 11 P L T 898.

3. Bhikhia Jha v. Birj Behari Singh, (1917) 4 A I R Pat 597=42 I O 526=2 Pat L J 478.

includes the representatives of the judgment-debtor and also all persons who are bound by the decree against the judgment-debtor and by the sale in execution of that decree; and that the purchaser of a portion of a holding is, so far as his interest is concerned, bound by the decree for rent obtained under S. 148-A, Ben. Ten. Act, and by the sale in execution of that decree and therefore he could not apply under Rr. 100 and 101, O. 21. The principle of this decision, although not specifically mentioned, has been followed in 3 Pat L J 579.⁴ But the decision in 19 C L J 13¹ which was reported as early as in 1914 does not appear to have been referred to in either of the above two cases, 2 Pat L J 478³ and 3 Pat L J 579⁴ and I have not been referred to any decision of this Court in which that decision has been dissented from. The decision in 3 Pat L J 579⁴ was not followed in 53 Cal 913.⁵ The cases cited before me all deal with facts quite different from the facts of the present case. But the position seems to have changed after the amendment of the Bihar Tenancy Act, as will appear from the decision in 17 Pat 333⁶ to which I was a party. There, it was held that a transferee is not affected by a decree passed against the original tenants unless the transferee is made a party to the suit. There is therefore nothing in the views taken by this Court which is against the view taken in the decision in 19 C L J 13¹ and if the principle of that decision is to be referred to by implication, the decision in 17 Pat 333⁶ is in accord with that principle.

That being so, the question arises whether this is a case in which I should interfere in revision. Mr. Chatterjee refers to the decisions in 5 P L T 107⁷ and 16 P L T 311,⁸ for the purpose of showing that if by a wrong interpretation of law the Court has failed to exercise its jurisdiction, then this Court will interfere. But, on the other hand, my attention has been drawn to the decision reported in 34 C W N 577,⁹ where Rankin C. J. declined to interfere on the

ground that another remedy was open to the mortgagee. It depends upon the facts of each particular case whether or not this Court will interfere in revision on that ground. In this case I am of opinion that by a misunderstanding of the legal position the lower Court has failed to exercise proper jurisdiction. I would therefore allow this application with costs; hearing fee one gold mohur.

D.S./R.K.

Application allowed.

A. I. R. 1939 Patna 264

JAMES J.

Baidyanath Dutta — Appellant.

v.

Kanhailal Marwari and another — Respondents.

Appeal No. 225 of 1937, Decided on 14th November 1938, from appellate decree of Sub-Judge, Purulia, D/- 27th February 1937.

Set-off — Understanding between landlord and tenant that advances to landlord should be set-off against rent — Suit by landlord for rent — Claim for set-off in respect of advances not made in rent suit but in separate cross suit is legal.

Where there is an understanding between the landlord and tenant that the advances taken by the landlord from the tenant that is debts of the landlord should be set off against the rent payable to the landlord, but the landlord ignoring these advances institutes a suit for rent, the claim of set off in respect of advances not made in the rent suit but preferred by way of plaint in separate cross-suit cannot be regarded as illegal since the two claims which are claims for money are not essentially of the same nature. [P 265 C 2]

R. S. Chatterji — *for Appellant.*

S. C. Mazumdar — *for Respondents.*

Judgment.—The plaintiff in this litigation was a shop-keeper who was a tenant of the defendant. From time to time the defendant took advances of money or required cloth on credit from the plaintiff and on one occasion the plaintiff paid the municipal tax for the house which the defendant had ordinarily to pay. There was an understanding that the debts of the defendant were to be set-off against the rent payable to the defendant as the rent fell due; but the defendant ignoring these advances instituted a suit for arrears of rent against the plaintiff. It would have been open to the plaintiff under O. 8, R. 6 to make his claim by way of a set-off in the rent suit, paying court-fee on the written statement; but he preferred to institute a

4. Panchratan Koeri v. Ram Sahay Singh, (1918) 5 A I R Pat 483=43 I C 969=3 Pat L J 579.

5. Purna Chandra v. Manobini Devi, (1927) 14 A I R Cal 156=99 I C 718=53 Cal 913.

6. Thakur Rai v. Issardayal Parshad, (1938) 25 A I R Pat 559=179 I C 104=17 Pat 333.

7. Ram Kishun Singh v. Damodar Prasad, (1924) 11 A I R Pat 506=83 I C 599=5 P L T 107.

8. Harihar Prasad Narain Singh v. Gopal Saran Narain Singh, (1935) 22 A I R Pat 385=155 I C 976=14 Pat 488=16 P L T 311.

9. Bhim Naik v. Chakradhar Maity, (1930) 17 A I R Cal 348=127 I C 552=34 C W N 577.

separate cross-suit. The rent suit was decreed as also the plaintiff's suit; and the defendant, the plaintiff's landlord, has come in second appeal against the decree which is concerned with his debt to the plaintiff.

Mr. Chatterji on behalf of the defendant-appellant suggests that the learned Subordinate Judge attached too much weight to entries in the plaintiff's book of account. Before the learned Subordinate Judge it was urged that the book was not genuine because it was not produced before the Income-tax Officer; and indeed it would appear from a reply given by the plaintiff under cross-examination that he did not produce his book before the Income-tax Officer; but there is some ambiguity and the point is not clear. In argument before the learned Subordinate Judge, the signature of the Income-tax Officer was pointed out on the questioned book actually at the page in which the items affecting the defendant were found. However that may be, the learned Subordinate Judge came to the conclusion that the book was an account book kept in the ordinary course of business; and he considered that it did corroborate the oral testimony of the plaintiff, which proved that the money and goods in respect of which he claimed a decree had been paid to the plaintiff, and that the municipal tax had been paid on the plaintiff's behalf. It is suggested that the book ought not to have been taken in evidence under Sec. 34, Evidence Act; but the finding that the book was kept in the ordinary course of business, is a finding of fact which was within the province of the learned Subordinate Judge.

It is argued in the second place that the plaintiff had no cause of action because he ought to have pleaded these payments and advance by way of set-off in the suit for rent. It appears that he did in fact mention them in his written statement in that suit; but he had by that time instituted a separate suit and the two suits were not tried together, so that the question of the amount of set-off to which the tenant might be entitled was not actually in issue in the rent suit. Mr. Chatterji suggests that since it could have been pleaded and set off claimed as a defence in the rent suit, it could not be claimed in a separate suit, citing the analogy of a mortgage suit in which certain items which ought to have been brought into account were left aside and a suit was subsequently instituted in respect of them. In the present instance

the two suits went on side by side; and Mr. Mazumdar on behalf of the respondent states before me that an application was made that they might be tried together, but the application was not allowed. O. 8, R. 6, provides that the written statement containing a claim to set off shall have the same effect as a plaint in a cross suit. In the present instance the plaintiff adopted the method of preferring a plaint in a cross-suit which certainly cannot be regarded as illegal, since the two claims which were claims of money were not essentially of the same nature. If the defendant in return for these advances had granted receipts describing the advances as payments on account of rent, the matter might have been different; but as it was, it appears that there was nothing but an understanding which might or might not be regarded as having the effect of a contract and the present plaintiff was not obliged on pain of losing his advances to claim a set-off in the rent suit.

There is no merit in this appeal which must be dismissed with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 265

AGARWALA J.

Jageshur Singh and others—Appellants.
v.

Alakh Narain Singh and others —
Respondents.

Appeal No. 259 of 1935, Decided on 15th December 1938, from decision of Addl. Sub-Judge, Gaya, D/- 15th November 1934.

Lease—Construction—Settled raiyat executing zarpeshgi lease for three years—Settlement taken with object of acquiring more land for cultivation — No mention in document that lands pledged as security for repayment of advance—Document read as whole held amounted to lease for cultivating purposes — Executant held became occupancy raiyat at the end of lease.

A settled raiyat executed a zarpeshgi lease in favour of the landlord for a period of three years. The recitals in the document indicated that the object of executants in taking the land was not for the purpose of securing the repayment of the advance of peshgi money but to acquire more kasta land in the village as the lands which they had were insufficient for their maintenance. The document did not mention that the lands were pledged as a security for the repayment of the advance nor did it contain any provision for the repayment of the debt:

Held that the document read as a whole amounted to a lease for cultivating purposes and not a mortgage and the advance made was by way

of premium and not a loan. The executant therefore became an occupancy raiyat in respect of the lands at the end of the lease : 24 Cal 272 (P C) and A I R 1924 Pat 580, Ref.; A I R 1938 Pat 35, Disting. [P 266 C 2; P 267 C 1]

Dr. Dwarka Nath Mitter, B. C. Mitter and J. M. Ghose — *for Appellants.*

K. Husnain, H. R. Kazimi and K. N. Varma — *for Respondents.*

Judgment. — This second appeal is by defendants 1 to 3. The facts were as follows : In 1913, Khuban and others executed in favour of the landlords, defendants 11 and 12, a document which has been called a zarpeshgi kabuliyat, evidencing the advance of Rs. 145-8-0 as peshgi. The executants agreed to pay rent of Rs. 30-12-0 for the term of the lease which was for three years. In 1916 Khuban who was a settled raiyat of the village was recorded as an occupancy raiyat in respect of the demised lands. In 1917 another document, called an ijara deed, was executed by defendant 11 in favour of Khuban and others with regard to 3 bighas of land and evidencing an advance of Rs. 200 as peshgi. The term of the ijara was for five years. Three years later, Basdeo Narayan, defendant 11, executed a zarpeshgi with regard to 3 bighas of land in favour of defendants 3 and 4 and in 1922 he executed an ijara with regard to 12 bighas in favour of defendants 1 and 2. Khuban and others sold their interest to the plaintiff in 1913 in respect of plot No. 208 and a part of plot No. 87. Shortly afterwards, the plaintiff sold part of plot No. 208 to the sister of defendant 11 and about the same time defendants 11 and 12 sold their milkiat interest in the property to Madho Singh, the cousin of the plaintiff. The plaintiff then purchased a further 10 bighas from Khuban. In 1924, defendants 1 to 4 sued to recover possession of the properties covered by the zarpeshgi of 1920 and the ijara of 1922. In execution of the decree obtained in that suit, defendants 1 to 3 (the appellants) purchased the property and obtained delivery of possession. The plaintiff applied to be restored to possession of the property but his application was dismissed. He thereupon instituted a suit out of which this appeal has arisen.

The decision of the appeal depends upon a construction of the zarpeshgi lease of 1913. If this was a lease for cultivating purposes then, as Khuban was a settled raiyat of the village, he obtained occupancy rights in the lands in suit. If, on the other

hand, it was a transaction in the nature of a mortgage, then he did not obtain occupancy rights in the suit lands. The material portion of the zarpeshgi lease of 1913 is as follows :

As we, the executants, who are cultivators, have no sufficient kasht for our maintenance in the mauza . . . it is necessary for and incumbent upon us to take settlement of further kasht land for cultivation. We therefore approached Babu Basdeo Narayan Lal requesting him to give us kasht lands on nakdi system for cultivation for a definite period, He granted our request and became ready to settle the kasht land with us on nakdi system, for a definite period to take zarpeshgi from us and to get a kabuliyat executed for a period of three years, we have therefore taken settlement of the whole and entire 29 bighas 5 kathas of kasht land on payment of Rs. 145-8-0 as peshgi money, at a rental of Rs. 6 per bigha for a term of three years, from the beginning of the agricultural year, 1321 Fasli.

At the end of the document in tabular form is drawn up a statement of the area, the rate of rent, the total jama and the net jama after a deduction of interest on the peshgi money. In 24 Cal 272¹ the Privy Council held that a zarpeshgi lease is not a mere contract for the cultivation of the land at a rent, but is a security to the tenant for his money advanced and that the possession of a tenant in such a case is at least in part that of a creditor operating payment to himself, and is no foundation for a claim for occupancy rights. Similarly in 3 Pat 465² a Division Bench of this Court held that :

A person who enters into possession of land under a zarpeshgi lease, the preliminary object of the lease not being to create the relationship of landlord and tenant but to provide a security as between debtor and creditor, cannot acquire occupancy rights in the land during the period of the lease.

The contention on behalf of the appellants is that the provision in the document under consideration for the payment of interest is inconsistent with the relationship of landlord and tenant. Looking at the document as a whole, it appears to me that the primary object of it was to demise the land for cultivating purposes and the advance of Rs. 145-8-0 was not by way of a loan but by way of a premium. The recitals indicate clearly that the object of the executants Khuban and others in taking settlement of the land was not for the purpose of securing the repayment of the

1. Bengal Indigo Co. v. Roghobur Das, (1897) 24 Cal 272=23 I A 158=7 Sar 94=1 C W N 83 (P C).

2. Kharag Narayan v. Dwarka Prasad Singh, (1924) 11 A I R Pat 580=78 I C 588=3 Pat 465.

advance but to acquire more kasht land in the village because the lands which they had were insufficient for their maintenance. The document does not state that the lands were pledged as security for repayment of the advance and there is no provision for repayment of the debt. In that respect the case differs from that in (1938) P W N 15.³ In that case it was held that where a grantor of a zarpeshgi deed borrowed money and where the substance of the transaction was that after deduction of various sums by the grantee against the interest for the money advanced by him, a sum was reserved as rent payable by the grantee to the grantor, and the latter had a right to redeem before the expiration of the period provided by the document, the transaction was a mortgage in spite of the reservation of a certain sum as an actual jama. The terms of the document of 1913 may be compared with the ijara deed of 1917. The material portions of the recitals were as follows :

As I am in urgent need of money. I have therefore let out in ijara lease for a term of five years the whole and entire 1.87 acres of milkiat to Khuban Mahto on receipt of Rs. 200 of Imperial Currency as peshgi money. . . . On the expiry of the term in 1329 Fasli, I shall, on payment of the entire peshgi money in one lump sum, bring the leasehold property in my direct possession.

Now this document was clearly a mortgage. To secure an advance of Rs. 200, the land is pledged as security for payment of the debt and there is provision for redemption. It was argued that the fact that Khuban Mahto entered into this transaction in 1917 evidences that he did not look upon himself as an occupancy raiyat in respect of the land that was the subject-matter of the lease of 1913. Against that however is the fact that after the expiry of the ijara in 1917, the landlords realized rent, thereby indicated that Khuban Mahto was a tenant. Now if the ijara lease of 1913 was, as I hold, a cultivating lease, Khuban Mahto became an occupancy raiyat in respect of the disputed land and the subsequent acceptance of the ijara of 1917 could not have the effect of depriving him of his occupancy rights. There was therefore evidence on which the conclusion of the Court below could be arrived at and this second appeal fails and is dismissed with costs.

N.S./R.K.

Appeal dismissed.

3. Dildar Hussain v. Saddiq Sholkh, (1938) 25 A I R Pat 85=172 I C 985=18 P L T 925=1938 P W N 15.

A. I. R. 1939 Patna 267

ROWLAND AND CHATTERJI JJ.

Baijoo Lall Kataryar and another —
Appellants.

v.

Rajendra Nath Bhattachariya —
Respondent.

Appeal No. 109 of 1938, Decided on 23rd November 1938, from appellate order of Addl. Dist. Judge, Gaya, D/- 2nd February 1938.

(a) Bengal, Agra and Assam Civil Courts Act (12 of 1887), Sec. 8 (2)—Transfer of appeal by District Judge to Additional District Judge — From mere absence of order to that effect in order-sheet it cannot be held that Additional District Judge has no jurisdiction to hear appeal.

From the mere irregularity that the order-sheet in the appeal does not show that any order was passed by the District Judge transferring it to the file of the Additional District Judge, it will be unreasonable to hold that the Additional District Judge had no jurisdiction to hear the appeal. However, in order to avoid any objection on this score, it is desirable that the order should be recorded in the order-sheet of each particular case transferred.

[P 268 C 1]

(b) Civil P. C. (1908), Sec. 100 and O. 41, R. 11—Lower Appellate Court recording findings of fact in dismissing appeal under O. 41, R. 11—Findings are binding in second appeal.

The rule in second appeal is that the findings of fact of the lower Appellate Court are conclusive and there is nothing in the Code to take out of the rule a case where an Appellate Court has recorded a finding of fact in dismissing an appeal under Order 41, Rule 11.

[P 268 C 2]

Where the lower appellate Judge considered the points that were raised before him with reference to the evidence, oral and documentary, and he saw no reason to differ from the findings of fact arrived at by the trial Court, the mere fact that the judgment has been written in a few lines does not make the findings of fact any the less binding in second appeal.

[P 268 C 2]

Raj Kishore Prasad — *for Appellants.*

S. N. Bose — *for Respondent.*

Chatterji J. — This appeal arises out of a proceeding under S. 47, Civil P. C. The respondent obtained a decree against the appellants on the basis of a handnote executed by their deceased father, the decree being enforceable only against the assets of the joint family. In execution, the decree-holder proceeded to attach certain moveables as part of the joint family assets. The judgment-debtors objected that these were their separate properties and were therefore not liable to attachment under the terms of the decree. This objection was overruled by the trial Court and the judgment-debtors preferred an appeal to the

Court of the District Judge. After the record was called for by the District Judge the appeal came up for hearing under O. 41, Rule 11, Civil P. C., before the Additional District Judge who dismissed it under that Rule. It is against this decision that this appeal has been preferred. The first contention raised on behalf of the appellants is that there being nothing in the order-sheet to indicate that the appeal was transferred by an order of the District Judge, the Additional District Judge had no jurisdiction to hear it. Reliance is placed on S. 8, Bengal, Agra and Assam Civil Courts Act (12 of 1887) of which Cl. 2 is relevant and runs as follows :

Additional Judges so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to them, and in the discharge of those functions, they shall exercise the same powers as the District Judge.

There is very little substance in the contention. No doubt the order-sheet in the appeal does not show that any order was passed by the District Judge transferring it to the file of the Additional District Judge; but it is difficult to see how the record could have been sent to the Additional District Judge without the District Judge's order. It might be that a number of cases were transferred at the same time and the order was recorded on a separate sheet of paper which was not incorporated in the order-sheet in each case. It will be unreasonable to hold that on account of such irregularity, if it may be so-called, the Additional District Judge had no jurisdiction to hear the appeal. I should however observe that in order to avoid any objection on this score, it is desirable that the order should be recorded in the order-sheet of each particular case transferred. The next contention raised is that the judgment is not in accordance with law. It is urged that although the appeal may be dismissed summarily under O. 41, Rule 11, the Court is required to record the judgment in accordance with law as laid down in O. 41, R. 31, Civil P. C. A number of decisions have been referred to on this point, but it is unnecessary to deal with them because in the present case a judgment has been recorded and it is difficult to hold that it is not a judgment in accordance with law. The learned Additional District Judge considered the points that were raised before him with reference to the evidence, oral and documentary, and he saw no reason to differ from the findings of fact arrived at by the trial Court. It is however said that he ex-

pressed no opinion of his own but merely accepted the findings of the trial Court. But this is not so. The main contention before him was that the trial Court did not properly consider the peon's report (Ex. 1) in a previous execution case which, it was suggested, was sufficient to prove that the father's moveables were all exhausted in that execution. With regard to this contention the learned Additional District Judge says :

On a consideration of the documentary evidence I am satisfied that this contention must fail.

Then as regards the oral evidence, he says :

The lower Court was fully justified in relying on the evidence of the decree-holder and in rejecting the uncorroborated testimony of the judgment-debtors' witness.

The question then is whether in this second appeal, any grounds have been shown which would entitle this Court to interfere with the findings of the lower Appellate Court. The mere fact that the judgment has been written in a few lines does not make the findings of fact any the less binding in second appeal. The facts of the case are quite simple and the evidence is very short and there is absolutely no reason to suppose that the learned Additional District Judge did not properly apply his mind to the same. I do not see any error of law or defect in procedure which would justify our interference in second appeal. It is further contended that the Courts below went wrong on the question of onus of proof. But having regard to the findings of the Courts below, the question of onus is quite immaterial. Indeed the trial Court referred to the question of onus but it considered the evidence on both sides and relying on the evidence for the decree-holder, it came to the definite finding that the disputed moveable properties belonged to the judgment-debtors' father. In the appellate judgment, there is no reference to the question of onus. I do not find any merit in this appeal which I would dismiss with costs.

Rowland J. — I agree. The rule in second appeal is that the findings of fact of the lower Appellate Court are conclusive and there is nothing in the Code to take out of the rule a case where an Appellate Court has recorded a finding of fact in dismissing an appeal under O. 41, R. 11.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 269

JAMES AND ROWLAND JJ.

Sidheshwar Prasad Singh—Appellant.

v.

*Ramcharitar Chaudhuri and another,
Plaintiffs and others, Defendants —
Respondents.*

Appeals Nos. 665 and 666 of 1937, Decided on 9th February 1939, from appellate decrees of Sub-Judge, Gaya, D/- 28th May 1937.

(a) Bihar Tenancy Act (8 of 1934) — Suit for produce rent after Amending Act is governed by one year's limitation.

Suit for produce rent instituted after the Amending Act came into force is governed by one year's period of limitation : *A I R 1939 Pat 122, Foll.*

[P 269 C 2]

(b) Landlord and Tenant — Suit for produce rent — Burden of proof — No evidence before Court to form estimate — Decree will be passed only so far as liability is admitted by tenant.

In a suit for produce rent it is for the landlord to prove the quantity of out-turn and in the absence of any evidence on the part of the landlord on which Court can act in forming estimate as to the produce, no decree can be claimed except in so far as liability has been admitted by the tenant : *A I R 1938 Pat 81, Rel. on.* [P 270 C 1]

Baldeva Sahay and Raj Kishore —

*for Appellant.*S. N. Rai — *for Respondents.*

Rowland J. — The facts of the litigation and the history of the land which gave rise to the rent suits leading to these appeals are somewhat complicated ; but the points arising for decision in the appeals are simple. The contention of the appellant who was defendant 1 in Suit No. 349 of 1936 and was defendant 3 in Suit No. 448 of 1936 was to begin with that the suit as framed was not maintainable because there were lands of more than one holding included in the suit. It was also said that some of the lands sued for were nagdi and some were bhauli. Alternatively, it was contended that part of the claim was barred by limitation and further it was said that the Courts below had assessed the produce of the bhauli lands arbitrarily and not on basis of evidence and should have passed a decree not in excess of the quantities of produce admitted by the defendant. As to the first point, the appellant relies on the previous history of the land. There had been a number of raiyati holdings which had been purchased in about the year 1922 by certain of the cosharer proprietors, namely Prayag Singh alias Lal Babu and his nephew and cousin Kalika Prasad and

Sheonandan Prasad Singh. The two latter persons subsequently transferred their milkiat interest to Ali Sajjad who is impleaded in Suit No. 349 as defendant 2. The apparent result of this will be that those purchased lands would remain in the occupation of Ali Sajjad and Prayag Singh alias Lal Babu in equal shares. Thereafter by a deed of gift Prayag Singh transferred his interest in these lands to the appellant who thus became entitled along with Ali Sajjad to hold them subject to payment of the proportionate rent to the other cosharer maliks. Now it is said that although the interest of Prayag Singh was transferred to this defendant by one transaction, nothing in these proceedings has had the effect of amalgamating the several holdings so as to create a single holding in respect of which one suit can be instituted by the plaintiffs for its rent. Now the question whether the holdings were amalgamated or not seems to me to be substantially a question of fact and it has been held by both the Courts that the holdings have been amalgamated. The objection on this ground to the maintainability of the suit, in my opinion, must fail.

The next point raised is that of limitation. Treating the lands in suit as one holding we find that it is a holding for part of which cash rent is paid and for part of which produce rent; and it is therefore contended that the limitation applicable to a suit for rent of such a holding is governed by the Bihar Tenancy Act, Sch. 3, Part I, Art. 2 (iii) (b) (ii) where the rent is paid in any of the ways specified in sub-s. (1) of S. 40 and the period of limitation prescribed by the Act as amended in November 1934 is one year. Doubt was expressed at one time whether the shorter period of limitation was to be held applicable to suits for which the cause of action accrued before the passing or before the coming into force of the Act; but the doubt has been set at rest by the decision in 20 P L T 38¹ where it was laid down that in suits instituted after the Amending Act came into force, the shorter period of limitation would be applicable. It is only necessary therefore to look to the date of institution of the suit which in each of the two appeals is 14th September 1935. This concludes that the shorter period of limitation will be applicable to these suits and the claim in each suit in respect of the

1. *Reyasat Sheikh v. Gopi Nath Misser*, (1939) 26 A I R Pat 122=20 P L T 38.

year 1340 and the claim in Suit No. 448 for the year 1339 will be held to be barred by time. Then as to the argument that the Courts have assessed the produce of the bhauli land arbitrarily and that therefore the findings should not be supported, we have been referred to 19 P L T 4² in which a Full Bench of this Court has laid down that in a suit for produce rent it is for the landlord to prove the quantity of the outturn and in the particular case it was stated that "no decree can be claimed except so far as liability has been admitted by the defendants." That is a statement of the position in the absence of any evidence on the part of the plaintiff on which a Court can act in forming its estimate of the produce and the principle no doubt will apply if all the evidence adduced is found totally worthless. But in this case although the landlord's papers were found to be unreliable and suspected to be fabricated and although the patwari did not show any great degree of familiarity with the lands in suit or competence to estimate accurately their produce, the Courts did have before them some material on which an approximate estimate of the outturn could be based. There was the raibandi in batwara proceedings, there was the fact that the area was canal irrigated, that the lands were fertile and not sandy and there were of course such admissions as have been made by the defendant himself. We cannot say that the finding as to the outturn in this case is a finding unsupported by evidence or one with which we should be entitled to interfere treating it as not a finding of fact for the purposes of second appeal.

I would therefore allow the appeals in part modifying the decree of the Court below by dismissing the claim so far as it refers to the years 1339 and 1340 but affirming the remainder of the decree. The plaintiff will get his proportionate costs in the first Court and the defendant-appellant will have costs in proportion to his success in the appeal and second appeal.

James J. — I agree.

N.S./R.K. *Appeals allowed in part.*

2. Pratap Narain Jha v. Ramasray Pershad, (1938) 25 A I R Pat 81 = 173 I O 724 = 19 P L T 4.

A. I. R. 1939 Patna 270

MANOHAR LALL J.

Mt. Bibi Fatma Sogra — Appellant.

v.

S. Haider Hussain and others —

Respondents.

Appeal No. 695 of 1938, Decided on 14th December 1938, from appellate decree of Dist. Judge, Gaya, D/. 10th May 1937.

Civil P. C. (1908), O. 26, R. 9—Commission cannot be issued in appeal simply to give opportunity to bring forth new evidence by a party who deliberately avoids it in trial Court — Superior Court has only to see if subordinate Court exercises discretion judiciously or capriciously.

The plaintiff suing for removal of encroachments preferred to rely upon evidence adduced by her and notwithstanding a challenge from the defendant and a suggestion from the Court refused to take out a commission but insisted upon a decision on the materials produced by her on which the Court declined to act and dismissed the suit. In appeal she applied for issue of a commission which application was also rejected :

Held that the Courts below had exercised their discretion judiciously and not capriciously, which only it is for the superior Courts to see and that the litigation could not be allowed to be prolonged simply to give the plaintiff an opportunity to bring forth new evidence : *A I R 1926 Pat 462, Foll.; A I R 1917 Cal 573, Not foll.; A I R 1938 Pat 421, Disting.* [P 272 O 2]

Rajkishore Prasad — *for Appellant.*

S. M. Mullick, Syed Ali Khan, H. R.

Kazimi and S. N. Bose —

for Respondents.

Judgment. — This is an appeal by the plaintiff arising out of a suit instituted by her for removal of two encroachments as alleged in the plaint. The dispute between the parties had been carried before the Criminal Court before the matter was taken to the Civil Court. In the Criminal Court, a Commissioner was appointed to find out the encroachments. The matter then came to the Munsif who tried the suit instituted in 1936 as Title Suit No. 63. Although a suggestion was thrown out by the Court in the course of the hearing that a commission ought to be taken out in the case, the plaintiff preferred to rely upon the evidence which she adduced and refused to take advantage of the suggestion. The learned Munsif speaks of this matter in this manner :

In a case of encroachment ordinarily, it is necessary that a commission should be taken out to ascertain by actual measurement on the spot if there has been really an encroachment. No such commission was however taken out in this case though I had even suggested to plaintiff's advocate about this course at the time of hearing.

In other words the plaintiff insisted that the Court must decide upon the evidence which she was adducing in the case; she apparently relied strongly upon the report of the Commissioner who was examined before the learned Munsif to prove the report and the map which he had submitted to the Sub-divisional Officer, which are marked Exs. 5 and 5 (a) in the case. The learned Munsif was not at all impressed by the report which he describes as perfunctory and unreliable. He explains his remarks by saying that the Commissioner is admittedly a class friend of plaintiff's son M. Nehal Hasan, and as such, he cannot be said to be an altogether unbiased witness.

He states further that :

He admittedly went to inspect the spot when the wall in question here was not in existence at all, it (according to plaintiff's case) having been constructed in May 1935, while the Amin went to inspect in February 1935. Therefore he is incompetent to depose or report about any encroachment caused by the construction of a wall which was not in existence at all at the time he visited the spot.

The learned Munsif adds :

It is significant that not a single independent witness of the village has been examined nor, as I have said, any commission taken out and one cannot help thinking that these omissions have been made because the plaintiff and for the matter of that her son Moulvi Nehal Hasan were not sure of their case.

In the end the learned Munsif held that the plaintiff failed to substantiate the alleged encroachment to the western wall of their plot No. 29. He then dealing with another encroachment in Issue 9 came to the conclusion that "this encroachment also remains unsubstantiated." The matter then went up in appeal and the plaintiff being now in a difficulty, applied to the learned District Judge asking him to exercise his appellate powers and issue a commission. But before he came to give his reasons for declining to issue a commission at the appellate stage, he considered the weight to be attached to the evidence of Nazir Ahmad, the Amin, who was deputed to the spot by the Sub-divisional Officer of Jahanabad in a proceeding under S. 107, Criminal P. C. He gave several reasons for which he was not inclined to rely upon this witness and he referred to the allegations put forward in a written statement by the defendants in which they challenged the correctness of the Amin's map and asked for an accurate map of the alleged encroachments : *see paras. 2 and 8 of the written statement.* "The learned Munsif," he observed :

himself suggested that a commission should be taken out for measurement of the alleged encroachments, but this suggestion was not taken up by the plaintiffs.

The learned District Judge also remarks:

Mr. L. K. Das urges that the taking out of a commission was really unnecessary and that the Court could have satisfied itself as to the truth of the plaintiff-appellant's story by making a local inspection.

In the alternative, Mr. L. K. Das argued that if the Appellate Court considered that a commission should have been taken out, his client was ready to take out one then. The learned District Judge then pointed out that it was not the duty of the Court to make a local inspection in order to find out the encroachments as that was the very point to be decided in the case. Local inspection is necessary only to understand the evidence and not to convert the Court into a witness of the very fact which is under dispute before him. The learned District Judge in the end declined to accede to the prayer of the plaintiff to issue a commission. He then dealt with the evidence on the record and agreeing with the Munsif, dismissed the suit of the plaintiff. Hence this appeal before me.

It is argued by the learned advocate appearing for the appellant that a commission had already been taken out before the Sub-divisional Officer, and the plaintiff thought that she could rely upon that report and if the trial Court did not for reasons, good or bad, think it satisfactory it was the duty of the trial Court to issue a commission itself. He therefore argued that his client had been deprived of a fair trial by the course adopted by the learned Munsif and the learned District Judge. He also argued that the learned District Judge was under an erroneous view of the law when he thought that the issuing of a commission was actually allowing fresh evidence to be adduced by the appellant in the appellate stage and he draws attention to the observation of the learned District Judge that

the Appellate Court's powers to permit fresh evidence to be adduced are not intended to be used to enable a party to fill up lacunae in its evidence.

Reliance was placed before me upon the case in 23 C L J 600,¹ but the later case of this Court reported in 7 P L T 795² lays down, in my opinion, the accurate view, namely that it is not a question of law as

1. *Tirthabasi Sing v. Bepin Krishna Roy*, (1917) 4 A I R Cal 578=94 I O 30=23 C L J 600.

2. *Sona Kuer v. Baidya Nath Sahay*, (1926) 19 A I R Pat 462=96 I O 327=7 P L T 795.

to whether a Subordinate Court exercising his appellate powers refuses to issue a commission after rejecting the Commissioner's report which is merely a basis of evidence before him.

Reliance was then placed upon a recent decision of this Court in A I R 1938 Pat 421,³ where a Division Bench of this Court in the circumstances stated therein, set aside the decision of the lower Appellate Court and directed him to dispose of the case in accordance with law after appointing a fresh commission for local investigation. But in that case the dispute between the parties was as to whether the disputed land fell within the area comprised with the admitted boundaries in the two deeds which were Exs. 2 and 4 in that case. The parties had taken out a Commissioner who made a local investigation and submitted his map and report from which it was clear that the disputed land fell within the boundaries specified in the plaintiff's title deed. The Commissioner had followed the directions of the Court as given in his order. The important circumstance in that case was that

to this report of the Commissioner, no objection was taken by either side to the correctness of the map and the report.

Now that being so, the matter apparently assumed a different aspect. When the learned Subordinate Judge declined to act on his map and report on the ground that "he located Bishun Dayal Shah's land on the western boundary, relying on enquiries on the spot," the learned Judges were of opinion, that another commission ought to have been issued. At p. 422 this important observation is found :

It is true that a Court when it rejects a Commissioner's report is not bound to issue a fresh commission if the other evidence on the record is sufficient for the disposal of the case. In the present case, a local investigation was essentially necessary in order to determine the identity of the land. The Commissioner's map was an important piece of evidence in support of the plaintiff's case, and the learned Subordinate Judge when he rejected the map and report, should have, in the exercise of his judicial discretion, issued a fresh commission.

The learned Deputy Commissioner in appeal from that decision did not at all consider the map and the report; in other words there was no finding of the Appellate Court as to whether the decision of the Munsif that the map and the report were not to be relied upon was correct or

not. On that ground alone the decision of the learned Deputy Commissioner in appeal was liable to be set aside. I do not take this case as an authority laying down a proposition of law that in every case where an Appellate Court rejects the Commissioner's report, he is bound in law to issue another commission. In every case the superior Court is to see whether the Subordinate Courts have exercised their discretion judiciously or capriciously. In the present case I am not satisfied that the two Courts below have exercised the discretion in the least capricious or arbitrary manner. The plaintiff notwithstanding the challenge thrown out by the defendants before the trial began and notwithstanding the suggestion of the learned Munsif when the trial began, insisted upon a decision of her case on the materials which she was able to produce, and if ultimately the Courts of fact have declined to act on these materials, the litigation cannot be allowed to be prolonged simply to give the plaintiff an opportunity to bring forth new evidence. In my opinion, the appeal has been rightly dismissed by the learned District Judge and it must be dismissed with costs by me here also. Leave to appeal is refused.

S.G./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 272

JAMES AND ROWLAND JJ.

Deonandan Prasad Singh — Appellant.
v.

Girdhar Prasad, Plaintiff and others,
Defendants — Respondents.

Appeals Nos. 533 and 542 of 1936, Decided on 24th January 1939, from appellate decrees of District Judge, Monghyr, D/- 13th May 1936.

(a) Bengal Land Registration Act (7 of 1876), Ss. 78, 81—Contract of lease—Lessee assigning lease — Assignee giving notice to lessor and tendering rent—Relationship is created between lessor and assignee — Lessor's suit for rent against assignee is not barred even if lessor not registered.

Where the assignee from the lessee, while taking the assignment, gives notice to the lessor that he is bound by the contract and actually makes a tender of rent to the lessor under the lease, a relationship is created between the lessor and the assignee for the purpose of Sec. 81 by the contract of lease to which each has become party. In such case therefore the fact that lessor is not registered is no bar to his suit for recovering rent : *A I R 1921 Cal 145 and A I R 1914 Cal 890, Rel. on ; A I R 1918 Cal 483, Ref.* [P 273 C 2]

3. *Deb Narain Kundu v. Amrita Lal Sil*, (1938) 25 A I R Pat 421=177 I C 156.

(b) Bihar Tenancy Act (8 of 1934), S. 5 (1) and Sch. 3, Art. 2 (b)—Usufructuary mortgagor taking lease from mortgagee—Relationship of landlord and tenant is created—Landlord's suit for arrears of rent is governed by provisions of Bihar Tenancy Act.

A transaction where a proprietor executes a usufructuary mortgage and then takes a lease from his mortgagee is to be regarded as essentially one transaction. Such a lease creates the relationship of landlord and tenant between the parties to the lease. Therefore a suit by the lessor for arrears of rent is governed by the provisions of the Bihar Tenancy Act : 35 All 48 (P C) ; A I R 1930 P C 13 and A I R 1930 Pat 33 (S B), Ref. [P 273 C 2; P 274 C 1]

B. C. De (in No. 533) and S. M. Mullick (in No. 542) —for Appellant.

S. M. Mullick, A. B. N. Sinha (in No. 533), K. Dayal and A. B. N. Sinha (in No. 542) —for Respondents.

James J.—On 16th July 1929, the defendants second party granted a usufructuary mortgage to the plaintiff's family and on the same day the mortgagees executed a lease whereby the mortgagors became their tenants at an annual rent of Rs. 562.8.0. This amount of rent was the amount which in the usufructuary mortgage bond had been mentioned as interest on the mortgage money. On 20th December 1931, the defendants second party by a registered document assigned their lease to the defendants of the first party who gave notice of the assignment to the plaintiff and his family and at the same time tendered rent for the years 1337 and 1338 Fs. This tender was refused because the mortgagees claimed interest which was not tendered. Subsequently, in a partition, the whole interest in this mortgage was assigned to the plaintiff who instituted the suit out of which this appeal arises claiming arrears of rent from the defendants first party. The Subordinate Judge dismissed the suit on the ground that the plaintiff was not registered and so under S. 78, Land Registration Act, he was not entitled to recover rent. He also held that the claim for the years 1337 and 1338 Fs. was barred by limitation. On appeal, the District Judge confirmed the finding that the claim for 1337 and 1338 was barred by limitation under Art. 2, Sch. 3, Bihar Tenancy Act; but he allowed the plaintiff's claim for the later years holding that S. 81, Land Registration Act, applied because there was a contract between the parties. Both parties have come in second appeal from that decision.

In Second Appeal No. 533 of 1936, the appeal of the defendant, Mr. B. C. De argues that the learned District Judge

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erred in holding that the suit was governed by the provisions of S. 81, Land Registration Act. Mr. De argues that if the plaintiff is to take advantage of the provisions of S. 81, he must show that there was a contract between himself and the defendant whom he seeks to make liable. He cites the decision in 27 C L J 474¹ wherein it was held that the contract must be actually between the parties to the suit. In 48 Cal 1078² and 24 I C 866,³ it was held to be sufficient if there was a contract entered into between the predecessors of the parties or the successor of one of the parties and another original party. In the present case, the contract was between the plaintiff and the assignors of the appellants; but when the appellants took the assignment of the contract and gave notice to the plaintiff that they were henceforth bound by this contract by actually making a tender of rent, it could not be said that their relationship was not created by a written contract to which each have become a party.

On behalf of the appellant in Appeal No. 542 of 1936 Mr. S. M. Mullick argues that the suit is not a suit for arrears of rent but merely for interest on the mortgage money, and that it should therefore not be regarded as a suit governed by the provisions of the Bihar Tenancy Act but as a mere money suit based on a registered contract. In 35 All 48,⁴ the Privy Council held that a transaction of this kind where a proprietor executes a usufructuary mortgage and then takes a lease from his mortgagee is to be regarded as essentially one transaction; and from that decision we may infer that if the plaintiff took possession of the mortgaged property his right to profits would be limited to Rs. 562.8.0 annually; but that does not affect the question of whether the relationship of landlord and tenant has been established between the parties. In A I R 1930 P C 13,⁵ the Calcutta High Court, whose decision was affirmed by the Privy Council, observed that a lease executed for the purpose of collecting rent was not excluded from the

1. Iswar Chandra v. Kali Charan, (1918) 5 A I R Cal 483=48 I C 726=27 C L J 474.

2. Probodh Chandra v. Harish Chandra, (1921) 8 A I R Cal 145=64 I C 58=48 Cal 1078.

3. Surya Kanta v. Ananda Mohan, (1914) 1 A I R Cal 890=24 I C 866.

4. Abdullah Khan v. Basharat Husain, (1912) 35 All 48=17 I C 737=40 I A 31 (P C).

5. Satya Niranjan v. Surajubala Debi, (1930) 17 A I R P C 13=127 I C 749 (P C).

operation of the Transfer of Property Act by S. 117 of that Act. Mr. Mullick suggests that this would necessarily imply that such a lease was not affected by the Bengal Tenancy Act; but although a thika lease may be governed by the provisions of the Transfer of Property Act this lease creates a tenure as defined by S. 5 (1), Bihar Tenancy Act and a suit by the lessor for arrears of rent is governed by the provisions of the Tenancy Act. In 11 P L T 669⁶ a special Bench of this Court held that in a transaction such as that which took place on 16th July 1929, the rent recoverable by the mortgagee was to be regarded not as agricultural income within the meaning of the Income-tax Act but as interest on the money advanced. The question of whether the mortgagees in the present case might or might not be liable to pay income-tax on the rent realized under their lease of 16th July 1929 does not here arise; but whether they are liable to pay income-tax or not, it is clear that for purposes of the present suit they are the landlords of the tenure and the contesting defendants are tenure-holders as described in S. 5, Bihar Tenancy Act. The suit is framed as a suit for arrears of rent. There is no suggestion in the plaint that the plaintiff is suing for anything but arrears of rent from a defaulting tenure-holder; and the learned District Judge rightly regarded the defendant tenure-holder as tenant of the plaintiff and the suit as a suit governed by the provisions of the Bihar Tenancy Act. Under Secs. 29 and 3, Limitation Act, we have to read into the Schedule of that Act, Art. 2, Sch. 3, Bihar Tenancy Act, and in applying the law of limitation, Sec. 29, Limitation Act, excludes the application of any other Article contained in the Schedule of that Act. The learned District Judge therefore held rightly that the claim for 1337 and 1338 was barred by limitation. I would affirm the decree of the District Judge and dismiss each of these appeals with costs.

Rowland J.—I agree.

N.S./R.K.

Appeals dismissed.

6. Rajniti Prasad Singh v. Commissioner of Income-tax B. & O., (1930) 17 A I R Pat 33 = 123 I C 617 = 9 Pat 194 = 11 P L T 669 (S B).

A. I. R. 1939 Patna 274

JAMES AND ROWLAND JJ.

Sital Prasad Sah and another —
Petitioners.

v.

Ramdas Sah and others —
Opposite Party.

Civil Revn. No. 652 of 1938, Decided on 26th January 1939, from order of Sub-Judge, Muzaffarpur.

(a) Revision—Decision on question of classification of suit for court-fee, adverse to plaintiff—Revision lies.

Where the decision of a lower Court on the question of classification of the suit for the purposes of court-fee has been adverse to the plaintiff, High Court has jurisdiction to enter into the question in revision : *A I R 1938 Pat 22 (FB), Foll.*

[P 275 C 1]

(b) Court-fees Act (1870), S. 7 (iv) (c) and S. 7 (iii) and (v)—Title suit in guise of partition suit—Ad valorem court-fee must be paid.

Where a partition suit is actually in the nature of a title suit, ad valorem court-fee is payable by the plaintiff, whether the suit is regarded as governed by Sec. 7 (iv) (c) or by sub-ss. (iii) or (v) of S. 7 : *A I R 1923 Pat 113, Rel. on.* [P 275 C 2]

(c) Court-fees—Partition suit—Value of suit—More property claimed as falling to share than that already possessed—Value of suit for court-fee is value of property claimed in excess.

Where in a partition suit plaintiff alleges that a private partition had been generally unfair and estimating his loss caused thereby at a certain figure asks the Court to set aside the partition and states that he is in possession of what purports to be his share in the joint family but that that property in his possession is of less value than the property to which he is entitled, then the value of the suit for the purposes of court-fee would be the difference between the value of the property in his possession and the value of the property claimed by him as falling to his share : *5 I C 582, Disting.; A I R 1931 Mad 94 and A I R 1920 Pat 609, Rel. on.* [P 276 C 1]

B. C. De and K. K. Banerji —
for Petitioners.

N. K. Prasad and A. N. Lal —
for Opposite Party.

Order.—The plaintiff instituted a suit for partition alleging that his uncle Ramdas Sah had recently made a partition of a portion of the family property which had been unfair. He alleged that a house had been allotted to him which no longer belonged to the joint family; that certain other property made over to him had been overvalued; that certain bad debts had been made over to him and that the partition had generally been unfair. He estimated his loss due to this unfair partition at Rs. 8775-8-6. Schedule B of the plaint

contained the description of property still held by the family as tenants-in-common. The plaint bore a court-fee stamp of Rs. 15; but the Subordinate Judge considered that the suit ought to have been treated as falling under S. 7 (iv) (c), Court-fees Act, and he required the plaintiff to pay ad valorem court-fee on the whole value of the property contained in Sch. A of the plaint. The learned Subordinate Judge in coming to this conclusion followed that he considered to be the effect of the decision in 5 I C 582.¹ The plaintiff applies for revision of that order on the ground that his case cannot properly be treated as falling under Sec. 7 (iv) (c), Court-fees Act. Since the decision in 16 Pat 766² it can no longer be argued that this Court has no jurisdiction to enter into this question in revision, where the decision of the Court below on the question of the classification of the suit has been adverse to the plaintiff.

Mr. B. C. De on behalf of the plaintiff argues that the effect of that decision would be to remove this suit from the category of a suit for declaration with consequential relief; because some attempt was made in that decision to define the kind of declaration which is affected by sub.s. (c) of S. 7 (iv). It appears to us that it makes little practical difference whether the suit is to be regarded as a suit for a declaration with consequential relief or as a suit for the possession of moveable and immovable property governed by sub-secs. (iii) and (v) of Section 7, since in the Courts of Bihar and Orissa where the consequential relief sought is recovery of possession of land, the plaintiff is not permitted to value that land at a lower rate than would be assessed under Section 7 (v).

In the present case the plaintiff states that he is in possession of what purports to be his share in the property in Sch. A; but that the property of which he is in possession is of less value than the property to which he is entitled. In 5 I C 582¹ the plaintiff sought to set aside a decree for partition and the Court held that ad valorem court-fee was payable. In the present case there is no decree and the plaint alleges that the only instruments of partition were an unregistered deed and some unregistered chithas. Whether these documents would

be admissible in evidence or not, we need not say at this stage; but the plaintiff asks that the partition shall be set aside and so a parallel might be found with the facts in 5 I C 582.¹ The learned Subordinate Judge interpreted that decision as implying that court-fee was to be paid on the whole value of the property which was to be brought under partition, though there is nothing in the decision which implies that this was the intention of the Court. The learned Subordinate Judge mentioned a decision of the Madras High Court in 129 I C 824³ where the difference between the value of the properties allotted to the plaintiff in a partition and the value which he claimed was treated as the value of the suit for the purposes of court-fee. The learned Subordinate Judge considered that he was bound by the decision in the Calcutta High Court; but as we have said, there is nothing to indicate in the Calcutta case on what basis the ad valorem court-fee was to be calculated. It is suggested on behalf of the respondent that court-fee ought to be calculated on the value of the plaintiff's share in the properties contained in Sch. A; but it appears from the plaint that the plaintiff is already in possession of a share which is approximately what he claims though in deficit by Rs. 8775. In 1 P L T 529⁴ the Taxing Judge of this Court was dealing with a partition suit in which the plaintiff was out of possession of a portion of the property of which he sought partition. The direction of the Taxing Judge amounted to this, that the plaintiff had to pay ad valorem court-fee on the amount by which his share in possession was stated to be of less value than the share which he claimed; and that so far as he was in possession of an adequate share, no ad valorem court-fee was payable. It has always been held in this Court that so far as a partition suit may actually be in the nature of a title suit, ad valorem court-fee is payable by the plaintiff, whether the suit is regarded as governed by S. 7 (iv) (c) or by sub-ss. (iii) or (v) of S. 7, we need only cite the decision in 6 P L J 662.⁵

The petition will accordingly be allowed to this extent, that the order of the Sub.

1. Hara Gowari Saha v. Dukhi Saha, (1910) 5 I C 582.

2. Ramkhelawan Sahu v. Surendra Sahi, (1938) 25 A I R Pat 22=172 I C 840=16 Pat 766=18 P L T 977 (F B).

3. Sundara Ganapathi Mudali v. Daivasikamani Mudali, (1931) 18 A I R Mad 94=129 I C 824.

4. Dip Chand Rai v. Chhetru Lal, (1920) 7 A I R Pat 609=56 I C 570=1 P L T 529.

5. Rachhya Raut v. Mt. Chando, (1923) 10 A I R Pat 118=65 I C 294=6 Pat L J 662=3 P L T 298.

ordinate Judge requiring the payment of ad valorem court-fee on the sum of Rupees 85,294 is set aside. The plaintiff has to pay court-fee on the amount by which his share in possession is in deficit of the share which he claimed, namely on Rupees 8775.8.6. We make no order for costs.

N.S./R.K.

Order accordingly.

A. I. R. 1939 Patna 276

HARRIES C. J. AND AGARWALA J.

Dhrubeshwar Lal Singh Deo and another — Defendants — Appellants.

v.

Kantu Laik, Plaintiff, and others, Defendants — Respondents.

Appeal No. 910 of 1937, Decided on 16th November 1938, from appellate decree of Dist. Judge, Manbhum, Purulia, D/- 19th July 1937.

(a) Practice — Three brothers holding tenure — Tenure sold in execution of rent decrees — Landlord purchasing tenure and settling same with another—Brothers filing suits to set aside sales—High Court decreeing two suits—Privy Council dismissing one — Privy Council order held had no effect of extinguishing interest of other brother.

A tenure held by three brothers was sold in execution of three rent decrees against them and was purchased by the landlord who subsequently settled the same with predecessor of plaintiffs. Of the three suits by the brothers to set aside the sales two were decreed by the High Court by one judgment and on appeal to the Privy Council in the suit by one of the brothers, the High Court decision was reversed. The purchaser of the one-third share of the other brother sued for partition:

Held that the order of the Privy Council did not even impliedly reverse the judgment of the High Court so far as it concerned the other brother against whom the High Court decree had become final, and it could not have the effect of extinguishing the right which had been found by the High Court to have existed in him : 3 Cal 30 and A I R 1923 P C 167, *Rel. on.* [P 277 C 2]

(b) Record of Rights—Correctness of entry cannot be raised in second appeal for first time.

Whether an entry in the Record of Rights be correct or not, cannot be opened in second appeal for the first time. The entry must be presumed to be correct in the absence of evidence showing it to be wrong. [P 277 C 2]

R. S. Chatterji — *for Appellants.*

U. N. Banarji — *for Respondents.*

Agarwala J.—This appeal is by the defendants from a decision of the District Judge of Manbhum confirming a decision of the Subordinate Judge decreeing the plaintiff's claim. The plaintiff sued for partition basing his title on a purchase from Maha-

nanda Chakravarty, who was himself the purchaser of the one-third share of one Sarobar in execution of a decree obtained by the Rajah of Pachet, the proprietor of the land in dispute, in 1902. The defendants claim that the whole of the estate, namely Ranipukur lot, which includes the property in dispute, was settled with them by the Raja in 1879. It is necessary to refer to a previous litigation respecting this land in order to decide the rights of the parties. Ranipukur lot was the property of the Raja of Panchot. Three brothers Chhatradhari, Gadadhar and Sarobar were the holders of a tenure including all the mauzas in Ranipukur lot. The Raja instituted a suit for rent of the tenure against Chhatradhari in 1870 and obtained a decree. Another suit was instituted against the same person in 1874 and resulted in a decree. This was followed by a suit against all the three brothers which resulted in a third decree. In execution of these decrees, the tenure was put up to sale in 1878 and purchased by the decree-holder. In the following year, the decree-holder made a settlement with the father of the defendants. Thereafter three suits were instituted by two of the judgment-debtors and a son of the third to set aside the sale. The suit instituted by the son of Chhatradhari abated on account of the death of the plaintiff. The two suits instituted by Gadadhar and Sarobar failed in the first Court. In both these suits the plaintiff Raja appealed. The appeals were heard together and were disposed of by one judgment. They resulted in the decision of the trial Court being reversed and two decrees being prepared in favour of the defendants Gadadhar and Sarobar. In one of these suits, namely in the suit that had been instituted by Gadadhar, the father of the defendants appealed to His Majesty in Council impleading Sarobar as a pro forma respondent. Gadadhar died during the pendency of the appeal and Sarobar was then made his legal representative. The result of the appeal to the Privy Council was that the decision of the High Court in the suit instituted by Gadadhar was reversed. As a result of these proceedings, the defendants now contend that what was purchased by the plaintiff's predecessor-in-title in 1902 was not the title of Sarobar but an illusory title, the contention being that Sarobar's interest had been extinguished by the decision of the Privy Council in the appeal in Gadadhar's case. The order of His Majesty in Council does not

expressly reverse the decision of the High Court in the case instituted by Sarobar; but it is contended by the learned advocate for the appellants in this Court that the decision of the High Court in that case was reversed by necessary implication.

In 3 Cal 30¹ Garth C. J. pointed out the danger which follows from holding that a decree in one suit is impliedly reversed by a decision in another suit. The Chief Justice's judgment was a dissenting judgment agreed to by Jackson J. in a Bench of five Judges, and was approved of recently by the Privy Council in 46 Mad 895.² That was a case in which a landlord had sued his tenants for the acceptance of pattas at certain rates for wet lands. The suits were dismissed by the Revenue Court and by the District Judge on appeal. The High Court in second appeal reversed the decision holding that the pattas tendered by the zamindar were proper. This decision was reversed by the Privy Council six years later on the ground that the appeals to the High Court had been concluded by findings of fact. Between the date of the decree of the High Court and the date of the order in Council, the zamindar had recovered rent decrees in accordance with the decision of the High Court. The tenants, after the order in Council in their favour, sued to recover the amounts by which the rents paid by them after the High Court decree exceeded the amounts for which they had been liable by the Order in Council. It was held that the decision of the Privy Council had not superseded the decrees under which the rent had been paid and the tenants were not entitled to recover. That decision was sought to be distinguished in the present case by reason of the fact that Sarobar was a pro forma respondent in the appeal which was preferred in the case instituted by Gadadhar. It must be remembered however that in the suit which had been instituted by Sarobar himself, the decree of the High Court had become final. He was not therefore interested in the appeal in Gadadhar's case in resisting the claim that was made by the appellants to His Majesty in Council, and there is nothing in the Order in Council from which it can be inferred that it was intended by their Lordships of the Privy Council to interfere

with the decision of the High Court in Sarobar's case. I would therefore hold that the decision of the Privy Council in Gadadhar's case did not have the effect of extinguishing the right which had been found by the High Court to exist in Sarobar.

It was next contended by the learned advocate for the appellants that the entire tenure having been settled with them in 1879, they were patnidars and that the interest, if any, acquired by the plaintiffs by their purchase in 1902 was an interest subordinate to the appellants. This case was not made in either of the Courts below. In the Record of Rights the defendants (appellants) have been recorded only with respect to two-thirds of the patni interest. Whether the entry in the Record of Rights be correct or not, cannot be opened in this second appeal. The entry must be presumed to be correct in the absence of evidence showing it to be wrong. From the known facts of the present case, it appears that the parties themselves have always acted on the assumption that the entry is correct; its correctness cannot now be impugned. The result therefore is that the appeal must be dismissed with costs.

Harries C. J.—I agree.

S.G./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 277

MOHAMAD NOOR AND DHAVLE JJ.

Benimadho Pd. Singh — Appellant.

v.

Hemchandra Mitter — Respondent.

Misc. Appeal No. 338 of 1938, Decided on 5th December 1938.

Bihar Money-Lenders Act (3 of 1938), S. 15—S. 15 is void being repugnant to O. 34, Civil Procedure Code.

Section 15, Bihar Money-Lenders Act, is void, if not on account of its repugnancy to O. 20, R. 11 (2) on account of its repugnancy to the provisions of O. 34, Civil P. C. [P 277 O 2]

Judgment.—This is an appeal against the order of the learned Subordinate Judge refusing to fix, under S. 15, Money-Lenders Act, instalments of a final mortgage decree for sale. Among the grounds given by the learned Subordinate Judge, one is that in his opinion perhaps that Section is void on account of its repugnancy to O. 20, R. 11 (2), Civil P. C. We have no doubt that that Section is void, if not on account of its repugnancy to O. 20, R. 11 (2), on account of its repugnancy to the provisions of O. 34.

1. Jogesh Chunder Dutt v. Kali Churn Dutt, (1877) 3 Cal 80=1 C L R 5 (F B).

2. Bommadevara Naganna Naidu v. Venkatapayya, (1929) 10 A I R P C 167=76 I O 594=46 Mad 895=50 I A 801 (P O).

A Full Bench of this Court of which one of us was a member and another Division Bench of which another of us was a member have held that the provisions of a provincial law which are repugnant to any existing Indian law relating to matters enumerated in List III of Sch. 7, Government of India Act, are void to the extent of that repugnancy. We are clearly of opinion that S. 15, Money-Lenders Act is repugnant for that reason. So far as this Court is concerned, the decision of the Division Bench and that of the Full Bench are binding upon us. The appeal is accordingly dismissed. We certify that this case involves a substantial question of law as to the interpretation of the Government of India Act and we grant a certificate in the terms of S. 205 of the Act.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1939 Patna 278****HARRIES C. J. AND MANOHAR LALL J.***Kedar Nath Sahu — Plaintiff —**Appellant.*

v.

*Basant Lal Sahu and others —**Defendants — Respondents.*

First Appeals Nos. 182 and 190 of 1937,
Decided on 27th January 1939.

Civil P. C. (1908), O. 32, R. 7—Arbitration—Reference without leave of Court expressly recorded with reason renders all proceedings invalid at the option of minor.

An agreement to refer to arbitration is such an agreement as is contemplated by O. 32, Rule 7. Hence, where a minor is a party to litigation no effective reference to arbitration can be made by the parties unless the next friend or guardian ad litem first obtains leave of the Court to agree to any such reference. Merely obtaining an order referring the matter to arbitration is not sufficient. The Court must first be asked on behalf of the minor for its leave to permit the guardian to agree to a reference to arbitration and the Court must expressly record its reasons for giving or refusing such permission. It is only after obtaining the leave of the Court that the guardian can agree to a reference to arbitration and any agreement without such leave will render all subsequent proceedings invalid at the option of the minor : *A I R 1937 All 65 (F B)*; *A I R 1917 Mad 672*; *A I R 1931 Bom 500*; *A I R 1934 Cal 845*; *A I R 1916 Pat 223 and 36 Mad 295 (P C)*, *Foll.*; *A I R 1925 Cal 475*, *Not foll.* [P 280 C 2]

Brahmadeva Narayan (in No. 182) and

B. C. De and K. K. Singh (in No. 190)

— for Appellants.

Ray Guru Saran Prasad, Ray Paras Nath

(in both the appeals) and Brahmadeva

Narayan (in No. 190) —

for Respondents.

Harries C. J.—These are two connected appeals from a decree of the learned Subordinate Judge of Muzaffarpur dismissing the plaintiff's claim for a declaration that a certain award and a final partition decree based upon it is not binding against the plaintiff-appellant.

First Appeal No. 182 of 1937 is an appeal brought by the unsuccessful plaintiff, whereas First Appeal No. 190 of 1937 has been preferred by defendants 2 to 4. As will appear hereafter, it is clear that these defendants cannot challenge the decree of the Court below, and Mr. De who has appeared on their behalf has asked for permission to withdraw the appeal. In the circumstances, I think it is right that this appeal should be withdrawn; but these defendants must pay to Basant Lal Sahu, defendant 1, the costs which the latter has incurred as a result of this appeal.

In the year 1929 Basant Lal Sahu, defendant 1, brought a partition suit No. 89 of 1929 against defendants 2 to 4, and the present plaintiff who was a minor represented by his guardian ad litem defendant 3. On 29th February 1932, a preliminary decree was passed and defendant 2, who was the karta of the joint family, was ordered to furnish a full account of his dealings with the family property. On 18th December 1934, during the pendency of the proceedings relating to the account which had been ordered, the parties agreed to refer the matter to arbitration and in due course a reference to arbitration was made by the Court. At this stage the present plaintiff, who was then a minor and a defendant, was represented, as I have stated, by defendant 3 as his guardian ad litem. No application was made on behalf of the present plaintiff to the Court for leave to refer the matter to arbitration. On 2nd March 1935, the appointed arbitrator made his award. Objections were preferred by various parties which were disposed of, and in due course a decree was passed in terms of the award. The suit out of which this appeal arises was brought by the plaintiff for a declaration that this award and the final decree, which is based upon it, is null and void and not binding upon him. It was contended on behalf of the plaintiff that as the leave of the Court was not obtained by the guardian ad litem before agreeing to refer the matter to arbitration the whole of the proceedings thereafter were vitiated and in consequence the award and decree are a nullity. Defendants

2 to 4 did not file a written statement and have in fact appeared through counsel in this Court and supported the plaintiff's contention. Defendant 1 contested the suit in the Court below and urged that the omission to obtain the leave of the Court before agreeing to arbitration did not vitiate the proceedings.

The learned Subordinate Judge came to the conclusion that the failure to obtain leave of the Court before referring the matter to arbitration was not fatal and that the award and the decree based upon it were binding upon the plaintiff. As I have stated, both the plaintiff and defendants 2 to 4 have preferred appeals; but as the appeal by defendants 2 to 4 has been withdrawn, it is now only necessary to consider the plaintiff's appeal. It is common ground that no application was made to the Court by the guardian ad litem of the present plaintiff for leave to enter into an agreement to refer the matter to arbitration. According to the plaintiff's contention, the failure to obtain such leave vitiates the whole of the subsequent proceedings. Defendant 1, who is the only contesting respondent, has argued that no such leave is necessary and accordingly that failure to obtain leave does not vitiate the whole proceedings. The procedure to be followed when all parties to a suit agree to refer their differences to arbitration, is governed by Para. 1, Sch. 2, Civil P. C., and that Paragraph is in these terms :

(1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

This paragraph makes no reference to the procedure to be adopted where one of the interested parties is a minor. However O. 32, Rule 7, Civil P. C., deals with the procedure to be followed when a next friend or guardian of a minor enters into any agreement or compromise. O. 32, R. 7 provides as follows :

(1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. (2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

On behalf of the plaintiff-appellant it has been argued that Para. 1, Schedule 2, Civil

P. C., is subject to the provisions of O. 32, Rule 7. Accordingly, it is contended that where the next friend or guardian ad litem of a minor party agrees to join in a reference to arbitration, the leave of the Court to do so on behalf of the minor must be obtained by the next friend or guardian ad litem and expressly recorded in the proceedings in compliance with the terms of O. 32, R. 7, Civil P. C., and that the omission to obtain leave will render an award or any decree based upon it voidable as against the minor.

In my opinion this view is well-founded. The precise point arose in a case decided by a Full Bench of the Allahabad High Court, I L R (1937) All 317.¹ The Full Bench, of which I was a member, held that Para. 1 of Sch. 2 to the Civil P. C. was subject to the provisions of O. 32, Rule 7. Accordingly, it was held that where a guardian ad litem had failed to obtain the leave of the Court to refer a matter to arbitration, an award and a decree based upon it were voidable at the instance of the minor. There was some difference of opinion in that case; but upon this point the three Judges comprising the Bench were unanimous.

In 39 Mad 853,² a Bench of the Madras High Court also stressed the necessity of a guardian ad litem obtaining the leave of the Court before entering into an agreement. The Bench held that a suit could be brought on behalf of minors to set aside a decree passed on a compromise in another suit or appeal in which the minors were parties, on the ground that leave of the Court under O. 32, R. 7, Civil P. C. was not obtained by their guardian ad litem to enter into the compromise on their behalf. The Bench further held that leave of the Court under O. 32, R. 7 must be obtained by a guardian ad litem of minors for agreeing on their behalf to refer through Court the subject-matter of a suit to arbitration; and where no such leave was obtained, a decree passed on an award is not binding on the minors and a suit could be instituted on behalf of the minors to obtain a declaration that the decree was not binding on them. It was further held that the avoidance of a decree in a partition suit

1. *Mt. Mariam Bibi v. Amina Bibi*, (1937) 24 A I R All 65=167 I C 99 = I L R (1937) All 317=1936 A L J 1333 (F B).

2. *Vijaya Ramayya v. Venkatasubba Rao*, (1917) 4 A I R Mad 672=32 I C 881=80 M L J 465=39 Mad 853.

will have the effect of re-opening the whole suit in respect of all the parties thereto, and on an application being made, the Court must proceed with the trial of the suit.

A similar view was taken by a Bench of the Bombay High Court in A I R 1931 Bom 500³ in which it was held that the provisions of O. 32, R. 7 were imperative, and that where one of the parties to a suit was a minor and represented by his mother as guardian and the suit was referred to arbitration by the parties by a reference made without the sanction of the Court, the award and decree passed in terms of the award were void. The case in A I R 1934 Cal 845⁴ is to the same effect.

There is also a decision of this Court, A I R 1916 Pat 223,⁵ which supports the contention of the appellant in this appeal. In that case it was expressly held that no next friend or guardian could compromise a case on behalf of a minor without the leave of the Court expressly recorded in the proceedings and that the action of a Court in referring a case to arbitration in accordance with the compromise between the guardian of a minor and other parties to a suit was not equivalent to approving of the compromise on behalf of the minor. At page 225, *Chamier C. J.* observed :

I am not prepared to whittle away the salutary provisions of O. 32, R. 7. In my opinion the compromise was not binding on the minor, inasmuch as the leave of the Court had not been obtained before his guardian thought fit to withdraw her application for that leave.

The importance of a guardian ad litem obtaining the leave of the Court before entering into any compromise on behalf of the minor was considered by their Lordships of the Privy Council in 36 Mad 295.⁶ In that case a member of a joint family brought a suit for partition. Defendant 3 was the father of defendant 6 who was a minor, and the Court appointed the father guardian ad litem of his son. The father entered into a compromise without obtaining the leave of the Court, and their Lordships held that such compromise and the decree passed upon it was not binding upon

the minor on his attaining majority. This decision of their Lordships does not deal with the question whether an agreement to refer to arbitration is within O. 32, R. 7: but it does lay down that the provisions of O. 32, R. 7 are mandatory and that failure to comply strictly with them will render any compromise or agreement or any decree based on such voidable at the instance of the minor. Counsel for the respondent has relied upon a Bench decision of the Calcutta High Court, A I R 1925 Cal 475.⁷ In that case *Suhrawardy J.* did in terms hold that an agreement to refer to arbitration is not such an agreement as is contemplated by O. 32, R. 7, *Civil P. C.* Page J., who was the other member of the Bench, does not appear to have taken the same view; and in my judgment the view of *Suhrawardy J.* cannot be accepted in face of the large body of authority to the contrary to which I have referred.

In my judgment the agreement to refer to arbitration is such an agreement as is contemplated by O. 32, R. 7, *Civil P. C.* Where a minor is a party to litigation no effective reference to arbitration can be made by the parties unless the next friend or guardian ad litem first obtains the leave of the Court to agree to any such reference. Merely obtaining an order referring the matter to arbitration is not sufficient. The Court must first be asked on behalf of the minor for its leave to permit the guardian to agree to a reference to arbitration and the Court must expressly record its reasons for giving or refusing such permission. It is only after obtaining the leave of the Court that the guardian can agree to a reference to arbitration and any agreement without such leave will render all subsequent proceedings invalid at the option of the minor. It is clear from the terms of O. 32, R. 7 that the minor only can challenge an award or a decree based upon it made after a reference without obtaining the Court's leave. Sub-sec. (2), O. 32, R. 7, *Civil P. C.*, expressly provides that the minor can avoid the award or decree; but the other parties to the reference cannot. As the reference in the present case was made without the guardian of the minor first obtaining the leave of the Court, the plaintiff, who was the minor defendant in the suit, can challenge the award and the decree based upon it. The other parties to the suit, namely defen-

3. *Sadashivappa Gangappa v. Sangappa Chanvirappa*, (1931) 18 A I R Bom 500=134 I C 1221=38 Bom L R 1038.

4. *Nurul Anwar v. Sm. Golenoor Bibi*, (1934) 21 A I R Cal 845=153 I C 289=52 C L J 521.

5. *Hanuman Rai v. Jagdis Rai*, (1916) 3 A I R Pat 223=35 I C 675.

6. *Ganesha Rao v. Tuljaram Row*, (1913) 36 Mad 295=19 I C 515=40 I A 132=1913 M W N 575=25 M L J 150 (P C).

7. *Debir-ud-Din v. Amina Bibi*, (1925) 12 A I R Cal 475=78 I C 335.

dants 2 to 4, cannot challenge the proceedings and for that reason the appeal preferred by them has in my view been rightly withdrawn.

For the reasons which I have given, I am satisfied that the award and decree based upon it passed in the partition suit No. 89 of 1929 are not binding upon the plaintiff-appellant, and that being so, his suit in the Court below should have been decreed. I would therefore allow this appeal, set aside the decree of the learned Subordinate Judge and decree the plaintiff's claim as prayed. The effect of this will be that the whole suit will be re-opened in respect of all the parties from the point at which the matters were referred to arbitration and the Court on application being made to it must proceed with the trial of the suit from that point. The plaintiff-appellant will have his costs in this Court and in the Court below. The defendant-appellants in Appeal No. 190 of 1937 which has been withdrawn, must pay the costs of the defendant-respondent in that appeal, which we fix at Rs. 100.

Manohar Lall J.—I agree.

S.G./R.K.

Appeals allowed.

A. I. R. 1939 Patna 281

JAMES J.

Bhupal and others — Petitioners.

v.

Abdul Hakim and others —

Opposite Party.

Criminal Revn. No. 665 of 1938, Decided on 9th January 1939, from order of Magistrate, First Class, Bhagalpur, D/- 21st July 1938.

Criminal P. C. (1898), Sec. 145—Order of Magistrate under Sec. 146 set aside by High Court directing him to pronounce judgment after consideration of evidence as a whole — Original Magistrate being transferred, case transferred to his successor — Successor is not obliged to examine witnesses other than those examined by his predecessor.

Where in a proceeding under S. 145, the order of the Magistrate under S. 146 ignoring the evidence of witnesses produced by both parties is set aside by the High Court directing him to pronounce judgment after consideration of the evidence as a whole, but the original Magistrate being transferred the case is transferred to his successor for disposal, the successor is at liberty to examine only those witnesses who had been examined before his predecessor. No obligation lies upon him to examine witnesses other than those originally produced before his predecessor.

[P 281 C 2; P 282 C 1]

S. C. Mazumdar — *for Petitioners.*

M. Yasin Yunus — *for Opposite Party.*

Order.—This application arises out of proceedings under Sec. 145, Criminal P. C. The subject-matter is a certain small plot of uncultivated land entered in the Record of Rights as gair mazrua malik with a note that it is parti qadim. The petitioners' party claimed that this was a mahant asthan of long standing on which acts of worship were performed by Hindus; while the opposite party which included the zamindars claimed that it was used for worship at the time of the Id-ul-Fitr and Bakri-i-id festivals, certain portion of it having been given in wakf by the zamindars for that purpose. Thirteen witnesses were examined for the petitioners' party and eleven for the opposite party. The Magistrate ignoring this evidence as a whole, attached the land under Sec. 146 relying exclusively on the evidence of the Superintendent of Police. The High Court set aside this order directing that the Magistrate should pronounce judgment after consideration of the evidence as a whole. The Magistrate who had originally heard the case had been transferred and another Magistrate to whom the case was transferred for disposal re-heard all the witnesses of both parties and has now given judgment. He has found that the petitioners have failed to prove that the land is by long custom used as a mahant asthan, so that the entry in the Record of Rights remains unrebutted which shows the land as in possession of the Mahomedan landlords. As these landlords had said that they had given portion of the land in wakf for the Id-ul-Fitr and Bakri-i-id prayers, the Magistrate accepted this statement and declared the possession of the second party, the Mahomedan party as a whole.

When the case was taken up on the second occasion, the first party came forward with a list of 174 witnesses whom they desired to summon. The Magistrate protested that the list was too long, whereupon the number was reduced to 92. The Magistrate said that the list was still too unwieldy and proposed that the best course would be to examine only those witnesses who had been examined when the case was before his predecessor. He accordingly summoned only thirteen witnesses for the first party; and Mr. Mazumdar on behalf of that party argues that in this the Magistrate acted illegally. It is to be observed

that if the Magistrate who originally heard the case had not been transferred, there would have been no occasion for the examination of any further witnesses at all; but since that Magistrate had been transferred, it was necessary that the witnesses should be examined again. The Magistrate had power to issue process on these witnesses under sub-s. 9 of S. 145; but, it cannot be said that any obligation lay upon him to summon any witnesses other than those originally produced by the parties in this proceeding. I do not find that at the time any witnesses attended whose evidence was not accepted or that the first party actually produced any evidence which the Magistrate disregarded.

Mr. Mazumdar suggests that the entry in the Record of Rights is not essentially against the claim of the first party; but that entry describes the landlords as the persons in possession of the land and describes no rights vested in anybody else. This was pointed out by Muhammad Noor J. in the earlier proceedings with a remark that if none of the evidence was sufficient to show that the entry in the Record of Rights was wrong, that entry must prevail and the decision of the Magistrate must be in favour of the landlords. Mr. Mazumdar further objects that the proceedings ought to have been under S. 147, Criminal P. C.; but the procedure described by that Section is the same as that prescribed by S. 145. I do not find any irregularity in this proceeding which would warrant interference in revision. The application is dismissed.

D.S./R.K. *Application dismissed.*

A. I. R. 1939 Patna 282

FAZL ALI AND VARMA JJ.

Biranchi Singh — Defendant —
Appellant.

v.

Nand Kumar Singh — Plaintiff —
Respondent.

Appeal No. 740 of 1936, Decided on 12th December 1938, from appellate decree of Sub.Judge, Monghyr, D/- 20th June 1936.

Limitation—Statutes of—Retrospective effect — Act of limitation which regulates procedure takes effect immediately — But, if it provides reasonable time for the enforcement of existing cause of action it does affect cause of action already accrued.

A statute which takes away or impairs rights acquired under the existing law must not be con-

strued to have retrospective force unless by express words or by necessary implication it appears that such was the intention of the Legislature which passed it. Ordinarily, the enactments which regulate procedure take effect immediately; and hence an Act of limitation being law of procedure will govern all proceedings to which its terms are applicable from the moment of its enactment. But when the new statute of limitation reduces the time previously allowed for the commencement of a suit and does not come into force forthwith and allows reasonable time for the enforcement of the existing causes of action, the Court will not hesitate to hold that the statute may affect causes of action already accrued in the same manner as those accruing after its passage : 6 Bom 26; 17 C W N 889 and A I R 1914 Cal 806 (F B), *Foll.*; A I R 1916 Mad 607; A I R 1916 Mad 912 (F B) and (1852) 21 L J M C 193, *Ref.* [P 283 C 1; P 285 C 2]

(b) Bihar Tenancy Act (8 of 1934), Sch. 3, Art. 2 (b) (ii) — Suit for claims before the Act but filed afterwards is governed by new Act.

A suit to recover arrears of manhunda rent which became due before the new Act came into force but filed afterwards is governed by the new Act and not by the Bengal Tenancy Act which is repealed by the new Act. [P 285 C 2]

M. K. Mukherjee — *for Appellant.*

G. N. Mukherjee — *for Respondent.*

Fazl Ali J.—This appeal arises out of a suit instituted by the plaintiff-respondent to recover arrears of manhunda rent for the years 1339 to 1342 Fasli. The suit having been decreed by the Courts below, the defendants have preferred this second appeal. As the suit was instituted by the plaintiff after the Bihar Tenancy Act came into force, it is contended on behalf of the appellant that the period of limitation which will govern the suit is the period provided by the new Act and so the claim for the years 1339 and 1340 Fasli is time-barred under Sch. 3, Art. 2 (b) (ii) of that Act. On the other hand, it is contended on behalf of the plaintiff that inasmuch as the claim for the rent of the years 1339 and 1340 arose before the passing of the new Act, the suit must be governed by the Bengal Tenancy Act as it stood before the new Act was passed. The parties have cited before us a number of decisions, the most recent decision being that of a Division Bench of this Court in Second Appeal No. 906 of 1936¹ which supports the view put forward on behalf of the appellant. This decision has already been followed by this Bench in Second Appeals Nos. 978 and 979 of 1936, but as its correctness was challenged both in the present appeal and in Second Appeals Nos. 978 and 979 of 1936 and as

1. *Shaikh Reyasat v. Gopi Nath Missir, Reported in (1939) 26 A I R Pat 122=20 P L T 38.*

we have been pressed to refer this case to a larger Bench, I propose to deal with the matter at some length. That the question is not free from difficulty will be evident from what follows.

It is well settled that a statute which takes away or impairs rights acquired under the existing law must not be construed to have a retrospective force, unless by express words or necessary implication it appears that such was the intention of the Legislature which passed it. It is true that ordinarily the enactments which regulate procedure take effect immediately on the principle that "no suitor has a vested interest in the procedure" and that an Act of limitation, being a law of procedure, will ordinarily govern all proceedings, to which its terms are applicable, from the moment of its enactment. But as we pointed out in 6 Bom 26² this rule must admit of the qualification that when the retrospective application of the statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then the statute is not any more than any other law, to be construed retrospectively. The propositions enunciated above have not only been affirmed in a series of decisions, but they have received statutory recognition in Sec. 6 and S. 8, Cl. (c), Bihar and Orissa General Clauses Act, 1917, and the new Bihar Tenancy Act must be construed subject to them. S. 8, Bihar and Orissa General Clauses Act, provides that:

Where any Bihar and Orissa Act repeals any enactment hitherto made, or hereafter to be made, then unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed.

Now there are no express words in the Bihar Tenancy Act to show that the provision made in Sch. 3, Art. 2 (b) (ii) of the Act was intended to affect rights which had accrued before the Act came into operation, but there is some authority for the proposition that where the Act does not come into force immediately but allows some time for the enforcement of existing causes of action, it may be inferred that the Act was intended to be retrospective. This view has been very clearly expressed by Lord Campbell in (1852) 21 L J M C 193³ while dealing with 11 and 12 Vict., Ch. 43, in the following passage:

2. *Khusalbai v. Kabhai*, (1881) 6 Bom 26.

3. *Queen v. Leeds and Bradford Ry. Co.*, (1852) 21 L J M C 193=16 Jur 817.

If the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention, on the part of the Legislature, not to give it a retrospective operation; but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the Legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal. . . . a certain time was allowed before the Act was to come into operation and that removes the difficulty.

Again in 17 C W N 889⁴ Mookerjee J. observed as follows:

On the other hand, where a new statute of limitation reduces the time previously allowed for commencement of the suit, but does not come into operation forthwith and allows a reasonable time for the enforcement of existing causes of action, the Court will not hesitate to hold that the statute *may affect causes of action already accrued* in the same manner as those accruing after its passage.

The observations made by Mookerjee J. were approved by a Full Bench of the Calcutta High Court in 41 Cal 1125⁵ at p. 1126 as will appear from the following extract from the judgment delivered by Sir Lawrence Jenkins in that case:

The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate. There are thus two positions, where in accordance with its provisions a suit could be brought after the passing of the amendment, *it may be that the amendment would apply*, but where it could not then the amendment would have no application.

I have underlined (here italicized) certain passages in the above quotations to show that neither Mookerjee J. nor Sir Lawrence Jenkins meant to lay down any rigid rule to the effect that whenever the operation of a statute is postponed, the Court must draw the inference that the statute was intended to affect causes of action already accrued. That there may be cases in which such an inference cannot reasonably be drawn, may be illustrated by the decisions of the Madras High Court in 38 Mad 101⁶ and 39 Mad 645.⁷ In these cases, the question of limitation arose in connexion with the Estates Land Act passed by the Madras Legislature in March 1908. It was stated

4. *Manjhoori Bibi v. Akel Mahmud*, (1913) 17 C W N 889=19 I C 793=17 O L J 316.

5. *Gopeshwar Pal v. Jiban Chandra*, (1914) 1 A I R Cal 806=24 I C 37=41 Cal 1125=19 C L J 549=18 C W N 804 (F B).

6. *Ramkrishna Chetty v. Subraya Iyer*, (1916) 3 A I R Mad 607=18 I C 64=38 Mad 101=24 M L J 54.

7. *Rajah of Pittapur v. Venkata Subba Row*, (1916) 3 A I R Mad 912=30 I C 94=39 Mad 645=29 M L J 1 (F B).

in that Act that it would come into force on 1st July 1908, that is to say nearly four months after it was passed and the Governor gave his assent to it on 25th March 1908 (nearly three months before the Act was to come into force). But the assent of the Governor-General having been given on 28th June, Wallis C. J. pointed out in the Full Bench case referred to above that

the result of the passing of the Act, which came into force only two days after it received the Viceroy's assent, was to leave no opportunity for the exercise of the plaintiffs' vested right of suit,

and held that the Act did not affect the causes of action which had accrued before it came into force. Now the points to be noticed with reference to the Bihar Tenancy Act are: (1) Unlike 11 and 12 Vict., Ch. 43 which Lord Campbell had to construe and the Estates Land Act of Madras, which was the subject of the two decisions of the Madras High Court cited above, the Act itself did not specify the date on which it was to come into force. All that was stated in the Act was that

it shall come into force on such date as the Local Government with the previous sanction of the Governor-General in Council may by notification in the local official gazette appoint in this behalf.

(2) After the assent of the Governor-General had been obtained, the Bihar Tenancy Act was published in the Bihar and Orissa Gazette on 14th November 1934, but the Government notification which announced that the Act would come into force from 10th June 1935 was not published in the Bihar and Orissa Gazette until 12th June 1935, that is to say, two days after the date which was notified as the date of its commencement. (3) Even if the present suit and other similar suits had been brought on 14th November 1934 when the Act was published for the first time in the Gazette, the claim for 1339 Fasli would have been barred, because as regards the claim for that year the limitation ran from 30th Bhado, that is to say 14th September 1933.

The points which arise from these facts are obvious and the learned advocate for the respondent fully emphasized them in his argument. His first contention was that where the Act itself does not state the period for which its operation has been suspended, no inference can be drawn as to the intention of the Legislature in postponing its operation. It was suggested by him that as the Act could not come into force without the sanction of the Governor

and the Governor-General, the Legislature could not but have left it to the Local Government to notify the date of the commencement of the Act and the mere fact that the Local Government in the exercise of its discretion thought it fit to postpone the operation of the Act, should not be a ground for holding that the Legislature, when it passed the Act, intended to take away the rights which had already accrued. The respondents then ask what will happen to suits instituted on 10th and 11th June 1935? This point arises because the notification that the Act was to come into force on 10th June was not published in the Gazette until 12th June. Then again, as has been already stated, even if suits for the rent of 1339 Fasli which under the old Act could be brought up to the middle of September 1936 had been brought on the date on which the Bihar Tenancy Act was published for the first time in the Gazette, the claim for that year would have been barred. Thus, in the present case, to use the words of Sir Lawrence Jenkins, the effect of the new law was not merely "to regulate but to confiscate." This raises a serious question, because even Lord Campbell observed with reference to 11 and 12 Vict., Ch. 43 that

if the Act did come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention on the part of the Legislature not to give it retrospective operation.

I have dealt with these points at some length, because I am convinced that there is a good deal to be said in favour of the contention that the statute should not be given retrospective effect. We are however not disposed to refer this case to a larger Bench, because we are not prepared to disagree with the decision in *Shaikh Reyasat's case*¹ in the present state of the authorities which have been elaborately dealt with in that case and in the judgments of Carnduff and Mookerjee JJ. in 17 C W N 889.⁴ On the other hand, certain facts which came to light in the course of the argument in this appeal lend, in our opinion, considerable support to the view expressed in S.A. No. 906 of 1936.¹ From the dates already given, it will appear that there was an interval of nearly seven months between the publication of the Act and the date on which it came into operation. The matter however does not rest there. On 13th February 1935, that is to say two months after the Act had been published in the Gazette, the Local Govern-

ment issued a press communique to the following effect :

It is notified for general information that the Government of Bihar and Orissa intended to appoint a date not earlier than 1st June 1935 as the date on which the Bihar Tenancy Amendment Act will come into force. The exact date will be notified later.

Then came the notification of 4th June which was published in the Gazette of 12th June. Thus, no vigilant suitor can legitimately complain that he did not get a reasonable opportunity to institute his suit before the Act came into force. The strongest argument against the retrospective operation of the Act is that the claim for the rent of the year 1339 would have in any case become time-barred ; but, if from the circumstances of the case taken as a whole, it can be gathered that the Act was intended to be retrospective, this fact alone will not alter the situation. The fact that the period of limitation provided in the previous Act was shortened by the Legislature shows that it looked with disfavour upon the practice of postponing the institution of suits for produce rent for three years, and that may be the reason why it did not show much consideration to plaintiffs who, though they could have instituted their suit earlier, had postponed its institution till the last day of limitation. It may be stated here that the present suit was instituted in August 1935, that is to say nearly two months after the present Act came into force.

Thus, following the decision of the Division Bench in *Sheikh Reyasat's case*,¹ I would allow this appeal in part and dismiss the claim of the plaintiff in regard to the rent for the years 1339 and 1340 and direct that a decree be passed for the rent due from the defendants in 1341 and 1342. The damages must be calculated upon the rent due for these two years but in other respects the decree of the lower Appellate Court will be upheld. The parties will bear their own costs in this appeal and in the proceedings in both the Courts below.

Varma J.—I agree. Ordinarily an Act of limitation is placed in the category of adjective law and under the established rules of interpretation, it has retrospective effect; but as was laid down in 6 Bom 26² this rule must, in certain instances, be qualified, e. g. when a retrospective effect of the statute of limitation would destroy vested rights by inflicting such hardship or injustice as could not have been in the contemplation of the Legislature. The question

in the present case is whether the Bihar Tenancy Act will apply to the present suit, which was filed for realizing arrears of manhunda rent for the years 1339 to 1342, Fasli. The suit was filed on 30th August 1935. The Act was published in the Gazette of 14th November 1934 after the assent of the Governor-General given on 21st October 1934. A notification, published in the Bihar and Orissa Gazette on 12th June 1935, announced that the Act would come into force from 10th June 1935, that is to say two days before the publication in the Gazette; and we also find that on 13th February 1935 a press communique was issued by the Local Government to the following effect :

It is notified for general information that the Government of Bihar and Orissa intend to appoint a date not earlier than 1st June 1935, as the date on which the Bihar Tenancy Amendment Act will come into force. The exact date will be notified later.

I respectfully agree with the view taken in 17 C W N 889⁴ and 41 Cal 1125,⁵ that where a new statute of limitation reduced the time previously allowed for commencement of the suit, but does not come into operation forthwith and allows a reasonable time for the enforcement of existing causes of action, the Court will not hesitate to hold that the statute may affect causes of action already accrued in the same manner as those accruing after its passage. The whole question is whether on the date mentioned, it can be held that there was reasonable time for the litigant public to enforce their existing causes of action. Taking into consideration the date of the publication of the Act in the Gazette and the communique on 13th February 1935, I am of opinion that the Act will affect causes of action already accrued; and following the decision in S. A. No. 906 of 1936¹ I hold that in this case also the Bihar Tenancy Act will apply. I agree, however, with my learned brother that there is a good deal to be said for the opposite view and the question is not free from difficulty.

S.G./R.K.

Appeal partly allowed.

A. I. R. 1939 Patna 285

MOHAMMAD NOOR AND DHAVLE JJ.

Avadh Bihari Saran—Appellant.

v.

S. K. P. Sinha—Respondent.

Appeal No. 165 of 1934, Decided on 21st December 1938, from original order of Sub-Judge, Gaya, D/- 22nd May 1934.

Civil P. C. (1908), O. 16, Rr. 10 and 17 — Witness—Non-appearance on day of hearing—Order-sheet not clear as to direction to witness to re-appear—Witness held not guilty of wilful absence in defiance of order.

An employee of a District Board appeared for further cross-examination on 15th April 1934 when nothing was done, and the order sheet did not show that the witness was ordered to appear on 17th April 1934. An attempt to catch hold of the witness failed on 16th April 1934 as he first declined to appear without permission of his superior, but when the necessary permission was obtained, the witness was not to be found as he had gone to Calcutta for the work of Board and the Court held that the witness wilfully absented himself from the Court though required for cross-examination and fined him on the impression which was expressed as follows: "He was asked to re-appear on 17th May 1934 in open Court as a result of a discussion between the Court and the lawyers of the parties when his evidence was likely to be taken up, and to the hearing of the Court".

Held that the impression of the Judge must be distinguished from what the witness understood the situation to be, and that the witness did not fail to appear in the Court as it was not clear that he had understood that he was so required.

[P 287 C 1]

K. Husnain and S. A. Khan —

for Appellant.

D. N. Nandkeolyar and Govt. Pleader—

for Respondent.

Dhavlé J. — This is an appeal against an order of the Subordinate Judge of Gaya, fining the appellant Rs. 100, besides ordering him to pay Rupees 3 of the cost of an attachment under R. 17, read with R. 10 of O. 16, Civil P. C. The appellant was a defence witness in a case tried by the Subordinate Judge, and had been examined as such on 13th April 1934, and cross-examined on the following day. It appears that the plaintiff afterwards moved the Court for summoning the appellant for further cross-examination, and that the appellant, an employee of the District Board, appeared in Court on the 15th of that month. On this date, he was not cross-examined; and the learned Subordinate Judge finds that the appellant was directed to appear for cross-examination on 17th May and that as appellant failed to comply with that order, he had rendered himself liable to punishment under R. 17, read with other Rules, of O. 16, Civil P. C. The order-sheet does not show that on 15th May 1934, the appellant was ordered to reappear on the 17th. It does appear from the order sheet however that on the 16th work ran short and, at the instance of the plaintiff, an attempt was made to get hold of the appellant from the District Board Office and

let him be cross-examined by the plaintiff. This attempt failed because the appellant at first declined to come unless permitted by his superior, the District Engineer; and when the Court sent a slip to the District Engineer, and the District Engineer passed the necessary order, the appellant was not to be found. This incident, which is supported by materials available in the record seems to have led to some confusion in the mind of the lower Court; for the learned Subordinate Judge says, not only that the appellant had been ordered to come on 17th May 1934, but that before taking steps for compelling his attendance, a slip was sent to the District Engineer asking him to direct his clerk—the appellant—to come, that the District Engineer ordered the appellant to comply at once "but still he would not come," and that thereupon the Court again wrote to the District Engineer and was informed in reply that the appellant was not in the office. There is no material to show that the appellant was in the District Board Office at all on the 17th. On the contrary, there is a note, written or signed by the Chairman of the District Board on 20th May, not very long afterwards, that in the absence of any further instructions from the Court, that is to say, instructions after 15th May the appellant had been deputed on District Board work to Calcutta, and was likely to come back within two or three days. The appellant's case was that, as a matter of fact, he was away in Calcutta on District Board work on the 17th, the date on which the Subordinate Judge has found that the appellant wilfully absented himself from Court though required for cross-examination as a witness. Much of what happened in connexion with this matter is not to be found in the order-sheet of the main case at all. On 18th May, the Subordinate Judge took some evidence, recited certain facts, and directed the issue of a warrant of arrest. It was in these recitals that he spoke of the order passed by the Court on 15th May directing the appellant to attend the Court on 17th, being "verbally communicated to him in Court," and also of the appellant declining to come on the 17th "still he would not come". When the learned Subordinate Judge wrote his final order on 22nd May he expressed himself somewhat differently:

He was asked to re-appear on 17th May 1934, in open Court as the result of a discussion between the Court and the lawyers of the parties, when his evidence was likely to be taken up, and to the hearing of the Court.

This is clearly not quite the same thing as saying that the appellant was told with- in the hearing of the Court and in open Court that the appellant was to re-attend on 17th May; and indeed, if that is what the Subordinate Judge had intended, it is difficult to believe that he would have pro- ceeded to record the evidence of his peshkar on the point on 18th May. That the learned Subordinate Judge was under the impres- sion that the appellant had been ordered to re-attend on 17th May is, of course, quite clear; the slips he sent to the District Engineer would be otherwise quite unintel- ligible. But the impression of the Subordi- nate Judge must be distinguished from what the appellant, as a witness, understood the situation to be. It seems clear from the note of the Chairman that the appellant was not in Gaya at all on 17th and it is not easy to believe that his absence in Calcutta on District Board work on that day was meant as a defiance of any order passed by the Court on 15th May, especially when we can find no trace of any such order in the records. There was apparently some confusion on one side and on the other. As regards the confusion on the part of the learned Subordinate Judge, reference has already been made more than once to the remark of the learned Subordinate Judge that on 17th May the appellant "still would not come." Clearly, this is not a case where it is possible to hold on the record that the appellant failed on 17th May to re-attend as required by the Court. It is by no means clear that he understood that he was so required by the Court; and there certainly is no definite order of the 15th or the 16th or the 17th pointing to the exis- tence of any such direction. In this view I would allow the appeal and set aside the order of the Subordinate Judge. The fine and penalty, if recovered, must be refunded.

Mohammad Noor J.—I agree.

S.G./R.K.

Appeal allowed.

A. I. R. 1939 Patna 287

VARMA AND ROWLAND JJ.

Ram Lal Singh—Plaintiff—Appellant.

v.

Lalji Misser—Defendant—Respondent.

Appeal No. 215 of 1938, Decided on 13th January 1939, from appellate decree of Sub-Judge, Chapra, D/- 3rd January 1938.

(a) Hindu Law — Debts — Widow — Debts incurred by her for her own purpose bind her own personal estate only.

Where the last male holder left no debts and there is no evidence that the borrowing by the widow was for anything but her own purposes the debts incurred by the widow for such purposes are binding only on her personal estate : 23 Cal 766 (P C); 21 All 71 (P C) and A I R 1914 P C 38, Foll.; A I R 1916 P C 110, Disting. [P 288 C 1]

(b) Hindu Law—Alienation—Legal necessity does not include "Janeo" ceremony of daughter's daughter's son.

The "Janeo" ceremony of a daughter's daughter's son does not constitute legal necessity for an alienation by a Hindu widow. [P 288 C 1, 2]

(c) Hindu Law — Alienation—Widow—Ante- cedent debts—Inquiry to be made by the alienee.

While dealing with a male karta of a joint Hindu family it may be enough for the purchaser to satisfy himself that a previous zarpeshgi which he redeemed was for consideration but in case of a Hindu widow an antecedent debt is of no effect unless such debt itself was incurred for necessity. [P 289 C 1]

B. P. Sinha and Krishna Kumar Singh
— for Appellant.

Ganesh Sharma and Satish Chandra Misra — for Respondent.

Rowland J.—This appeal arises out of a suit brought by the nephew and nearest agnate of Harlal Singh, the last male holder of certain immovable property, to declare as not binding on him an alienation of 34 bighas odd made by the daughter of Harlal to the principal defendant on 8th April 1918, by a sale deed (Ex. F) for a consideration of Rs. 1299. The suit was instituted in declaratory form in the life- time of the lady, but shortly after its institution she died. The plaint was then amended and a relief added asking for possession over the property, and additional court-fee was paid on this relief. The Courts have held that the plaintiff is the next reversioner. The Munsif held that the defence of legal necessity for the alienation was for the defendant to prove and that defendant had adduced no evidence to prove these necessities, and that there was no proof of his having made proper inquiries as to the existence of the necessities. On appeal the Subordinate Judge said that the defects on the defendant's side would seem to be on account of the lapse of time. He then referred to the decision of the Privy Council in 43 I A 249=44 Cal 186,¹ and treated the burden of proof as discharged by infer- ence from the recitals themselves. In my opinion, the case is governed by the general rule laid down in many decisions of the

1. Nandalal Dhur Biswas v. Jagat Kishore, (1916) 3 A I R P C 110=36 I O 420=44 Cal 186=43 I A 249 (P O).

Privy Council particularly in 23 Cal 766,² in 21 All 71=25 I A 183,³ and again in 36 All 187.⁴ In the last case their Lordships said :

In the present case the appellant has adduced no evidence to prove such legal necessity as would bind the husband's estate. He has relied simply on the recitals in the schedule attached to the sale deed. Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the alienation there must be some evidence aliunde.

In 44 Cal 186¹ the circumstances which induced their Lordships to make an exception to the rule were unusual. The last of the transactions was over fifty years old. The recitals referred to matters which at the time would have been easily demonstrable, e. g. the existence of an unsatisfied decree against the last male holder. Further, the property appeared on the face of things to be insufficient for the maintenance of the lady, and the course of dealing with the property indicated a strong probability that the recitals were founded on fact. The facts recited, if accepted as true, were sufficient to support the plea of necessity and the binding nature of the debt. Here the case is different. There were 41 bighas of mukarrari lands. It is not suggested that Harlal left any debts. There is no evidence, generally speaking, that the borrowing by the widows was for anything but their own purposes. Debts incurred for such purposes are binding only on the personal estate of the widow.

However, I shall examine the details of the consideration of Rs. 1299. Rs. 999 of this is said to have been required for paying off a previous zarpeshgi given by Lakhrupi in February 1904 to Suraj Prasad covering the entire 41 bighas. A further sum of Rs. 222 is said to have been set off against the vendee's own dues, Lakhrupi having borrowed from him for the purpose of a Gaya-sradh, and Rs. 78 is mentioned as having been taken for the purpose of bullocks and other necessities. As to this Gaya-sradh, the evidence is that that recital was false, that the money was in fact taken for the Janeo ceremony of Dhyani, a daughter's daughter's son of Harlal Singh. That, as both the Munsif and Subordinate Judge have pointed out, was not a necessity

which could be made binding on the estate of Harlal; and it is unpleasant to find that to give the deed a better colour a false recital of Gaya-sradh was entered in it. In my view the Rs. 300 made up of Rs. 222 plus Rupees 78 must be held to be not for necessity. Then I turn to examine the necessity for the Rs. 999 recited as being due on the previous zarpeshgi which was executed in 1904. The document recites that of its consideration Rs. 619 was debt due from Raji Kuar, a widow of Harlal, to one Mahadeo on a simple mortgage bond dated 1st February 1900, for a consideration of Rs. 499. In addition Rs. 370 is said to have been taken for payment of previous creditors. Particulars of necessity are not stated, except regarding Rs. 27 said to have been borrowed from Radha Mohan Singh for performance of the sradh of Lakhrupi's mother Raji, and Rs. 45 said to have been taken for payment of rent to the landlords. Furthermore, Rs. 10 cash was taken at the time of execution. If the recitals are taken as supporting that the debts were incurred as recited, it might be that Rs. 27 plus Rs. 45 can be considered as supported by necessity. The balance of Rs. 370 and Rs. 10 cannot be considered to have been taken for necessity. Next, there is the bond of 1900 for a consideration of Rs. 499. This consideration is recited as being made up of Rs. 262.13.6 said to have been borrowed from the mortgagee by the widow Raji, for the purpose of survey disputes. The balance Rs. 236 odd was taken in cash for meeting certain creditors whose names do not appear. On the face of the recitals, the Rs. 236 cannot be considered to have been taken for necessity. If the recitals be accepted as supporting the facts recited, the sum of Rs. 262.13.6, out of the consideration of the bond, Rs. 1900, could be treated as money taken for necessity. This amount with proportionate interest would be represented by Rs. 306 at the time of the execution of the zarpeshgi in 1904.

Now, if we followed strictly the rule laid down in the Privy Council decisions, which I have said is applicable, in that case the plaintiff might be entitled to immediate possession. Mr. Bhuvaneshwar Prasad Sinha for the appellant has said that he does not wish to press his claim to the extent of denying to the respondent payment of what may be considered justly due on account of sums probably advanced for necessity. On that footing it may be said that there appears to be necessity

2. Maheshar Baksh Singh v. Ratan Singh, (1896) 23 Cal 766=23 I A 57=7 Sar 19 (P C).

3. Sham Sunder Lal v. Achhan Kunwar, (1899) 21 All 71=25 I A 183=7 Sar 417 (P C).

4. Brij Lal v. Inda Kunwar, (1914) 1 A I R P C 38=23 I C 715=36 All 187 (P C).

for this much of the consideration of the zarpeshgi of 1904, viz. Rs. 27 + Rs. 45 + Rs. 306, total Rs. 378. To this extent, the zarpeshgi may be considered to have been binding on the estate up to the time that it was redeemed by the purchaser and, if so, it would be equitable to treat the purchaser as entitled to retain a lien on possession of the property until the date when the plaintiff shall bring this sum into Court for payment to him.

The Subordinate Judge thought that the validity of the zarpeshgi should be supported because the purchaser satisfied himself that the zarpeshgi deed was for consideration. That might be enough if the purchaser had been dealing with the male karta of a joint Hindu family. Antecedent debt in such a case may be enough to bind the estate; but here in the case of a widow, antecedent debt is of no effect unless such debt itself was incurred for necessity, and the defendant himself admitted that he had made no inquiry as to how the consideration of the zarpeshgi deed was made out. I would allow the appeal, set aside the judgment and decree of the Subordinate Judge and restore that of the Munsif with costs; but it should be added that the decree will not be executed until the plaintiff brings into Court the sum of Rs. 378 for payment to the principal defendant.

Varma J. — I agree.

S.G./R.K. *Appeal allowed.*

A. I. R. 1939 Patna 289

WORT AG. C. J. AND MANOHAR LALL J.

Kumar Kamakhya Narain Singh —
Appellant.

v.

Kalipado Dutt — Respondent.

Appeal No. 145 of 1937, Decided on 22nd September 1938, from original order of Sub-Judge, Ranchi, D/. 4th February 1937.

Execution—Step-in-aid—Decree transferred to other Court for execution—Application after transfer made to Court transferring decree is not step-in-aid of execution.

Where a decree has been transferred for execution to another Court, an application for execution of such decree made, after the transfer, to the Court which transferred the decree is not an application to the proper Court and is not therefore a step-in-aid of execution: *A I R 1923 Pat 384, Foll.; A I R 1916 P C 16, Rel. on; A I R 1923 Pat 224, Disting.; 14 M I A 529 (P C), Ref.*

[P 290 C 1]

1939 P/37 & 38

B. P. Sinha and Bindeshwari Prasad —
for Appellant.

S. M. Mullick and L. K. Choudhury —
for Respondent.

Wort Ag. C. J. — The question in this appeal is whether the execution taken out by the present appellant who was the decree-holder, was barred by limitation. The point depends upon whether the application made on 1st October 1931, was an application to a proper Court and therefore a step-in-aid of execution. Speaking for myself, it seems to me that the matter is perfectly clear from the provisions of S. 38, Civil P. C. In 43 I A 238,¹ their Lordships of the Judicial Committee decided a similar question. There the decree had been transferred from the District Court to the Court of the Munsif, and an application to the District Court, after the transfer, was held not to be an application to the proper Court, and, as the question of limitation depended upon whether that application was a step-in-aid of execution, their Lordships held that the application before them was barred by limitation.

Mr. Sinha who appears on behalf of the appellant however contends that the basis of the judgment of their Lordships of the Judicial Committee in that case was the fact that the property which was attached was property within the local limits of the jurisdiction of the Munsif's Court, and not of the District Judge, and that, had that not been so, the decision would have been different. This Court considered the decision of their Lordships in the case in 2 Pat 247² and took the view that the decision of their Lordships depended not upon the question mooted by Mr. Sinha but upon the fact that the application to the District Judge was after the decree had been transferred to the Munsif. However, the decision is in point; it is a case entirely similar to the one which is before us and the decision of the learned Judges of this Court is therefore binding upon us. Any suggestion that the case has been wrongly decided is one which, in the circumstances, cannot be sustained, particularly having regard to the statement of Das J. towards the end of the judgment in which he says:

Section 38, Civil P. C., provides that a decree may be executed either by the Court which passes it or by the Court to which it is sent for execution,

1. *Maharaja of Bobbili v. Narasaru Pedasimhulu*, (1916) 3 A I R P O 16=36 I O 682=39 Mad 640=48 I A 238 (P C).

2. *Jnanendra Nath v. Kumar Jogendra Narain*, (1923) 10 AIR Pat 384=74 IO 608=2 Pat 247.

which provision, the learned Judge seems to consider is conclusive of the matter, and if I may say so, with respect, I entirely agree with that view. The Section is disjunctive. It is not that a Court to which the decree is transferred as well as the Court from which it is transferred, may execute the decree, but "either or" is the expression used. The matter also seems to me to be still more clear from the provisions of O. 21, R. 10, which are :

Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

In my judgment, as I have already stated, that puts the matter beyond any doubt. Nor does that view of the matter conflict with the principle which is laid down by Sec. 46 and is the principle which their Lordships of the Judicial Committee appears to have applied in 14 M I A 529.³ S. 46, as it now is, provides as follows :

Upon the application of the decree-holder, the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

Then the later Sections lay down the conditions applicable to such circumstances. The fact that the executing Court may attach a property by way of precept to any other Courts does not conflict as I have said, with the principle that the Court to which the application for execution is made, must be either the Court which passed the decree or the Court to which the decree has been transferred: in other words, even assuming that the property is to be attached in several Courts, the Court which has control of the proceedings is the Court which passed the decree or the Court to which the decree has been transferred. Therefore quite clearly the application in 1931 to the Hazaribagh Court was not an application to the proper Court inasmuch as it is not the Court to which the decree has been transferred, it having been by that time transferred to the Ranchi Court. The application is therefore not a step-in-aid of execution. The appeal fails and I would dismiss it with costs.

Manohar Lall J. — I agree. There is nothing in the argument of Mr. Sinha, appearing on behalf of the appellant, which leads me even to suspect that the decision

of this Court in 2 Pat 247,² was wrongly decided. The learned Judges in that case applied the decision of their Lordships of the Judicial Committee in 43 I A 238,¹ to the facts of the case before them, and that decision of the Privy Council equally applies to the facts of the present case. It was argued however that another decision of this Court reported in the same volume, viz. 2 Pat 328,⁴ is an authority in favour of the appellant. But if the facts of that case are examined, it will be seen that the question which is now in controversy before us was never raised in or decided by that case. In that case while the execution in respect of a decree was still pending before the Court which had passed the decree, an application was made to that Court that some other property belonging to the judgment-debtor should be attached in the form of Rs. 6309.10.0 which was in deposit in the Court of a Subordinate Judge but the Court refused to do that upon its view of the law that it could not issue another execution or execution in another form while the previous execution was still pending and undisposed of before him. This Court set aside that order holding that there was nothing in the Code to prevent a simultaneous execution being issued by the same Court, in other words, the same executing Court could grant both the reliefs by different applications made on different dates. It may be noticed that the Court which was asked to grant the second relief was the very Court which was in seisin of the whole execution case. It was not a case where the Court which was executing the decree was granting one relief and the Court which passed the decree was being asked to grant another relief. S. 38, Civil P. C., and the case in 43 I A 238,¹ were not even referred to in that case for the simple reason that the question, as I have already said, did not arise. I am unable to find anything in this case which helps the appellant. It follows that the appeal fails and must be dismissed with costs.

N.S./R.K.

Appeal dismissed.

4. Ram Sumran Prasad v. Ram Bahadur, (1923) 10 A I R Pat 224=71 I C 741=2 Pat 328=4 P L T 99.

3. Saroda Prosaudd Mullick v. Luchmeeput Singh, (1870-72) 14 M I A 529 = 17 W R 289 = 2 Suther 560=3 Sar 77 (P C).

* A. I. R. 1939 Patna 291

MOHAMAD NOOR J.

Ramasray Rai — Appellant.

v.

Lal Bahadur Rai and others —

Respondents.

Second Appeal No. 883 of 1937, Decided on 30th January 1939, from decision of Addl. Sub-Judge, Arrah, D/. 21st September 1937.

* (a) Contract Act (1872), S. 23 — Criminal prosecution for non-compoundable offence — After Magistrate had come to conclusion that prosecution could not stand, parties referring dispute to arbitration whereby it was agreed that accused should sell disputed plot to complainant for certain amount — Subsequent to end of prosecution accused receiving amount as price of plot agreed to be sold to complainant — Agreement held not void.

A person prosecuted some persons for a non-compoundable offence, i. e., for cutting bamboos from the disputed plot which he claimed as his and which, according to the accused belonged to another person having been purchased by him. When the Magistrate had already come to the conclusion that the criminal prosecution could not stand and obviously a case of theft was not likely to succeed, the parties referred the matter in dispute between them to the arbitration of the landlord of the parties. At his instance, it was agreed that half of the plot should be sold by the accused to the complainant for Rs. 25. Thereafter the accused were acquitted in the criminal case and four months later one of the accused received Rs. 25 from the complainant as the price of half of the plot to be sold and acknowledged it. The accused however did not execute the sale deed and the complainant instituted a suit for specific performance:

Held that when the agreement was arrived at the criminal case had practically come to an end, though nominally pending. Secondly, the acceptance by one of the accused of Rs. 25 as the price of the land four months after the criminal prosecution had come to an end could by itself be taken to be a contract having been entered into by the parties long after the criminal case was over. Hence the agreement was not void : *A I R 1927 All 318, Ref.; A I R 1930 P C 100, Disting.* [P 292 C 1]

(b) Hindu Law—Alienation—Agreement for sale by karta of family property to end litigation which might have become source of trouble to family — Agreement is binding on other members.

A karta of a joint Hindu family is competent to enter into an agreement for sale of the family property to end certain litigation which might have become a source of trouble and expense to the family. The agreement is therefore binding on other members. [P 292 C 2]

D. N. Varma — *for Appellant.*

Shambhu Barmeshwar Prasad —

for Respondents.

Judgment. — This second appeal arises out of a suit instituted by the plaintiff-respondent for specific performance of a contract for sale in respect of half of plot No. 642 (.03 acre in area) in village Ganghar.

The plot lies in front of the houses of the parties. It appears that the plaintiff prosecuted some of the defendants for cutting bamboos from the disputed plot which he claimed as his and which, according to the defendants, belonged to defendant 4 having been purchased by him. During the pendency of the criminal case, obviously at the suggestion of the Magistrate who was trying the case, the parties referred the matter in dispute between them to the arbitration of the landlord of the parties, Babu Kailash Bihari. At his instance it was agreed that half of the plot should be sold by the defendants to the plaintiff for Rs. 25.

Thereafter the accused were acquitted in the criminal case and four months later defendant 1 received Rs. 25 from the plaintiff as the price of half of the plot to be sold and acknowledged it. The defendants however did not execute the sale deed and the plaintiff instituted the present suit. The trial Court dismissed the suit holding that the consideration of the contract was illegal, as against public policy under S. 23, Contract Act. On appeal by the plaintiff, the learned Subordinate Judge has reversed the decree of the trial Court, has decreed the suit and ordered the defendants to execute the sale deed. Defendant 4, in whose name the land stands, has preferred this second appeal. Two points arise in this appeal. One is whether defendant 4, in whose name the land stands and who was admittedly no party to the agreement, is bound by it and can be compelled to execute the sale deed; and the second is whether the contract is void on account of the fact that the consideration was stifling of the criminal prosecution for a non-compoundable offence. I shall take up the second point first.

The appellants mainly relied upon the decision of their Lordships of the Judicial Committee in 57 I A 117 = A I R 1930 P C 100.¹ In my opinion this case has got no application. In that case, a criminal case under various non-compoundable Sections of the Penal Code, was pending and then a compromise was effected. Thereafter the complainant refused to adduce any evidence in the case and the prosecution was dropped. In the present case according to the evidence of defendant 1 himself, the criminal case had practically come to an end. When the agreement was arrived at,

1. *Kamini Kumar Basu v. Birendra Nath*, (1930) 17 A I R P C 100 = 123 I C 187 = 57 Cal 1302 = 57 I A 117 (P C).

Ramsewak Rai, defendant 1, deposes as follows as to what happened in the criminal case :

The Court said that we had nothing to do with the case and have been falsely implicated, and that we might be ruined by payment of costs.

The word "we" is obviously a mistake for complainant as he later on says :

The Court did not say that I should be paid Rs. 25 as costs, he said that the case was false and should be compromised.

It is clear from this deposition that the learned Magistrate, who was trying the case, had already come to the conclusion that the criminal prosecution could not stand and obviously a case of theft was not likely to succeed in view of the fact that civil rights of the parties were involved. The second thing is that defendant 1 took Rs. 25 from the plaintiff as the price of the land four months after the criminal prosecution had come to an end and that this acceptance of the money can by itself be taken to be a contract having been entered into by the parties long after the criminal case was over. It was held in 49 All 540² that a compromise which is otherwise a fair and reasonable one is not invalidated because in connexion therewith a trifling charge of theft between the servants of the parties had been withdrawn.

I agree with the learned Subordinate Judge that the compromise in this case, by which the defendants agreed to sell half of the plot in dispute to the plaintiff, was a fair settlement of the dispute between the parties. The criminal case though nominally pending, had, according to the admission of defendant 1 himself, already come to an end inasmuch as the learned Magistrate had expressed his opinion that there was no case against the accused. Apart from this, as I have stated above, four months later, there was a renewal of the agreement by defendant 1 accepting the price and acknowledging it saying that it was the consideration of the promised sale. The learned Subordinate Judge is quite correct in holding that the real consideration of the promise to sell was the payment of this sum of Rs. 25 by the plaintiff to defendant 1.

The next question is whether defendant 4, in whose name the property stands, is bound by the agreement to which he himself was not a party. This issue is concluded by the finding of fact of the learned Subordinate Judge who has held that the defen-

dants are members of a joint Hindu family and that defendant 1 was its karta. This defendant, on behalf of the family, was perfectly competent to enter into an agreement for sale and this agreement was for the benefit of the family inasmuch as it was to end a litigation which might have become a source of trouble and expense to the family. On the whole I agree with the conclusions of the learned Subordinate Judge and dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 292

HARRIES C. J. AND AGARWALA J.

Kholia Naiko and others

Accused — Appellants.

v.

Emperor.

Criminal Appeal No. 6 of 1938, Decided on 15th November 1938, from decision of Sess. Judge, Ganjam Puri, Berhampur, D/- 25th June 1938.

Criminal Trial—Enmity between accused and witnesses—Conviction based on their evidence is bad.

Where there is enmity between the accused and the witnesses, it is unsafe to uphold the conviction of the accused based on the evidence of such witnesses. [P 294 C 1]

G. C. Das — *for Appellants.*

Public Prosecutor for Orissa —

— *for the Crown.*

Agarwala J.—The five appellants were charged in the Court of the Sessions Judge of Ganjam Puri with being members of an unlawful assembly, the common object of which was to murder Lokhono Tripathi and with the murder of that man. Of the four assessors who assisted at the trial three were of opinion that the charges were not proved while the remaining assessor found the accused guilty of rioting with deadly weapons and of causing grievous hurt in prosecution of the common object of the assembly. The learned Sessions Judge accepted the opinion of the last mentioned assessor, convicted all the appellants under S. 426, read with S. 149 and sentenced them to six years' rigorous imprisonment each.

The prosecution case as laid in Court was that at 9 P. M. on 30th January last, the deceased and his brother Baranidhi Tripathi (P. W. 3) had finished the measuring of their paddy on their threshing floor. Then the deceased went home to have his evening meal leaving Baranidhi Tripathi (P. W. 3) to watch the paddy. When the deceased returned to the threshing floor, Baranidhi

2. Onkar Mal v. Ashiq Ali, (1927) 14 A I R All 318=100 I C 499=49 All 540=25 A L J 495.

(P. W. 3) went home to have his meal. On his way back from his home to the threshing floor P. W. 3 saw the five appellants going from the direction of the threshing floor towards the village carrying arms. When he reached the threshing floor, P. W. 3 saw his brother lying there severely injured, and he deposed that his brother told him that he had been assaulted by the five appellants. According to the evidence of P. W. 3, an alarm was then raised which at first brought P. Ws. 4 and 5 to the scene. The story that these two witnesses told is curious and unnatural. They say that hearing a man cry out from the khalihan and hearing blows, they hastened there and found the appellants in the act of assaulting Lokhono. On their protest the five appellants hastily withdrew. They themselves did nothing to ease the injured man but returned to the place from which they had come and said nothing to anybody. Later, when they heard P. W. 3 raise the alarm, they went to the threshing floor and they depose that on this occasion Lokhono made a statement that he had been assaulted by the appellants. While Damodar Tripathi (P. W. 4) remained at the threshing floor with P. W. 3, Hari Krishna Panda (P. W. 5) was sent to the village to inform the villagers, and it is said that then Baidyanath Panda (P. W. 6) and Dibya Sinha alias Gandu Panda (P. W. 7) arrived and that Lokhono informed them also that he had been assaulted by the five appellants. This evidence fails to carry conviction for a number of reasons. In order to appreciate those reasons, it is necessary to state the relationship of the appellants inter se. Kholia Naiko and Bhika Naiko, appellants 1 and 2, are brothers, living jointly at Ghiari Jhola. Baya Naiko, appellant 3, is the husband of their sister. His home is at Nuvagodo, four miles from Ghiari Jhola. The remaining two appellants Kalu Misra and Lingaraj Misra, are two Brahmans of Ghiari Jhola and are related to each other as uncle and nephew.

Some two months before Lokhono Tripathi's death, a complaint had been laid against one Raibari Naik that he had stolen a necklace from the person of the daughter of Agadhu Misra, a Brahman of village Ghiari Jhola. During the course of the investigation which followed this complaint, appellant 1, Kholia Naiko, who was the village Talayari, informed the police that the story of theft was false and that the real fact was that the modesty of the

daughter of Agadhu Misra had been outraged by Raibari Naik, but as the Brahmans did not wish this fact to be known, they had falsely converted the case into one of theft. The result of this action of the appellant was that the police did not pursue the charge of theft. There was therefore a cause of enmity between the Naiko appellants and the Brahman witnesses of the village.

Then, with regard to the Brahman witnesses 6 and 7, who depose to having heard the dying declaration from the lips of the deceased, it appears that P. W. 6, had instituted a suit on a mortgage against the brother of the first appellant and this suit had been dismissed, the Court upholding the plea of payment made by the defendant. As a result of the failure of that suit, the appellant prosecuted P. W. 6 for bringing a false charge. The witness denies that he knows the result of that prosecution. Dibya Sinha (P. W. 7) admitted that the brother of the fourth appellant Kalu Misra had taken his lands in settlement of his debt. Against both of these witnesses, it has also been pointed out that there is a further cause of suspicion, namely, that in the statement which P. W. 3 made to the village Munsif at 6 A. M. on the morning following the crime, no mention is made of their presence or of the deceased having made any statement to them. The same criticism is levelled against the evidence of witnesses 4 and 5. No mention is made of their presence in the statement which P. W. 3 made to the village Munsif. That statement is Ex. B, and in it the deponent gave a version of what had happened on the evening at the threshing floor which differs materially from his evidence in Court. According to this statement, it was not when he was returning from his home to the threshing floor that he saw the five appellants but when he was going from the threshing floor to his home for the purpose of taking his meal. What he actually said was :

When I went home from the threshing floor to take my meal, Kholi Naik, Bhika Naik, Kalu Misra, Baya Naik of Nua Gardh and Lingaraj Misra came with knives, spears and crowbars. When I arrived at the threshing floor I found that my brother Lokhono Tripathi was injured.

The sequence of events has therefore been changed at the trial and the reason probably is that if in fact he saw the five armed men at about midnight going in the direction where his brother was guarding the paddy and knowing the cause of enmity

between them, he would at least have done something to render assistance to his brother before he could be attacked. In that statement the deponent went on to say that his brother told him that the five appellants had assaulted him. He made no mention whatsoever of anybody else being present at any time when such statement was made. In view of the enmity which existed between the appellants and the Brahman witnesses on whose evidence the conviction is based and to which I have already referred, I consider it would be unsafe to uphold the convictions of the appellants. The information which P. W. 3 gave to the village Munsif at 6 A. M. did not reach the Sub-Inspector until 11-30 although the police station is only three miles from the village. There is no explanation of why this time should have been taken in informing the Sub-Inspector. The police officer who supervised the investigation of the case was not favourably impressed by the witnesses and reported against the prosecution. In my opinion, the majority of the assessors rightly appreciated the evidence that they heard and I agree with the conclusion that they came to with regard to it. I would therefore set aside the convictions and direct that the appellants be set at liberty.

Harries C. J.—I agree.

D.S./R.K. *Convictions set aside.*

A. I. R. 1939 Patna 294

DHAVLE J.

Briju Pandu — Petitioner.

v.

Gangu Ahir — Opposite Party.

Civil Revn. No. 393 of 1938, Decided on 7th February 1939, against order of Sub-Judge, Second Court, Chapra, D/- 17th January 1938.

(a) Civil P. C. (1908), S. 20—Suit on hand-note—Place of suing is either where contract is made or where it is agreed to be performed—In the absence of plea to the contrary by defendant, it may be taken that money was to be repaid where the transaction was made.

Cause of action for a suit on a hand-note arises either at the place where the transaction takes place or where it is agreed to be performed. But where it is not urged on behalf of the defendant that he was to repay the loan at any place other than the one where the transaction was made, it may be taken that the money was to be repaid to the plaintiff where the transaction took place: *A I R 1927 P C 156, Foll.* [P 294 C 2; P 295 C 1]

(b) U. P. Agriculturists' Relief Act (27 of 1934), Sec. 7 — Applicability—Act applies to

suits filed within United Provinces and does not extend its protection outside the province.

Provincial Legislature being only empowered to make laws for the peace and good government of the territories for the time being constituting that province, the operation of the U. P. Agriculturists' Relief Act, would be *prima facie* confined to the United Provinces and its provisions cannot have any operation outside the province so as to protect the agriculturists of the province from the extra provincial consequences of contracts that they might enter into outside the province. Hence a suit on a hand-note executed at Bania Chappar in Gopalgunj munsifi by defendant, an agriculturist and resident of Gorakhpur District in the United Provinces can be filed in Gopalgunj Munsifi as the United Provinces Act does not take away the jurisdiction of Courts lying outside the province: *22 Cal 222 (P C), Disting.; A I R 1931 All 689 & A I R 1936 Mad 552, Ref.* [P 295 C 2; P 296 C 1]

S. C. Misra — *for Petitioner.*

H. P. Sinha and P. Jha —

for Opposite Party.

Order. — This application in revision relates to a suit for the recovery of money due on a handnote said to have been executed by the defendant on 16th Kuar 1341 Fasli in mauza Bania Chhappar in the munsifi of Gopalgunj. The defence was two-fold: (1) that the hand-note was not genuine, valid and for consideration, and (2) that under Sec. 7, U. P. Agriculturists' Relief Act, 1934, the Munsif of Gopalgunj had no jurisdiction to try the suit. The trial Court found in favour of the plaintiff as regards the validity of the hand-note, but held that the Gopalgunj Court had no jurisdiction under Sec. 7, Agriculturists' Relief Act, referred to. It was accordingly ordered that the plaint be returned for presentation to the proper Court. An appeal was preferred against this order, and the Subordinate Judge who heard it agreed with the trial Court that "the suit was not entertainable in the Court at Gopalgunj."

It has been contended on behalf of the plaintiff-applicant that the lower Courts were wrong in holding that S. 7 of the Act, operated to deprive the Gopalgunj Court of jurisdiction to try the suit. There is no dispute that the defendant is a resident of mauza Bairiya in the District of Gorakhpore and is an agriculturist within the meaning of the United Provinces Act in question. The trial Court accepted the plaintiff's oral evidence that the loan was advanced, and the hand-note executed and delivered, in Bania Chappar within the Gopalgunj munsifi. The cause of action for a suit on such a contract arises either at the place where the contract was made or at the place where the contract was to be

performed, and it does not seem to have been so much as urged on behalf of the defendant that he was to repay the loan at any place other than Bania Chappar where "the transaction was done." We may therefore take it, 5 Rang 451,¹ that the money was to be repaid to the plaintiff in Bania Chappar within the Gopalgunj Munsifi. Under S. 20, Civil P. C., suits on hand-notes may be instituted in a Court within the local limits of whose jurisdiction "the cause of action, wholly or in part arises." Sec. 7, U. P. Agriculturists' Relief Act, 1934, however provides that :

Notwithstanding anything contained in any other enactment for the time being in force, every suit for recovering an unsecured loan in which the defendant is an agriculturist, shall be instituted and tried in a Court within the local limits of whose jurisdiction: (a) the agriculturist defendant actually and voluntarily resides ; or (b) in case the agriculturist defendant resides outside the limits of the United Provinces of Agra and Oudh, (i) the holding or the landed property of agriculturist defendant is situate, and (ii) if the agriculturist defendant has (no) holding or landed property, the agriculturist defendant carries on the profession by virtue of which he is classed as an agriculturist.

The trial Court overruled the argument that the United Provinces Act, being a provincial Act, cannot take away the jurisdiction of the Gopalgunj Court, on the ground that the object of the Legislature, viz. the protection of United Provinces agriculturists and their relief from indebtedness, would be frustrated and the Act become a dead letter if that contention of the plaintiff were to be accepted. The lower Appellate Court took the same view on the ground that the Act makes no reference to the residence of the plaintiff and lays down, irrespective of such residence, that whenever a suit for an unsecured debt is filed against an agriculturist defendant, who is a resident of the United Provinces, the Courts in those provinces and no other Courts have jurisdiction to entertain it.

The learned advocate for the applicant has laid stress on the fact that in the opening part of S. 7 of the United Provinces Act the words "shall be instituted and tried in a Court" are not followed by words like "in the United Provinces of Agra and Oudh;" but it is obvious that nothing turns on this in the circumstances of the present case, since the defendant is an agriculturist actually and voluntarily residing in the district of Gorakhpur in the

United Provinces. The omission of the words "in the United Provinces, etc." in the section is not unintelligible, having regard to the provisions of clause (ii) of paragraph (b) of the section. I am unable to appreciate the argument of the learned advocate for the applicant and this was his principal argument that this omission, coupled with the mention of the United Provinces in S. 1, operates to prevent a right of action given by Sec. 20 (c), Civil P. C., from being taken away by S. 7, United Provinces Act; and yet we must not overlook the facts that by S. 1 (2), United Provinces Act "extends to the whole of the United Provinces of Agra and Oudh," and that under S. 80-A, Government of India Act, then in force, each Provincial Legislature was only empowered "to make laws for the peace and good Government of the territories for the time being constituting that province." The operation of the Act would thus be *prima facie* confined to the United Provinces, and it would be impossible to contend with any show of reason that such Sections of the Act, as for example Sec. 35 or 40, which imposes penalties "for entering in books of account a sum larger than that actually lent and for not giving receipts" or prescribes "stamp duty etc., on certain bonds by agriculturists" could have any operation outside the United Provinces. The consideration that weighed with the learned Munsif that if agriculturists from the United Provinces could be sued outside those provinces, the object of the Legislature would be frustrated overlooks the circumstance that the United Provinces Legislature cannot be presumed even to have considered that it had power to protect the agriculturists of the United provinces from the extra-provincial consequences of the contracts that they might enter into outside the United Provinces. The learned Advocate for the defendant opposite party has cited 22 Cal 222,² and contended that the cause of action being personal, the suit must be tried in the jurisdiction in which the defendant resides. But the question that was decided in *Gur-dyal Singh's case*² was the effect to be given in a Punjab Court to an *ex parte* decree passed in a Faridkot Court regarded as a foreign Court. Such decrees stand on an entirely different footing from decrees passed by a Court in one province of British

1. Soniram Jeetmull v. R. D. Tata & Co., (1927) 14 A I R P O 158=102 I C 610 = 5 Rang 451 = 54 I A 265 (P C).

2. Gurdyal Singh v. Raja of Faridkot, (1895) 22 Cal 222 = 21 I A 171 = 6 Sar 603=(1894) A O 670 (P O).

India and sent for execution to another province: see Secs. 40 and 44, Civil P. C., and 53 All 747³ and 59 Mad 918.⁴ The contract in suit is prior to April 1935 when the United Provinces Act came into force. It must be taken to have been entered into by the parties with reference to the then existing law including S. 20 (c), Civil P. C. Under that contract therefore, the Gopalgunj Court had jurisdiction to entertain a suit based on it, and the United Provinces Act does not even purport to take away the jurisdiction of Courts lying outside the United Provinces, even if it could be pretended that it had any power to do so. The Act may be a good defence in suits brought in the Courts of the United Provinces to which it extends, but it seems to me clear that it cannot affect the jurisdiction of the Gopalgunj Court to entertain the suit notwithstanding the fact that the defendant is an agriculturist of Gorakhpur.

The application in revision must, therefore be allowed and the order to return the plaint for presentation to the proper Court set aside. The trial Court will now proceed to dispose of the suit in accordance with the law. The applicant is entitled to the costs incurred by him in all Courts so far, including a hearing fee of one gold mohur in this Court.

S.G./R.K.

Application allowed.

3. Sheo Tahal Ram v. Binaik Shukul, (1931) 18 A I R All 689 = 136 I C 353 = 53 All 747 = 1931 A L J 653.

4. Oomar Hajee Ayoob Sait v. Thirunavukkarasu Pandaram, (1936) 23 A I R Mad 552 = 162 I C 904 = 59 Mad 918 = 71 M L J 93.

A. I. R. 1939 Patna 296

WORT J.

*Ram Lal Sahu and another —**Defendants — Appellants.*

v.

Mt. Bibi Zohra and others—Plaintiffs
— Respondents.

Appeals Nos. 444 and 634 of 1936, Decided on 7th December 1938, from appellate decrees of Sub-Judge Second Court, Gaya, D/. 21st April 1936.

(a) Landlord and Tenant—Tenancy—Nature of — Proof — Kabuliyat by which tenancy is created not registered—No patta in respect of tenancy produced—Kabuliyat is not admissible in evidence to prove that tenancy is permanent.

Where the agreement or kabuliyat by which a tenancy was created is not registered, and no patta in respect of the tenancy is produced, both on the ground that the kabuliyat is not registered and, on the ground, that there is no patta, the kabu-

liyat is inadmissible for the purpose of proving that the tenancy is permanent. [P 297 C 2]

(b) Landlord and Tenant — Suit for ejectment on ground of breach of agreement — Tenants executing agreement that they would build a thatched roof with tiles on house constructed on land leased out and would not make a chat — Mere creation of roof inside building and under thatched-roof does not in law amount to breach of agreement. (*Obiter*).

The defendants who were tenants of the plaintiffs executed an agreement in their favour that they would build a thatched roof with tiles on the house constructed on the land leased out to them and would not make a chat. The plaintiffs alleged that the defendants had broken the agreement by constructing a roof inside the building and under the tiled and thatched roof and claimed an injunction restraining the defendants from continuing, the breach of the alleged agreement. What the defendants had really done was, that, whereas on the completion of the thatched and tiled roof they had one storied building, they erected another roof inside the building which converted it from one storied into two storied building :

Held that, as a matter of law, it could not be said that the erection of a roof inside the building was itself a breach of the agreement between the parties. [P 298 C 2].

(c) Lease — Construction—Origin of tenancy known — It cannot be inferred from facts proved that tenancy is other than what it purports to be.

Where the origin of a tenancy is known, it is impossible to hold, as a matter of inference from the facts proved that the tenancy is other than what it purports to be. [P 299 C 1]

(d) Evidence Act (1872), S. 115—Sec. 115 represents law of estoppel in England.

Section 115 represents or is the same as the law of estoppel in England : 20 Cal 296 (P C), Rel. on. [P 300 C 2].

(e) Lease — Construction—Plaintiffs suing to eject defendants after serving them with notice, alleging that they held land under monthly tenancy—Defendants contending that they had permanent tenancy and that in any case, plaintiffs were estopped by their conduct from denying that tenancy was permanent—Kabuliyat by which tenancy was created inadmissible in evidence being unregistered — Facts and circumstances relied on by defendants held did not amount to representations so as to create estoppel —In absence of contract to contrary, tenancy held to be from month to month and plaintiffs held entitled to eject defendants — S. 53-A, T. P. Act, held had no application.

The plaintiffs brought a suit to eject the defendants from certain land alleging that they held it under a monthly tenancy under the plaintiffs and stating that notice to quit had been duly served on them. The defendants contended that they had a permanent tenancy and that, in any case, the plaintiffs (landlords) were estopped, by reason of their conduct, from contending that the tenancy was other than permanent tenancy. The agreement or kabuliyat by which the tenancy was created was not registered and so was inadmissible in evidence to prove that defendants had a permanent tenancy. The defendants derived their title from one G thus : A building lease was granted to G in 1913. In 1915 G died leaving E

who took possession. In 1923 *B* sold his interest to *H* who in turn assigned his rights in 1930 to the defendants. The facts that were relied on by the defendants for establishing their case of estoppel were the ground lease in 1913 for building purposes, the sales of the land and house in 1923 and 1930. They also relied on two facts, namely one, that in 1915 when *G* died his brother *B* took possession; the other, that in 1919 *B* executed an ijara deed in favour of a person. They also relied on two agreements executed between them and the plaintiff in 1932 under which they (defendants) undertook not to construct a chat on the house constructed on the land and only to build a thatched roof :

Held that the acts or omissions of the landlords before the defendants came into possession could not be relied on by the defendants for establishing an estoppel against the plaintiffs. Even assuming those acts and omissions could be so relied on by the defendants, they did not amount to clear representations which caused the defendants to act in the way in which they did, so as to create an estoppel under Sec. 115, Evidence Act. The agreement of 1932 also did not constitute any representation because, what was allowed by those agreements was referable to the interest which the defendants already had. Therefore, in absence of contract to the contrary, the tenancy was from month to month within the meaning of S. 106, T. P. Act, and there was no estoppel in the case which would prevent the plaintiffs from contending that what the defendants had got was merely a tenancy from month to month and the plaintiffs having given valid notice to the defendants to quit, were entitled to eject them. S. 53-A, T. P. Act, was of no help to the defendants : 21 All 496 (P C); A I R 1931 P C 79; S. A. No. 460 of 1935 and A I R 1929 Cal 37, *Rel. on*; A I R 1925 P C 146; (1865-66) 1 H L 129 and 32 Cal 648, *Dist. ing.*; Case law discussed. [P 301 C 1, 2; P 303 C 1]

(f) Transfer of Property Act (1882), Sec. 53-A—Nature of rights given by Section 53-A explained.

Section 53-A gives a party relying upon it such rights which, but for the lack of some formality, he would have under the written agreement, but it gives no more and does not give any right which the informal agreement would not give.

[P 303 C 1]

P. C. Manuk and C. P. Sinha (in No. 444) and Khurshed Husnain, S. M. Hafiz and Syed Ali Khan (in No. 634) —

for Appellants.

Khurshed Husnain, S. M. Hafiz and Syed Ali Khan (in No. 444) and P. C. Manuk and Raj Kishore Prasad (in No. 634) — *for Respondents.*

Judgment.—These are two appeals, one by the defendants and the other by the plaintiffs, in the following circumstances. The plaintiffs' action was for an injunction to restrain the defendants from continuing an alleged breach of an agreement of 1932, alternatively for possession of the property, notice to quit having been served. The agreement of 1932 was in settlement of certain proceedings taken by the plaintiffs

under S. 107, Criminal P. C. There it was alleged that there was a possibility of a breach of the peace, that the defendants were not complying with the terms of their tenancy and of the agreement mentioned. The agreement, as I have said, was with regard to a roof, and it was therein undertaken by the defendants that they would build a thatched roof with tiles and would not make a chat; this was to be done within fifteen days.

The question that came to be determined by the trial Court and the Appellate Court was, first of all, whether there was a breach of the agreement of 1932; and, secondly whether the plaintiffs in the alternative were entitled to eject the defendants. The decision of the latter question depended upon whether the defendants had (as they alleged) a permanent lease or whether their tenancy was from month to month. Now, the issue as regards the tenancy has been decided against the plaintiffs, the Judge holding from the facts that there was a permanent tenancy. As regards the other question, the Judge has held that there has been a breach of the agreement.

I propose in the first place to deal with the alleged breach of agreement of 1932. I might add at this stage that the case has been argued with great ability by Mr. Manuk on behalf of the defendants and by Mr. Khurshed Husnain on behalf of the plaintiffs, so I find it unnecessary to reserve my judgment although the arguments have been long and detailed. With regard to the question whether the defendants had broken the agreement of 1932, I must make a further statement. It appears that the present defendants came into possession of the premises by an assignment of 1930, two years before the agreement the breach of which is complained of. But the original tenancy was one of 1913 under an agreement or kabuliyat which was unregistered and therefore inadmissible in evidence to prove that it was a permanent tenancy. There was a statement in the Court below that there was a patta, but that was not produced. Therefore both on the ground that the kabuliyat of 1913 was not registered and on the ground that there was no patta, having regard to the decision of the Full Bench of this Court, the document which I have before me is inadmissible for the purpose of proving the original tenancy of 1913. It would be otherwise, if the correct view of the matter is that the document constitutes merely a tenancy from month

to month. Under that document the predecessor-in-interest of the defendant covenanted in these terms:

I declare and put in writing that I shall, in keeping with the terms of this kabuliyat, build a tiled straw thatched house and shop on the land taken in settlement.

Now, it has been held in this case (and it is quite unnecessary to go into further detail with regard to the matter) that the intention of the parties was that the house or premises to be built by the defendants should be built in such a way as not to overlook those of the plaintiffs or to affect their privacy. It was the contention of the plaintiffs that there had been a breach of this understanding, and indeed the breach of the express terms of the agreement of 1932, as I have already stated, was the reason for this action. Some fifteen days after the first agreement of 12th January 1932, i. e. on 27th January 1932, the parties came to another agreement. Perhaps it would be better to describe the second document as a statement to which both parties put their names. The terms were these :

The petitioners second party have completed the thatching of the house with tiles as promised in the petition filed on 11th January 1932 (the date given should have been 12th January 1932), and now the petitioner Akif Hussain, first party, has no objection whatsoever left in this connexion. Therefore it is prayed that the case may be dismissed.

It really amounts to a compromise of the criminal case under S. 107, Criminal P. C. What the plaintiffs said in this case was this that, although they had agreed on 27th January 1932 that the original terms of the 12th of the month had been complied with, the defendant had surreptitiously broken the agreement by erecting a "roof" inside the building and under the tiled and thatched roof. What the defendants really did was this, that whereas on the completion of the tiled and thatched roof they had a one storied building, they erected another roof (or as it has been described and wrongly described a ceiling) inside the building which converted it from one storied into two storied. They also opened a window which according to the plaintiffs gave on to the plaintiffs' premises and affected their privacy. Now, there was some discussion as regards this window in the trial Court, but it seems to me that the matter is disposed of by the statement of the learned Munsif who, in deciding Issue 7, says :

As regards the right of privacy, the learned

advocate for the plaintiffs said at the outset that for this he did not rely on any right beyond what he got by agreement.

If this matter had been pressed very seriously, which perhaps it cannot be having regard to the statement made in the trial Court, I should have been inclined to remand the case for the determination of the point which I shall indicate in a moment.

Now, it is quite clear that the agreement of 12th January 1932 had in fact in letter been complied with, as is clearly shown by the subsequent statement which was made by the parties in settling the 107 proceedings. The only question therefore to be determined is whether by turning the building into a two-storied one the defendants had caused a breach of the agreement which they had entered into. It is perfectly obvious, although perhaps it may not be necessary to decide it, that the intention of the agreement was that the privacy of the plaintiffs should not be affected, but I am clearly of the opinion that as a matter of law it cannot be said that the erection of a ceiling or floor or, it may be correctly described a roof inside the building, is itself a breach of the agreement. Therein arises the point to which I referred a moment ago, namely whether having erected the ceiling inside the house, turning a one-storied building into a two-storied one, and having thrown open a window on the east side which gave on to the plaintiffs' premises, the defendants had in fact broken the agreement and the whole intention of the parties had been vitiated in that way? But having regard to the decision which, it seems to me, I am bound to come to on the other part of the case, it is unnecessary for me to decide that point. But if my decision on the other question is wrong, it seems to me necessary that the case be remanded for a determination of the question whether a window had been made which overlooked the plaintiffs premises, and, if that be answered in the affirmative, whether thereby a breach of the agreement of 1932 had been caused.

The other question is a much more serious one. The question is, whether the plaintiffs were entitled to eject the defendants. If the document of 4th October 1913, the kabuliyat executed by Gajadhar Sahu, the predecessor-in-title of the defendants, be construed as creating a tenancy from month to month or if they have otherwise such a tenancy, then quite clearly the plaintiffs

having issued a valid notice to quit were entitled to eject the defendants. The defendants derived their title from Gajadhar Sahu thus: A lease was granted to Gajadhar in 1913. In 1915, Gajadhar died leaving his brother Bulkan who took possession; in 1923 Bulkan sold his interest to one Hira Sahu and in 1930 Hira Sahu in turn assigned his interest to the defendants for a sum of Rs. 2461. If the kabuliyat is to be construed as creating a tenancy from month to month, the only clause which can be relied upon is this clause :

For the purpose of building a shop and house fixing the ground-rent at annas four a month, the annual ground-rent being Rs. 3.

The period at which rent is payable has always been held to be evidence of the term of a tenancy. But I should hesitate before coming to the conclusion in this case that on the construction of the document itself it was a monthly tenancy, as the document is certainly ambiguous, regard being paid to the words "the annual ground-rent being Rs. 3." But the defendants did not rely on any such contention, naturally their contention being that they had a permanent lease. But, quite apart from the fact that no patta exists, I am prevented from relying upon this kabuliyat for holding that the defendants had a permanent lease for the reason that it is unregistered. Mr. Manuk who appears on behalf of the defendants does not seriously dispute nor can he dispute that proposition. I am therefore thrown back, for the decision of the case, on other grounds. Before I leave that branch of the case I would say that it is impossible, as Mr. Khurshed Husnain argues, for this Court to come to the conclusion in the circumstances of the case that the defendants had a permanent lease, and for this simple reason that when the origin of the tenancy is known, as it is here, it is impossible to hold as a matter of inference from the facts proved that the tenancy is other than what it purports to be. And indeed Mr. Manuk does not seriously contend that on the facts of this case the inference should be drawn that the defendants had a permanent tenancy. But what he does contend here is that the landlords, in the circumstances of the case, are estopped from contending that the tenancy is other than a permanent tenancy. I have already stated some of the facts upon which the defendants rely for establishing their case: the ground lease in 1913 for building purposes, the sale of the house

and land in 1923 and again in 1930. There are two other facts which are relied upon by the defendants: one is that in 1915 when Gajadhar died his brother Bulkan took possession; and the other is that in 1919, four years afterwards, Bulkan executed an ijara deed in favour of a person whose name is irrelevant. Another fact is that in the earlier proceedings, the details of which it is perhaps unnecessary to state, the plaintiffs complained to the predecessor of the defendants that in the building of their premises the defendants were encroaching upon the plaintiffs' land; and again, and perhaps the most important fact upon which the defendants rely, are these agreements of 12th January and 27th January 1932. Mr. Manuk on behalf of the defendants contends that these facts in law constitute such a representation as is contemplated by S. 115, Evidence Act, and, in support of his contention he relies upon a number of authorities or principles laid down in those authorities.

The case most in his favour is a decision of this Court in 2 Pat 452¹ where two questions fell to be considered by Jwala Prasad and Adami JJ., first whether on inference drawn from the facts of the case there was in law a permanent tenancy; and, secondly, whether to use the words of the learned Judges, "the subsequent acts and conduct of the lessor and lessees converted the lease into a permanent one." In deciding the first point the following statement was made,

upon the facts in the present case and the lease in question, we are not prepared to differ from the view of the Court that at its inception the lease was a permanent lease and not one from year to year. The respondents are on firmer ground on Issue 2,

Issue 2 being estoppel. The learned Judge there particularly referred to the fact that in 1907 before the foundations of permanent or pucca buildings were laid, the defendants applied for permission and they were given that permission. Comment was made that under the *parwangs* which had been given by the landlord it appeared that the buildings had already been completed and that the construction of those buildings was confirmed by the plaintiff, the landlord. There were a number of other facts, including the fact that no higher rent was claimed as a condition of the erection of these per-

1. A. H. Forbes v. Hanuman Bhagat, (1924) 11 A I R Pat 88=77 I C 32=2 Pat 452=4 P L T 414.

manent buildings, and the learned Judge summed up the position by stating that

the plaintiff in this case did not only acquiesce in the construction of the buildings in question by merely abstaining from interference, but he actually granted permission for erecting the buildings.

Mr. Manuk then relies upon the observations of their Lordships of the Privy Council, as expressed by Mr. Ameer Ali, in 52 I A 178,² for his contention that there is an estoppel in this case. That was a case in which there was one possible construction of the lease (which incidentally was a registered lease), that it was a tenancy from year to year. But, on the footing of a letter written by Forbes' agent that the lease was in fact a permanent lease, their Lordships of the Judicial Committee of the Privy Council held that the defendants were estopped from asserting that the lease was not permanent. Mr. Manuk contends that although there may have been a definite specific statement in *Forbes' case*,² which their Lordships held to be an estoppel, yet, estoppels are not confined to specific statements. For this contention he relies upon S. 115, Evidence Act, which provides: "When one person has, by his declaration, act or omission, intentionally caused or permitted another person": in other words, it may be an act or omission on the part of the landlord; and, if he can show in this case that there has been an act or omission upon which the defendants acted, then the landlords in this case, equally as in *Forbes' case*,² would be estopped from asserting that the tenancy of his clients was not a permanent one. Now, their Lordships in coming to their conclusion in *Forbes' case*² made this statement at p. 186 of 52 I A 178.²

The Munsif and the District Judge have rightly held, in their Lordships' opinion, that the statement in the letter of 31st December 1903, is a statement of fact and not an expression of opinion as contended by the plaintiff.

Their Lordships then proceeded to rely upon the decision in (1865-66) 1 H L 129³ and repeated the well-known passage to which reference has been made in more than one case. Mr. Manuk relies upon that passage which runs thus:

The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in

land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and without objection by him lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in (1811) 18 Ves 328,⁴ and as I conceive, is open to no doubt.

Now, it is quite clear that the defendants cannot rely on (1865-66) 1 H L 129³ as the case before me is not a case in which the defendant

takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation . . . lays out money upon the land.

There is another reason to which I shall in a moment refer for coming to the conclusion that (1865-66) 1 H L 129³ is no authority for the proposition put forward by Mr. Manuk. 52 I A 178,² taken as a whole, cannot be an authority in Mr. Manuk's favour as the decision must be confined to the facts of that case and they were that there was a representation of fact and the party had acted upon it. But here Mr. Manuk says there was an "act or omission" under Sec. 115, Evidence Act. I should like to observe that their Lordships of the Judicial Committee of the Privy Council have stated that S. 115, Evidence Act, represents, or is the same as the law of estoppel in England: see 19 I A 203.⁵ I would now like to refer to one or two other cases in passing. Reference was made to 32 Cal 648.⁶ It will be observed, however, that that was not a case of estoppel but a case in which the Court presumed that in the origin the lease was intended to be permanent. Reliance has also been placed on certain observations of Rankin C. J. in 56 Cal 738.⁷ There the origin of the tenancy was unknown: it could be traced back for about hundred years, rent had not been enhanced at least for forty years, certain small houses or huts had been built upon the land, the land had been used for residential purposes but the Court declined to draw the inference that there was a per-

4. Gregory v. Mighell, (1811) 18 Ves 328=11 R R 207.

5. Sarat Chander Dey v. Gopal Chunder Laha, (1892) 20 Cal 296=19 I A 203=6 Sar 224 (P C).

6. Promada Nath Roy v. Srigobind Chowdhry, (1905) 32 Cal 648=9 C W N 463.

7. Kamal Kumar v. Nanda Lal, (1929) 16 A I R Cal 37=116 I C 378=56 Cal 738=33 C W N 211.

2. A. H. Forbes v. L. E. Ralli, (1925) 12 A I R P C 146=87 I C 318=4 Pat 707=52 I A 178 (P C).

3. Ramsden v. Dyson, (1865-66) 1 H L 129=12 Jur (N S) 506=14 W R 926=149 R R 543.

manent tenancy. The observation of Sir George Rankin upon which Mr. Manuk relies is that the erection of the buildings was a notice to the landlord that a permanent tenancy was claimed; and it is contended in this case that the creation of more permanent buildings after the kutchha buildings had been pulled down was also a notice to the landlords in this case that a permanent tenancy was created. Now, it is a remarkable fact that apart from 52 I A 178² and the decision reported in 2 Pat 452¹ to which reference was made in the early part of my observations, there is no decision in which this rule of estoppel has been applied. It is not conclusive of the fact, but it does seem to indicate the difficulty of holding that the landlord is estopped.

The facts upon which Mr. Manuk relies, for his contention that the landlords in this case are estopped, I have already referred to and do not propose to state them again. It must be noticed that apart from the agreements of 1932, all the "acts or omissions" which are relied upon took place years before the present defendants came into possession. It is difficult, indeed it is impossible I think to contend that the fact that Gajadhar's brother Bulkan took possession in 1915 when Gajadhar died, and the omission of the landlords to take any action can be treated as a representation by the landlords causing the present defendants to believe that the then holder of the land had a permanent tenancy; and it seems to me equally impossible to contend that the present defendants in any way acted upon such belief in the year 1930 when they took possession of the land. A building was already on the land and it cannot be said therefore that the defendants built upon the land acting upon the representations of the landlord. In my judgment, quite clearly the omissions or acts of the landlords before the present defendants came into possession are not matters upon which the defendants can rely for establishing an estoppel. But, I will assume for the purposes of the case that those facts can be relied upon by the present defendants, that is to say, those facts and circumstances prior to the defendants' possession may be relied upon for what they are worth by the defendants. The facts must be examined, the first being the lease of 1913 which was a building lease. It is impossible to hold that being a building lease it was necessarily a permanent lease or that being granted a building lease

the defendants were entitled to believe that it was a permanent lease. They knew what they had. They had the document of 4th October 1913 and they knew what sort of right they had. The fact that Bulkan, the brother of Gajadhar, took possession is quite equivocal. The landlords might or might not have insisted upon the possession of the land being given up by Bulkan, but in no sense could it be said that the non-intervention of the landlord was a representation giving the defendants a permanent right in the property: see 56 Cal 738.⁷ The fact that the landlord stood by in 1919 when Bulkan executed the ijara deed is also equivocal. Bulkan was transferring such interest as he had, and it was the ijaradar's look out as to what he got under that transaction. The transfer in 1923 and again in 1930 must, in my judgment, be looked at in the same light. It was on these facts and similar facts that the Calcutta High Court declined to infer that the tenancy there under consideration was of a permanent character. I refer to this decision as Mr. Manuk argues that the matters to be taken into consideration for coming to a conclusion whether on its proper construction a tenancy is a permanent one or not, are the same considerations which apply to the question whether in this particular case an estoppel is established.

Mr. Khurshed Husnain appearing on behalf of the plaintiffs relies on the other hand upon the well-known case in 26 I A 58.⁸ There the defendants failed to establish equitable estoppel. The land in that case had been let to five tenants for the purpose of constructing thereon a saltpetre factory at the annual rent of Rs. 28. The saltpetre factory had been constructed, but in course of time it got into a state of disrepair or was demolished, and then other buildings were erected and the defendants spent several thousands of rupees on those buildings. The plaintiffs instead of objecting or prohibiting (it was alleged), induced the defendants and their ancestors to build. Their Lordships of the Judicial Committee, reversing the decisions of the Courts in India, observed that the statement of the rule of equity made in 1885 A W N 100⁹ was inadequate; and that in order to raise a case of equitable estoppel,

it was incumbent upon the respondents to show that the conduct of the owner, whether consisting

8. Lala Beni Ram v. Kundan Lal, (1899) 21 All 496=26 I A 58=7 Sar 523 (P O).

9. Gopi v. Bisheshwar, (1885) A W N 100.

in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation.

In referring to (1865-66) 1 H L 129³ Lord Watson repeated the words of the Lord Chancellor to this effect :

It follows as a corollary from these rules, or perhaps, it would be more accurate to say it forms part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and building when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end.

Mr. Manuk agrees that this decision lays down the proposition that mere acquiescence is not enough. What is there in the case before me other than acquiescence? There is the acquiescence or standing by, by the landlords when Bulkan the brother of Gajadhar took possession; there is acquiescence or standing by when he executed the ijara deed; and there is the same when there was a transfer to Hira Sahu and to the defendants. The only additional circumstance is the agreement of 1932. I held and I still hold that even assuming that acquiescence by the landlords up to 1930 were facts upon which a party could otherwise rely, no reliance could be placed upon them by the present defendants because they do not amount to a representation to them or their agent. But assuming they do, there is nothing, as I have said, but mere acquiescence or standing by, and the agreement of 1932 adds nothing to, but conditions the terms under which the defendants are presumed to have gone into possession. These acts or omissions are not clear representations which caused the defendants to act in the way they did. Their actions such as they were, that is to say the building operations, are referable to the agreement which they believed entitled them to build, and not to any representation by the plaintiffs.

I now pass on to the well-known decision in 58 I A 91,¹⁰ which Mr. Manuk contends is not an authority against him. This decision has been applied in this Court by my brothers Agarwala and Varma in 19 P L T 791.¹¹ I make no further reference

to that authority because I agree that the facts in that case are almost precisely similar to the facts in 58 I A 91.¹⁰ In 58 I A 91¹⁰ the defendant had taken possession of the land on the understanding that he was to get a permanent lease. He proceeded to build structures of a permanent character upon the land, and then apparently made a request to the landlord to give him a permanent lease which he had contracted for: there was an agreement that he should have a lease for five years. In the result the landlord brought an action against the tenant to eject him. The plea was taken and accepted that there had been part performance of the agreement, or that there existed an equitable estoppel. Lord Russell in delivering the judgment of their Lordships of the Privy Council, referred to the fact (which I have already stated in the earlier part of my judgment) that both the cases in (1865-66) 1 H L 129³ and (1811) 18 Ves 328⁴ were cases in which doctrines of part performance in contradistinction to estoppel were pleaded, and pleaded in suits in the Court of Chancery for specific performance. They had nothing to do with the facts of the case before the Privy Council. Lord Russell, in the course of his judgment, in referring to the facts, said this at page 103 of 58 I A 91¹⁰ :

In truth this case, when the true facts are appreciated, is simple enough. The acts of the respondent are all referable to a verbal contract which was enforceable against the appellant at the time when the respondent's expenditure was incurred, and for long afterwards. Unfortunately for the respondent, he allowed his rights to enforce his contract to become barred, with the result that he can only resist the appellant's claim to possession by seeking to establish a title, the acquisition of which is forbidden by the statute.

And in referring to 52 I A 178² Lord Russell stated that "that decision was based upon an estoppel grounded upon a statement of fact." Mr. Manuk rightly contends that the difference between 58 I A 91¹⁰ and the case before me is that in that case there was an oral agreement of lease and in this case there is an agreement which cannot be used in evidence as it was not executed in accordance with law. I fail to see what difference in the proper application of the principle those facts make. Indeed when the cases are examined they seem to bear a striking resemblance to one another. I have already stated and repeat that Mr. Manuk strongly relies upon the agreements of 12th and 27th January 1932. It is impossible to contend that those agreements constituted any represen-

10. Ariff v. Jadunath Majumdar, (1931) 18 A I R P C 79=131 I C 762=58 Cal 1235=58 I A 91 (P C).

11. Maina Sahu v. Balak Das, (1938) 25 A I R Pat 485=19 P L T 791.

tation, because what was allowed by those agreements was referable to the interest which the defendants already had, namely the unenforceable lease. Indeed, the agreements rather restricted than enlarged the defendants' right. To put it shortly, they were agreements which kept the defendants within the confines of the original agreement of tenancy. I fail to see any representation by 'act or omission' by the landlord, nor can I say that the compromise of 27th January 1932 can be described as an intentional 'act or omission' on the part of the landlord which led the defendants to believe that they had anything other than what they had already got; namely that under the Transfer of Property Act and the Registration Act the defendants, "in the absence of a contract to the contrary", had an agreement or lease from month to month within the meaning of Sec. 106 of that Act. I have so held in S. A. No. 460 of 1935¹² in which it was decided that S. 106, T. P. Act, in using the words "In the absence of contract or local usage to the contrary," referred to a contract with regard to that particular matter, that is to say the term of tenancy. I cannot see in this case any estoppel which would prevent the landlords from contending now that what the defendants have got is merely a tenancy from month to month; and the plaintiffs having given a valid notice to the defendants to quit are entitled to eject the defendants. Nor does S. 53-A, T. P. Act, help the defendants. That Section gives the party relying upon it such rights which but for the lack of some formality they would have under the written agreement, but it gives no more and does not give any right which the informal agreement would not give. Mr. Manuk referred me to the order passed in 19 P L T 791¹¹ but I can make no such order.

The result is that the plaintiff's appeal is allowed, but having regard to my decision that it might be necessary to remand the defendants' appeal for the determination of the question I referred to in the earlier part of my judgment, I make no order as to costs. The defendants have leave to appeal.

R.M./R.K.

Appeal allowed.

12. *Amrit Sahu v. Mt. Bibi Salima*, Second Appeal No. 460 of 1935.

A. I. R. 1939 Patna 303

FAZL ALI AND VARMA JJ.

Akhauri Thakur Prasad and others —
Appellants.

v.

Dwarka Singh and others, Plaintiffs
and another, Defendant—Respondents.

Appeal No. 867 of 1936, Decided on 19th December 1938, from appellate decree of Dist. Judge, Gaya, D/- 31st August 1936.

Tort—Negligence — Contributory negligence — Plaintiffs suing defendants for damages on account of loss sustained by them as result of diversion of water channel by defendants—Defendants cutting opening in 1928 and instituting suit for injunction restraining plaintiffs in present suit from closing up opening — Suit finally dismissed in 1933—Opening continuing to exist till 1933 and plaintiffs obstructed by defendants from closing up opening—Held that no question of contributory negligence arose and plaintiffs were entitled to damages.

The plaintiff instituted a suit against the defendants to recover from them a certain sum of money as damages for loss sustained by them as a result of the diversion of a water channel by the defendants. The defendants cut an opening or *khanr* in the embankment, some time in 1928 and after that they brought a suit in 1928 for a declaration that the *khanr* in question always remained open and for a permanent injunction restraining the present plaintiffs from filling up the *khanr*. The defendants' suit was finally dismissed by the High Court on 25th October 1933. The plaintiff alleged that the opening in the *bandh* continued even after the suit had been decided by the trial Court and that the plaintiffs themselves could not close the opening on account of there being obstruction on the part of the defendants. It was found that the opening continued to exist even after 25th October 1933, the date on which the defendants' second appeal was dismissed:

Held that no question of contributory negligence arose in the case. The effect of the wrong committed in the first instance by the defendants continued till the opening was filled up and the mere fact that the plaintiff did not take any steps to fill up the opening while the litigation was pending, did not exonerate the defendants from the responsibility for the losses sustained by the plaintiffs : A I R 1918 Pat 354, Applied.

[P 804 C 2]

S. M. Mullick and Sarjoo Prasad —
for Appellants.

Khurshaid Husnain and Raj Kishore Prasad — *for Respondents.*

Fazl Ali J. — This is an appeal by all the defendants except one *Jadu Singh* in a suit instituted by the plaintiffs to recover from them a certain sum of money as damages for loss sustained by them as a result of the diversion of a water channel by the defendants. The plaintiffs and the defendants are interested in two neighbouring villages, named *Aganda* and *Wari*, the

latter being to the east of the former. It appears that the lands of Aganda are irrigated by means of water which comes through a baha known as Pirthia Bandh Baha. The baha comes into village Aganda through village Bajaura which is situated immediately to the south of Aganda and in Bajaura the baha bears plot No. 1251 and its eastern embankment bearing No. 1252 lies between Bajaura on the west and Wari on the east. The appellants cut an opening or khanr in this embankment some time in 1928 and after that they brought a suit for a declaration that the khanr in question remains always open in order to enable the water of the Pirthia Bandh Baha to flow through this khanr to the village Wari. In this suit there was also a prayer for a permanent injunction to restrain the present plaintiffs and other mukarraridars of Aganda from filling up the khanr. This suit was instituted on 10th October 1928, and a temporary injunction was issued by the trial Court during its pendency. The suit was however dismissed on 24th February 1930, and the appeals preferred by the present defendants against the decision of the trial Court to the District Judge and the High Court were dismissed respectively on 19th January 1931, and 25th October 1933. The present suit was instituted on 19th December 1934. The plaintiffs allege in this suit that the opening in the bandh continued even after the suit had been decided by the trial Court and that the plaintiffs themselves could not close the opening on account of there being obstruction on the part of the present defendants. Both the Courts below have decreed the suit in part and the defendants other than Jadu Singh have appealed to this Court.

The short point which arises in this appeal may be very briefly stated here. The plaintiffs have definitely alleged in their plaint that they could not close the opening after the decision of the previous suit in 1930 because the defendants offered obstruction to the opening being closed. This allegation has been accepted by the trial Court, but the lower Appellate Court has proceeded on the footing that whether any obstruction was offered by the defendants or not the plaintiffs were entitled to be compensated for the loss they had suffered on account of the wrong done by the defendants which was a continuing one. The point which is raised on behalf of the appellants is that if the plaintiffs' case about the obstruction fails, the suit must also fail

automatically and that the lower Appellate Court was not justified in setting up a case for the plaintiffs which does not find a place in their pleadings.

Now, in para. 9 of the plaint it is clearly stated (1) that the khanr remained open till 1931, (2) that the defendants took away the entire amount of water during the period in suit, and (3) that on account of this act of the defendants, the irrigation of the lands of Aganda appertaining to the plaintiffs' takhta badly suffered. The Court below have concurrently found that the opening had been deliberately made by the defendants and that it continued to exist until after the decision of the second appeal arising out of the previous suit which was dismissed on 25th October 1933. On these facts, in my opinion, the principles laid down in 3 P L W 283,¹ fully apply to this case and no question of contributory negligence can arise. The effect of the wrong committed in the first instance by the defendants continued till the opening was filled up and the mere fact that the plaintiffs did not take any steps to fill up the opening while the litigation was still pending will not exonerate the defendants from responsibility for the losses sustained by the plaintiffs. It may also be pointed out here that the main point, raised by the defendants before the learned Subordinate Judge was that even admitting that the plaintiffs had attempted to fill up the khanr and were opposed by the defendants, the plaintiffs could not succeed, because they would have got the khanr closed with the help of the Court. Thus it cannot be said that the defendants had no opportunity to meet the case upon which the learned District Judge has based his judgment. In my opinion the judgment of the District Judge is correct and I would dismiss this appeal with costs.

Varma J.—I agree.

R.M./R.K.

Appeal dismissed.

1. *Raghunath Singh v. Achutanand*, (1918) 5 A I R Pat 354=43 I O 374=3 P L W 283.

* A. I. R. 1939 Patna 305

FULL BENCH

HARRIES C. J., WORT AND DHAVLE JJ.
Lal Sadanand Singh — Plaintiff —
Appellant.

v.

Madan Mohan Sahu Gaontia and
others — Defendants — Respondents.

Letters Patent Appeals Nos. 22 to 24 of 1937, Decided on 19th April 1939, from decision of Rowland J., D/- 22nd April 1937.

* (a) Central Provinces Land Revenue Act (18 of 1881), S. 65-A (7)—Scope and application of S. 65-A (7) fully explained — Meaning of words and expressions in S. 65-A (7) interpreted—Protected thikadar cannot be ejected for mere non-payment of thika jama.

A landlord has no common law right in India to eject a tenure-holder for non-payment of rent. His right to obtain ejectment depends in each case upon the terms of the agreement or lease. Where a right to eject the tenure-holder is not given by the agreement or lease, mere failure to pay the thika jama does not entitle the landlord to eject the thikadar. The form of sub-sec. 7 of S. 65-A suggests that the Legislature intended to save existing rights rather than to create new ones, and also intended to give the protected thikadar protection not only against the sale of his property in execution but also against ejectment except where the law allowed it on certain particular grounds. All that sub-s. (7) does is to save for the landlord any rights which he might have under the law for the time being in force and which is not inconsistent with the Act, to eject the thikadar on certain grounds. The sub-section is designed to deal with protection in relation to liability to ejectment, and does so by leaving such liability unaffected only in cases where it arises under decrees of the kind specified and by implying that the protected thikadar will not be liable to ejectment in any other case. Protection by limiting liability to ejectment to specified cases is easily intelligible, but not protection by extending it to cases where apart from the sub-section in question it does not exist. The interpretation of the expression "any law for the time being in force" as some law relating to the procedure of ejectment may possibly be suggested by the words "passed in accordance with" which precede it, but would mean ignoring the fact that a decree cannot be passed on mere procedure. What the words of the sub-section require is a decree which is good under the general law and not inconsistent with this Act. The words "in execution of a decree for ejectment passed in accordance with law" taken by themselves, cannot be restricted in their meaning. The words "passed in accordance with law" mean in accordance with the substantive or adjective law. But the words must be taken in conjunction with the other words in the sub-section: the words are "and not inconsistent with this Act." The Act deals with substantive rights and does not deal with matters of procedure. It is therefore evident that the expression "in execution of a decree for ejectment passed in accordance with any law for the time being in force" refers to law other than that contained in the statute; in other words, sub-cl. (a) and (b) do

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not give substantive rights apart from the general law but are conditions to be applied in testing the question whether a decree has been passed in accordance with the law. Therefore a protected thikadar cannot be ejected by the landlord for mere non-payment of thika jama: C. R. No. 99 of 1934; A. No. 27 of 1918 and S. A. No. 17 of 1926, *Expl.*; A I R 1918 Nag 66, *Rel. on.*

[P 306 C 1; P 307 C 1; P 308 C 1, 2; P 309 C 1; P 310 C 1; P 311 C 1; P 313 C 1, 2]

(b) Landlord and Tenant—Holders of interests similar to one of thikadar cannot be ejected for non-payment of rent (*Obiter*).

Holders of interests similar to that of a thikadar, gaontia or farmer cannot be ejected solely on the ground of non-payment of rent: 19 W R 349 and 22 W R 376, *Rel. on.* [P 308 C 1]

Dr. D. N. Mitter and G. P. Das —

for Appellant.

Sir M. N. Mukharji, G. C. Das and S. S. Rakshit — *for Respondents.*

Harries C. J.—These are three connected Letters Patent appeals from a decision of Rowland J. The suits out of which the appeals arise were instituted by Lal Sadanand Singh against the three respondents. The latter are protected thikadars and the plaintiff claimed in each suit arrears of rent due from the defendants and in default of payment he prayed that he should be entitled to eject them from their villages and the *sir* lands appertaining thereto. The learned Munsif, who heard the cases in the first instance, decreed the plaintiff's claims and ordered that in default of payment of the thika jama decreed within a certain period the plaintiff would be entitled to eject the defendants. The defendants appealed to the Court of the learned Subordinate Judge. They failed to pay the thika jama decreed within the time allowed and prayed that such time be extended. The learned Subordinate Judge came to the conclusion that he had no jurisdiction to extend the time and dismissed the appeals which involved the ejectment of the defendants. The defendants appealed to this Court and the appeals were heard together by Rowland J. He came to the conclusion that the plaintiff was not entitled to eject the defendants and accordingly he allowed the appeals and set aside the decrees for ejectment passed by the learned Subordinate Judge. The appeals came in the first place before a Bench of this Court consisting of Wort and Dhavle JJ. The learned Judges were of opinion that the authorities of this Court were conflicting and as the matter was one of importance they referred the appeals to the Chief Justice for the constitution of a Full Bench. The matter has accordingly been

argued before this Bench. The plaintiff is the landlord proprietor of three villages whereas the defendants are protected thikadars of the villages concerned. The only point which has to be considered is whether a landlord is entitled to obtain a decree for ejectment against a protected thikadar in the Sambalpur district upon the ground of the latter's failure to pay the thika jama.

The legal position of a protected thikadar is dealt with in S. 65-A, C. P. Land Revenue Act, (18 of 1881). That Section enables a settlement officer to declare certain thikadars, gaontias or farmers to be "protected" for the purposes of that Section, and when a thikadar, farmer or gaontia is declared to be protected the settlement officer may, at the request of the proprietor of the village, determine the amount of the thika jama which shall be payable by such thikadar, gaontia or farmer. Sub-s. (3) of the Section provides that any thikadar, farmer or gaontia who has been ejected or dispossessed may, in certain circumstances, obtain protection and be replaced in possession of the village. Sub-s. (4) sets out the incidents of a tenure of a thikadar, farmer or gaontia who has been declared to be protected under the Section. The tenure is heritable but not transferable by sale, gift, mortgage or dower, and it is expressly declared that it is not saleable in execution of any decree nor can any decree be passed for the sale thereof. On the death of a thikadar leaving more than one heir bearing the same relationship to him, the eldest of such heirs is to succeed. This sub-section contains other provisions relating to renewals of the holding on the termination of a lease or an agreement, settlement of disputes relating to the amount of the thika jama, enhancement of thika jama and such like. Sub-s. (5) is an important sub-section and is in these words :

In any proceedings before a Court for the ejectment of a thikadar, gaontia or farmer, if it appears that the thikadar, gaontia or farmer has filed an application before a Revenue Officer to obtain a declaration that he is protected, or if he files such an application before the Court, the Court shall stay proceedings until the application has been disposed of in accordance with the provisions of this Act, and shall, if the application is filed before itself, forward such application to the Deputy Commissioner or Settlement Officer for disposal.

This sub-section undoubtedly contemplates that a protected thikadar, gaontia or farmer should receive a measure of protection against ejectment. It expressly provides that where an application for protection has been made or if an application is made

before the Court in which ejectment is sought all proceedings must be stayed until the Deputy Commissioner or Settlement Officer has decided whether the thikadar is entitled to protection. It is only after such a decision is given by the Deputy Commissioner or Settlement Officer that the case can proceed. Sub-s. (7) deals with the liability of a protected thikadar, farmer or gaontia to be ejected. The precise terms of the sub-section are as follows :

Nothing in this Section shall affect the liability of any protected thikadar, farmer or gaontia to ejectment in execution of a decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act, on the ground :

(a) that he has failed to pay the thika jama legally payable by him;

(b) that he has diverted the culturable land of the village to non-agricultural purposes, or is chargeable with some act or omission which renders him liable to be ejected.

Both the learned Munsif and the learned Subordinate Judge were of opinion that this sub-section expressly gave the landlord proprietor a right to eject a protected thikadar when the latter had failed to pay the thika jama due from him. Rowland J., however, was of opinion that as long as the thikadar remained protected, he could not be ejected for mere non-payment of the thika jama. The learned single Judge was of opinion that before the thikadar could be ejected, steps would have to be taken to remove the protection given to him and such could be done under the provisions of sub-s. (6). It has been argued before us by Dr. Dwarak Nath Mitter on behalf of the appellant that Sec. 65-A (7), C. P. Land Revenue Act, gives the landlord in terms a right to eject a protected thikadar for non-payment of the thika jama. Counsel has relied upon a decision of this Court, namely *Rai Lal Rajendra Singh Bariha Bahadur v. Sukha Pujhari* (Appeal from Appellate Order No. 17 of 1926 decided by Mullick and Allanson JJ. on 1st April 1927.) This case is unreported, but we have had the advantage of reading the judgment of Mullick J. with which Allanson J. concurred. In that case a suit was brought by the proprietor landlord against a protected thikadar for ejectment of the latter. During progress of the suit a compromise was effected whereby it was agreed that the protected thikadar should pay to the plaintiff a sum of Rs. 85 and the costs of the suit by 4th August 1925, and in default of such payment the plaintiff should get possession of the thikadari property. The

protected thikadar failed to make payment on the due date and asked for an extension of time. This was refused by the learned Munsif though on appeal the learned Subordinate Judge appeared to think that the learned Munsif could have extended the time. The learned Subordinate Judge, however, was of opinion upon other grounds that the appeal failed, and it was accordingly dismissed. A second appeal was preferred to this Court and in that appeal it was argued that the proprietor landlord had no right under S. 65-A (7), C. P. Land Revenue Act, to eject a protected thikadar. This Court held that as the parties had compromised and had agreed that in default of payment of the amount due on a certain date the thikadar should be ejected the Courts below were right in ordering the ejectment of the protected thikadar.

If the Legislature intended by S. 65-A (7), C. P. Land Revenue Act, to give the landlord proprietor a right to eject a protected thikadar for non-payment of rent, then the sub-section has been drafted in a somewhat strange manner. The form of the sub-section suggests that the Legislature intended to save existing rights rather than to create new ones. The sub-section begins as saving Sections usually do; "nothing in this Section shall affect" However the manner in which the Section is drafted in no way concludes the matter, and its terms must be carefully examined. It provides that nothing in the Section is to affect the liability of any protected thikadar to ejectment in execution of a decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act on the ground *inter alia* that the thikadar has failed to pay the thika-jama payable by him. On behalf of the appellant, it has been argued that what this Section means is that nothing in the previous sub-sections shall affect the liability of a protected thikadar to be ejected in execution of a decree for ejectment based on any of the grounds set out in (a) or (b) of the sub-section, provided such a decree has been passed in accordance with the legal procedure in force for the time being and which is not inconsistent with the Act. In short the sub-section gives the landlord a right to sue for ejectment on either of the grounds set out in (a) and (b) and to eject the thikadars if he has obtained a decree on any such grounds in accordance with the procedural law then in force. On the other hand, it has been argued on be-

half of the respondents that all that this sub-section means is that nothing in the previous sub-sections is to affect the landlord's right to eject a protected thikadar upon the grounds given in (a) and (b) of the sub-section provided such a right is given to him by any law for the time being in force which is not inconsistent with the provisions of the Central Provinces Land Revenue Act. According to the respondents the sub-section gives the landlord no new right but merely saves rights in certain instances which he may have under the general law for the time being in force.

The whole controversy has turned on the meaning of the words "decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act." According to the appellant, the sub-section gives the landlord a right to eject the tenant on any of the grounds in (a) or (b) of the sub-section provided he obtains a decree according to the procedural law in force for the time being and not inconsistent with the Act. This was the view of Mullick J. in the unreported case to which I have already made reference. In the course of his judgment he observed :

Section 65-A on a proper reading would seem to mean that a protected thikadar is liable to ejectment for non-payment of rent provided that the decree for ejectment is obtained under the provisions of some law prescribing the procedure for such ejectment. The decree for ejectment in this case was made under the provisions of the Code of Civil Procedure and it has not been shown that it was incompetent or that it was inconsistent with the Central Provinces Land Revenue Act.

From this observation it seems clear that Mullick J. appeared to think that the words "decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act" meant a decree for ejectment passed in accordance with the law of procedure for the time being in force and which was not inconsistent with the provisions of the Act. The decision however in that particular case can be sustained upon a very different ground. There had been a compromise between the parties by which the landlord was given the right to eject the tenant in case the latter failed to pay the thika jama by a certain date. It may well be argued that the landlord had in such circumstances a right by the substantive law of the land to eject the tenant and therefore the decree for ejectment had been passed in accordance not only with the procedural

law but also with the substantive law for the time being in force and which was not inconsistent with the Act. In my view it is impossible to construe S. 65-A (7), Central Provinces Land Revenue Act, as giving the landlord a right to eject the protected thikadar merely for non-payment of thika jama or upon the grounds mentioned in (b) of that sub-section. It must be remembered that sub-section (5) of this Section provides that all proceedings before a Court for ejectment of a thikadar must be stayed in cases where an application has been or is made by the thikadar for protection, and it is clear that such proceedings for ejectment cannot be continued until the application for protection has been disposed of. This sub-section clearly contemplates that the liability of a protected thikadar to be ejected is something less than the liability of an unprotected thikadar to be so ejected. Otherwise, there would be no purpose whatsoever in staying the proceedings until the thikadar's right to protection had been determined.

Thikadars, gaontias or farmers in the Sambalpur district hold an interest very similar to that of a permanent tenure. It has not been seriously contended that apart from the terms of the lease or agreement under which he holds a thikadar gaontia or farmer can be ejected merely for non-payment of the thika jama. It has been held repeatedly that holders of interests similar to that of a thikadar, gaontia or farmer cannot be ejected solely on the ground of non-payment of rent: see 19 W R 349¹ and 22 W R 376.² In the latter case it was expressly held that Act 8 (B.C.) of 1869, S. 52, did not apply to the case of a talukdar who has power to transfer his land and is liable under the terms of his kabuliyat to immediate ejectment in the event of default. The question whether a talukdar is liable to ejectment must be determined by the provisions of his lease. In other words, these two early cases show that holders of interests of the nature of a permanent tenure could not be ejected for non-payment of rent unless the terms of their leases so provided. In short there could be no ejectment for non-payment of rent unless the lease or agreement contained something in the nature of a proviso

for re-entry. Counsel for the appellant has failed to show that there is any special provision of law or that there is any custom in the Sambalpur district giving a landlord a right to eject an unprotected thikadar, farmer or gaontia for non-payment of rent without there being a term in the lease or agreement giving him such a right. The landlord has, in my view, no common law right in India to eject a tenure-holder for non-payment of rent. His right to obtain ejectment depends in each case upon the terms of the agreement or lease. Where a right to eject the tenure-holder is not given by the agreement or lease, mere failure to pay the thika jama does not entitle the landlord to eject the thikadar. Reference has been made to an unreported Bench decision of this Court in *Iswar Naik v. Raja Lal Rajendra Singh* (Civil Revision No. 99 of 1934 decided by Courtney-Terrell C. J. and Saunders J.). A decree for ejectment had been passed against a thikadar in that case for non-payment of rent and it would appear that such was an unprotected thikadar. This case is no authority for the proposition that an unprotected thikadar can be ejected for non-payment of rent apart from any term in the lease or agreement permitting ejectment. The point was never raised nor discussed and no objection appears to have been taken to the decree on this ground.

If in the absence of any provision in the lease for ejectment a landlord is not entitled to eject a thikadar for non-payment of rent, then, if the appellant's contention be accepted, the protected thikadar is in a worse position than the unprotected thikadar. As I have stated, the appellant contends that sub-sec. (7) of S. 65-A, C. P. Land Revenue Act, gives the landlord, apart from the terms of the lease or agreement, a right to eject a protected thikadar on the ground of non-payment of rent, whereas the general law does not give the landlord a right to eject an unprotected thikadar for such non-payment except where the lease or agreement so provides. If the effect of sub-sec. 7 is to give the landlord a right against the protected thikadar which he did not possess previously against an unprotected thikadar, then I am wholly unable to understand why sub-s. (5), S. 65-A, C. P. Land Revenue Act, was ever enacted. Why should all proceedings in ejectment against an unprotected thikadar be stayed in cases where application has been or is being made by the thikadar for protection. If the appel-

1. *Mohunt Buloram Doss v. Jogendro Nath Mullick*, (1873) 19 W R 349.

2. *Mumtaz Bibee v. Grish Chunder Choudhry*, (1874) 22 W R 376.

lant's contention be sound, the only result of obtaining protection would be that in cases where there was no proviso for re-entry the thikadar would render himself liable to ejectment under sub-s. (7) whereas no such liability would exist if he remained unprotected. In my view all that sub-s. (7) does is to save for the landlord any rights which he might have under the law for the time being in force, and, which is not inconsistent with the Act, to eject the thikadar on certain grounds. According to the general law, a thikadar could be ejected by the landlord in all cases provided for in the lease or agreement. Sub-s. (7) limits the landlord's rights in the case of protected thikadars to decrees obtained on either of the grounds mentioned in (a) and (b). If the lease or agreement permitted a landlord to eject a thikadar on grounds other than those stated in (a) and (b) then such rights are taken away by sub-s. (7). On the other hand, if the agreement or lease gives the landlord a right to eject the thikadar for non-payment of the thika jama, he will have such right though the thikadar has become protected. If the lease or agreement does not provide for re-entry in the case of non-payment of rent, then the landlord has no right under sub-s. (7) to eject his thikadar. All that sub-s. (7) does is to save any rights which the landlord might have in accordance with the law for the time being in force and not inconsistent with the Act to eject his thikadar on either of the grounds mentioned in (a) and (b). If by the general law he has no such right, then the protected thikadar cannot be ejected.

To construe the words "decree for ejectment passed in accordance with any law for the time being in force" as meaning a decree for ejectment passed in accordance with the law of procedure for the time being in force is open to a further objection. Following those words are the words "and not inconsistent with this Act". Counsel for the appellant has failed to show us any provisions in the Central Provinces Land Revenue Act dealing with procedure relating to ejectment. As there are no such provisions, I cannot understand how the words "not inconsistent with this Act" were introduced if all that was intended was that the decree for ejectment should be passed in accordance with the procedural law then in force. If the Act does not deal with procedure for suits for ejectment, how could the procedural law in force at any time be

inconsistent with the Act? If these words are construed as meaning a decree for ejectment passed in accordance with the substantive law for the time being in force, then the addition of the words "and not inconsistent with this Act" is intelligible, because the substantive law for the time being in force might well be inconsistent with one or more of the provisions of S. 65-A, C. P. Land Revenue Act. Dr. Mitter has also argued that sub-sec. (7) of S. 65-A should be construed as giving the landlord a right to eject a protected thikadar for non-payment of rent because the landlord would otherwise have no remedy against the protected thikadar. As I have already pointed out, the interests of a protected thikadar are not saleable in execution of any decree and no decree can be passed for the sale thereof. Dr. Mitter has argued that if the thikadari property is not saleable and no decree for its sale can be passed, the Legislature must have intended the landlord to have a right to eject the protected thikadar for non-payment of rent. In my view no such inference can be drawn. If the landlord could sell the property in order to obtain his rent, the protected thikadar would at least have the difference between the sale price and the amount of the thika jama and costs due to the landlord. Such however is forbidden by sub-s. 4 (a) of the Act, and I do not see why the landlord should be given a far greater right, that is of ejecting the thikadar from the property for non-payment of the thika jama and retaining the property himself, though the value of the property might far exceed the amount of the thika jama in arrear. It appears to me that the Legislature intended to give the protected thikadar protection not only against the sale of his property in execution but also against ejectment except where the law allowed it on certain particular grounds.

A Bench of this Court in *Nruplal Singh Gartia v. Mahadeb Naik* (Appeal from Appellate Decree No. 27 of 1918 decided by Coutts and Adami JJ. on 18th July 1919) seems to have taken the view that Sec. 65-A (7), C. P. Land Revenue Act, did not give the landlord a right to eject a thikadar merely on the ground of non-payment of rent. In that case the plaintiff had applied for cancellation of the protection certificate, and Adami J. who delivered the judgment of the Court observed :

It is admitted that the plaintiff applied for cancellation of the protection certificate and this was

the first step to be taken in the proceedings for the ejectment of the thikadar.

From these observations it would appear that Adami J. was of opinion that as long as the protection continued, the protected thikadar could not be ejected for mere non-payment of rent. A view similar to that which I have expressed was taken by a single Judge of the Judicial Commissioner's Court, Nagpur, in the case in A I R 1918 Nag 66.³ At page 67, Mittra A. J. C. observed :

It is urged for the respondents that the decree for ejectment was illegal, as there is no statute applicable to the case which provides for such ejectment. S. 65-A, sub-s. (7), Land Revenue Act, however though not expressly providing for ejectment on the ground that the thikadar has failed to pay the thika jama, recognizes the validity of an agreement providing for the re-entry of the landlord on default of payment of thika jama.

Whether the plaintiff-appellant in this case can eject the respondents if he obtains a cancellation of the protection, will depend upon whether the lease or agreement gives the plaintiff-appellant a right to eject in the case of non-payment of rent. This matter is not before this Court and it is therefore unnecessary to discuss it any further. It may be that the landlord's only remedy is to obtain cancellation of the protection and then proceed by way of execution to sell the property which would no longer be protected from such a sale. For the reasons which I have given, I hold that the plaintiff-appellant had no right to eject the respondents and that Rowland J. was right in allowing the appeals and setting aside the decrees for ejectment. I would therefore dismiss these three appeals with costs.

Wort J. — The question in this appeal is whether a protected thikadar can be ejected on the ground of non-payment of rent. It has been held by Rowland J. from whose judgment this appeal is preferred, that he cannot be, without first removing the protection under sub-s. 6 of S. 65-A, C. P. Land Revenue Act (18 of 1881). The question is to be determined on the construction of S. 65-A, sub-s. (7) of the Act. The protection granted to a thikadar is stated in sub-s. (4); the tenure is not transferable by sale, gift, mortgage or dower, nor can it be sold in execution of any decree, nor can a decree be passed for the sale thereof, nor can it be partitioned

excepting the circumstances with which in this case we have nothing to do. A further advantage is stated in sub-sec. (3) of the same Section, namely that he may be reinstated if he has been ejected by the proprietor or lost possession "otherwise than by transfer or voluntary surrender." It is the contention of Dr. Mitter on behalf of the proprietor that sub-s. (7) of S. 65-A gives to the proprietor substantive rights against the thikadar to eject him in execution of a decree passed on his failure to pay the thika jama, or if "he has diverted the culturable land of the village to non-agricultural purposes, or is chargeable with some act or omission which renders him liable to be ejected." The main clause of the sub-section is as follows :

Nothing in this section shall affect the liability of any protected thikadar, farmer or gaontia to ejectment in execution of a decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act ; then the grounds are stated and are those to which I have already referred. At this stage it is to be noticed that under sub-s. (5) of S. 65-A

in any proceedings before a Court for the ejectment of a thikadar if it appears that the thikadar has filed an application before a Revenue Officer to obtain a declaration, that he is protected, or if he files such an application before the Court, the Court shall stay proceedings until the application has been disposed of in accordance with the provisions of this Act.

The certificate of protection is provided for by the first clause of the Section. Dr. Mitter contends in the first place that the expression 'in execution of a decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act' is a clause referring to procedure: in other words, if the decree is obtained in conformity with the law of procedure then in force the proprietor is entitled to a decree if such decree was obtained on one or other of the grounds set out in the sub-section, amongst them being non-payment of rent. This appears to have been the view taken by the late Mullick J. in *Rai Lal Rajendra Singh Bariha Bahadur v. Sukha Pujhari* (Appeal from Appellate Order No. 17 of 1926, an unreported case). The learned Judge expressed himself in these words :

But it does not appear that the learned Subordinate Judge's statement that there is no law authorizing the ejectment of a protected thikadar is correct. Sec. 65-A on a proper reading would seem to mean that a protected thikadar is liable to ejectment for non-payment of rent provided that

3. *Komalsingh v. Jagannath Muratsingh*, (1918) 5 A I R Nag 66=49 I O 840=15 N L R 39.

the decree for ejectment is obtained under the provisions of some law prescribing the procedure for such an ejectment.

The words 'in execution of a decree for ejectment passed in accordance with law' taken by themselves, cannot be restricted in their meaning. The words 'passed in accordance with law' mean in accordance with the substantive or adjective law. But the words must be taken in conjunction with the other words in the sub-section: the words are "and not inconsistent with this Act." The Act, as it will be seen, deals with substantive rights and does not deal with matters of procedure. It would seem therefore to be evident that the expression "in execution of a decree for ejectment passed in accordance with any law for the time being in force" refers to law other than that contained in the statute; in other words, sub-cl. (a) and (b) do not give substantive rights apart from the general law but are conditions to be applied in testing the question whether a decree has been passed in accordance with the law. At common law there is no right to eject for non-payment of rent although at one stage of the argument it was faintly suggested that in India such a right existed. Without a covenant or proviso to that effect which admittedly does not exist in this case, no such claim could be made. It seems that the learned Judge from whose judgment this appeal has been preferred might be understood to mean that the removal of the protection under sub-s. (6) would be a first step entitling the proprietor to obtain a decree in ejectment against the thikadar. But, it is manifestly clear that if there is no common law or customary right to eject apart from a covenant or proviso, no such claim can be made by the proprietor. The removal of the protection would appear to leave the tenure open to the perils stated in sub-cl. (a) of sub-s. 4. I would therefore guard myself against accepting the view to which I have just referred. Although for somewhat different reasons I come to the conclusion that the decision of the learned Judge is right, it must be affirmed and the appeal dismissed. This order governs L. P. A. Nos. 22 to 24 of 1937.

Dhayle J.—The question raised in this appeal is whether a landlord in the District of Sambalpur is entitled to a decree for ejectment of protected thikadar for the failure of the latter to pay the thika jama due from him. It is urged on behalf of the landlord appellant that S. 65-A (7), Central

Provinces Land-Revenue Act, Act 18 of 1881 (by which the case is governed), gives this right in terms; and reliance is placed on the observations of Mullick J. (with the concurrence of Allanson J.) in *Rai Lal Rajendra Singh Bariha Bahadur v. Sukha Pujhari*, (Appeal from Appellate Order No. 17 of 1926, decided on 1st April 1927):

.... it does not appear that the learned Subordinate Judge's statement that there is no law authorizing the ejectment of a protected thikadar is correct. S. 65-A on a proper reading would seem to mean that a protected thikadar is liable to ejectment for non-payment of rent, provided that the decree for ejectment is obtained under the provisions of some law prescribing the procedure for such an ejectment. The decree for ejectment in this case was made under the provisions of the Code of Civil Procedure, and it has not been shown that it was incompetent or that it was inconsistent with the Central Provinces Land-Revenue Act

.....

Section 65-A gives power to the Settlement Officer "notwithstanding any contract to the contrary" to declare thikadar to be "protected" for the purposes of the Section. The protection is given whether the thikadar holds under a written lease or a verbal agreement. Sub-s. 4 of the Section prescribes the incidents of the tenure of a thekadar who has been declared to be protected. To specify some of these, the tenure becomes heritable but not transferable by a sale, gift, mortgage or dower; it shall not be saleable in execution of any decree nor shall any decree be passed for the sale thereof; and it becomes impartible (Cl. (a)); there is a right to a renewal of the lease (whether written or verbal) on its expiry, on the protected thikadar agreeing to farm his village at a fair and equitable theka jama (Cl. (c)); not more than one enhancement of the theka jama is to be imposed during the currency of a settlement (Cl. (e)); the protected thikadar shall comply with the rules made under Sec. 124-A for the management of malguzari forests (Cl. (g)). The sub-section thus gives the liabilities no less than the rights of the protected thikadar; and it is to be observed that while liability to sale is expressly negatived, no reference is made to the liability or otherwise of a protected thikadar to ejectment. In the next sub-section the Court before which any proceedings for the ejectment of a thikadar may be pending is required to stay them until the disposal by the Revenue authorities of an application filed or to be filed by him for a declaration that he is protected. This plainly implies that the liability of an unprotected thikadar to ejectment may be affected in some

way favourable to him (which is however not indicated) if he receives protection. Sub.s. (6) empowers the Settlement Officer or Deputy Commissioner to declare a thekadar who contravenes "the condition of his tenure as contained in Cl. (a) or Cl. (g) of sub.s. (4)" or grossly mismanages the village held by him in lease to have forfeited the protection previously conferred on him under this Section. One result of the withdrawal of protection under this provision would be to make the tenure saleable in execution or (otherwise) and to permit a decree for sale; but the Section does not up to this point lay down positively anything about liability to ejectment and about the bearing of the withdrawal of protection on it. We next have sub.s. (7) which runs :

Nothing in this section shall affect the liability of any protected thekadar, farmer or gaontia to ejectment in execution of a decree for ejectment passed in accordance with any law for the time being in force and not inconsistent with this Act, on the ground

(a) that he has failed to pay the theka jama legally payable by him;

(b) that he has diverted the culturable land of the village to non-agricultural purposes, or is chargeable with some act or omission which renders him liable to be ejected.

The form of this provision seems to be against the contention that it confers any right on the landlord or imposes any liability on the protected thekadar. As nothing has been said in the previous sub-sections about the liability dealt with here, this provision might just as well read "protection under this section shall not affect the liability. . . ." and all that it purports to do is to leave unaffected the liability of a protected thekadar, etc., to ejectment in certain circumstances, namely (i) that the ejectment must be in execution of a decree for ejectment, and (ii) that the decree for ejectment must be "passed in accordance with any law for the time being in force and not inconsistent with this Act" on the grounds stated. Liability to ejectment is pre-supposed and restricted, particularly by the words "not inconsistent with this Act" qualifying the decree for ejectment. On the principle *expressio unius est exclusio alterius* the provision may be taken to involve that no protected thekadar shall be ejected except in execution of a decree of the kind specified, and may, from this point of view, be compared with Sec. 89, Ben. Ten. Act, according to which "no tenant shall be ejected from his tenure or holding except in execution of a decree."

This part of the statutory protection may also be read with sub.s. (3), S. 65-A, which enables a thekadar, if ejected by the proprietor at a time when he had earned a claim to be protected, to recover possession by applying to the Settlement Officer within two years. A thekadar on whom protection has been or is conferred may not therefore be validly ejected by the landlord even if it should have been agreed between the parties that the landlord would be at a liberty to re-enter at will without the intervention of the Court. Besides this implied exclusion of ejectment without a decree, the sub-section is confined to certain decrees only, viz. decrees for ejectment passed (i) in accordance with any law for the time being in force and (ii) inconsistent with the Act, on the grounds stated. No reference is made in these grounds to any agreement between the parties, and the concluding words "some act or omission which renders him liable to be ejected" will no doubt cover denial of the landlord's title, the common law ground for forfeiture to which effect was given in *Nruplal Singh Gartia v. Mahadeb Naik*, Second Appeal No. 27 of 1918, decided by Adami J. (sitting with Coutts J.) on 18th July 1919.

The illustration already referred to a protected thekadar holding under a lease-reserving liberty to the landlord to re-enter at will is again relevant; if it were to be supposed that such a landlord obtained a decree for ejectment on the basis of the express stipulation, the sub-section would operate to prevent him from obtaining ejectment in execution as the ground on which the decree is based would not be within this sub-section. The specific question before us is whether ground (a) failure to pay the theka-jama legally payable is only mentioned in the sub-section as one ground which may sometimes (e. g. when there is an agreed provision for re-entry in case of such failure) warrant a decree for ejectment, or whether the sub-section ought to be read as providing that ejectment may be decreed on this ground in all cases. Now, re-entry for such failure is not (unlike forfeiture for denial of the landlord's title) implicit in contracts of tenancy. Apart from express agreement, it must rest on custom or statute. Dr. Mitter contended that it was at one time very common for the landlords of Sambalpur to eject their thekadars. That may be, but he could not seriously maintain that it amounted to a

custom of ejectment for non-payment of rent. It was not urged that any such custom ever came before the Courts or that any evidence of it was given in the present cases. Nor did the learned Advocate claim that there is anything in the Tenancy Act or any other law in force in Sambalpur entitling the landlord to eject a thekadar for default in the payment of the theka jama. The contention for the appellant thus had to be that sub-s. (7) itself creates the liability; and it does seem to receive some support from the observations of Mullick J. in *Rajendra Singh Bariha's case*, which have been already quoted. The learned Judge however indicated no reasons for such a view except that the words qualifying the decree "passed in accordance with any law for the time being in force and not inconsistent with this Act" were taken to mean a decree obtained under the provisions of some law prescribing the procedure for such ejectment and not inconsistent with the Act. In the case before him the decree for ejectment had been passed on a compromise, which under O. 23, Rule 3, Civil P. C., was sufficient and indeed decisive. For, according to the compromise, the landlord was to get possession of the thekadar's property if the thekadar defendant failed to pay his dues by a certain date, and as there was nothing in this opposed either to the Act under consideration or to any law in force in Sambalpur, the Court was bound to record the compromise and pass a decree in accordance therewith.

The question whether S. 65-A (7) authorizes a decree for ejectment for failure to pay the theka jama even if there should be no agreement to that effect did not arise in that case; and the liability to ejectment under the decree, supported as it was by the compromise, was not affected by the sub-section in any view of this provision. The sub-section is designed to deal with protection in relation to liability to ejectment, and does so by leaving such liability unaffected only in cases where it arises under decrees of the kind specified and by implying that the protected thekadar will not be liable to ejectment in any other case. Protection by limiting liability to ejectment to specified cases is easily intelligible, but not protection by extending it to cases where apart from the sub-section in question it does not exist. The interpretation of the expression 'any law for the time being in force' as some law relat-

ing to the procedure of ejectment may possibly be suggested by the words "passed in accordance with" which precede it, but would mean ignoring the fact that a decree cannot be passed on mere procedure. What the words of the sub-section seem to require is a decree which is good under the general law and not inconsistent with this Act. It is not the appellant's case that any section of the Act other than Sec. 65-A has any bearing on the matter under consideration; and the Section plainly does not contain the whole of the substantive law regarding the ejectment of thekaders or protected thekaders, if only in view of the concluding words "chargeable with some act or omission which renders him liable to be ejected." Sub-sec. (7) contrasts "any law" with "this Act". It follows from these two considerations that the expression "any law" must include the general substantive law. I cannot also see any possible reason for the Legislature to limit "any law" to the law of procedure and to distinguish it from "this Act" which deals with the liability to ejectment in this sub-section only and does so by restricting it to certain cases. The words of the sub-section moreover point to a liability under the general law, not inconsistent with "this Act"; the latter is thus not thought of as imposing any liability to ejectment.

A possible example of a decree in accordance with the general law but inconsistent with this Act was given by my Lord the Chief Justice during the discussions—a decree for ejectment for non-payment of the theka jama on the basis of a contract of enhancement with a proviso for re-entry, if the enhancement be contrary to Cl. (e) of Sec. 65-A (4). With all respect to Mullick J., it seems to me impossible to read this sub-section as creating a liability to ejectment in certain cases (if this is what he meant) or as restricting "any law" to the law of procedure: such a reading of the provision is opposed to the idea of protection. An even stronger reason against the construction contended for by the learned advocate is furnished by sub-section (5). This sub-section deals with the ejectment of a thekadar who has filed or files an application for protection, while sub-sec. 7 deals with a thekadar who has already been protected. If the Legislature be taken by sub-s. 7 to make the protected thekadar liable to ejectment for failure to pay the theka-jama in all cases, sub-s. 5 will become absurd, for the thekadar there dealt with, though he

may not have been originally liable to ejectment for non-payment, will become so on the success of his application. And yet it is plain that sub-s. (5) was intended for his benefit, while it is beyond question that the ejectment he will incur under this construction of sub-s. (7) will generally mean a more severe penalty than the sale of the tenure from which the protection, if granted, will save him, as the sale will at least leave him the surplus proceeds. This also meets Dr. Mitter's argument that as the Legislature has denied to the landlord the sale of the tenure of a defaulting protected thekadar and could not have intended to leave the landlord without some adequate relief, it must have intended to give him ejectment. As a matter of fact, decrees are obtained against the holders of certain well-known tenures which do not admit either of sale or of ejectment, and their execution in other ways is by no means uncommon in this province. The protected thekadar is further liable to have his protection withdrawn; and when this is done, the tenure will become saleable in execution. But I do not think that the withdrawal of protection is an essential preliminary to ejectment in execution of a decree for ejectment for non-payment of the theka jama.

In the case of *Nruplal Singh Gartia*, to which I have already referred, Adami J. spoke of cancellation of a protection certificate as the first step to be taken in proceedings for the ejectment of the thekadar. This observation has been quoted and applied by Rowland J. in the judgment under appeal, but has no bearing on the point before us. It was made in a case of ejectment for forfeiture by denial of the landlord's title. The Subordinate Judge had held that forfeiture had not been incurred because the denial was not followed by any act of the plaintiff. Adami J. pointed out that this was not correct because the landlord had applied for cancellation of the protection certificate, and it was in this connexion that the learned Judge observed that the application for cancellation was the first step to be taken in the proceedings for the ejectment. I take it from the context that the learned Judge only meant that the application for cancellation was an "act showing his intention to determine the lease" (to adopt the words of S. 3 (g), T. P. Act, as they stood before the amendments of 1929) which is required to complete the forfeiture. That observation has no application to ejectment for failure

to pay the theka jama, but I agree with Rowland J. that one must first look for some powers to pass a decree in ejectment and then it will follow that Sec. 65-A, sub-s. (7) will permit that power to be exercised. The Section does not itself create such a power.

So far as Mullick J. may have taken the view that sub-sec. (7) itself created a liability to ejectment, apart from the agreement of the parties, I am of opinion that the sub-section was misconstrued, and that, as held in 49 I C 840,³ the sub-section merely recognizes the validity of an agreement providing for the re-entry of the landlord on default of payment of theka jama. It follows that the landlord appellant, having no proviso for re-entry in his favour, is not entitled to any decrees for ejectment. The appeals thus fail.

N.S./R.K.

Appeals dismissed.

A. I. R. 1939 Patna 314

JAMES J.

Bachu Singh and others — Petitioners
v.
Emperor.

Criminal Revn. Petn. No. 336 of 1938,
Decided on 27th July 1938, from decision
of Sess. Judge, Gaya, D/- 9th April 1938.

(a) Criminal P. C. (1898), S. 144—Order under S. 144 prohibiting people from cutting *grandi* in another village, rescinded by District Magistrate—Order of District Magistrate held did not give people licence to commit criminal trespass or riot.

Where an order under S. 144 was passed prohibiting people from cutting a *grandi* erected in a plot of another village for obstructing the flow of water but the prohibiting order was rescinded by the District Magistrate remarking that in rainy season there would not be any danger of breach of the peace :

Held that the order of District Magistrate rescinding the prohibitory order could not properly be treated as a license to commit criminal trespass. Still less a license to commit riot. [P 315 C 2]

(b) Penal Code (1860), S. 147 — People of village higher up channel obstructing water—People in village situated lower down cannot take law in their hands by committing riot.

Although the impulse to commit a breach of the peace may be very strong when there is not enough water to go round and a party stationed higher up the channel is obstructing the flow, this does not entitle the people in village lower down the channel to take the law into their own hands by committing a riot. [P 315 C 2]

Mrs. Dharamshila Lall—*for Petitioners.*
Govt. Pleader — *for the Crown.*

Order.—A pyne known as Neera Nala flows through Taraunchi village to Dadhpa on the north in Gaya District. The water

of the pyne is used for irrigation purposes in both villages. The maliks of Dadhpa contribute one-half of the costs of the upkeep through Taraunchi and the whole of it in Dadhpa. In the fard-abpashi it is recorded that the people of Taraunchi are entitled to make a grandi at plot No. 131 of Taraunchi for replenishing a natural reservoir which is plot No. 157 of the village. During last September and early October, the people of Taraunchi had erected this grandi at plot No. 131 thereby obstructing the flow of water to Dadhpa village. There was apprehension of a breach of the peace, which led the Sub-Divisional Magistrate to issue an order under S. 144, Criminal P. C., prohibiting the people of Dadhpa from cutting the grandi in Taraunchi. There was an appeal to the District Magistrate who on 8th October rescinded the order of the Sub-Divisional Magistrate remarking that after recent rains there would be no danger of a breach of the peace. Seven days after this a number of men of Dadhpa set out armed with lathis and other weapons to cut the grandi in Taraunchi. They were opposed by some men of Taraunchi whom they overpowered and on whom they inflicted several injuries. The petitioners now before the Court were placed on their trial charged under S. 147, I. P. C., with rioting with the common object of cutting the grandi in Taraunchi, and under S. 325 or S. 323 with causing hurt to one or other of the four injured men of Taraunchi. The petitioners were convicted, and by the final order of the Sessions Judge they were sentenced each to three months' rigorous imprisonment under Sec. 147, while for the convictions under S. 323, no separate sentence was imposed.

Mrs. Dharamshila Lall on behalf of the petitioners argues that the common object set forth in the charge ought not to be regarded as unlawful, because the men of Dadhpa should be regarded as having had a right to cut the grandi. Two witnesses who were examined on behalf of the defendants stated that it had been customary after the Taraunchi grandi had been standing for five or seven days for the Dadhpa people to cut it in order to bring water to their own village. Mrs. Lall points out that neither the trying Magistrate nor the Sessions Judge has made any reference to this part of the evidence of these two witnesses; and it is suggested that if this part of the evidence had been considered, the

decision might have been different. The learned trying Magistrate discussed the evidence of these witnesses touching the actual occurrence and I do not know that it can be said that he must have forgotten what these witnesses said merely because he makes no specific mention in his judgment of this part of their evidence. Both the trying Magistrate and the Sessions Judge have come to the conclusion that the Dadhpa people had no right to enter into Taraunchi and to cut the Taraunchi grandi and that by entering in Taraunchi to do this, they formed themselves into an unlawful assembly. The Record of Rights mentions that no pardbandi has been fixed for the exercise of the rights of the villagers of these two villages, and it would be difficult to hold that the learned Sessions Judge and the learned Magistrate were wrong in finding that they had no right to destroy the Taraunchi grandi by force.

The District Magistrate, when rescinding the order under S. 144 had advised the men of Dadhpa to apply under Sec. 38, Private Irrigation Works Act, but Mrs. Lall points out that the withdrawal of the order prohibiting them from cutting the grandi was treated by the men of Dadhpa as granting permission to do this. Indeed, it would appear likely that this would be the effect of the rescinding of the order under S. 144 but the order of the District Magistrate could not properly be treated as a license to commit criminal trespass; still less as a license to riot.

The learned Sessions Judge in discussing the complicity of individuals mentions that all the seven men convicted by the trying Magistrate had been mentioned in the first information report. Mrs. Lall points out that two of these men, Beel Ganreri and Sita Ram Singh were not mentioned in the first information report which was lodged by Prokash Koeri. This was a mistake of the learned Sessions Judge, but the witness Natu Koeri identified Beel Ganreri and Sita Ram Singh as persons who assaulted him, while Karoo Dusadh also gave evidence that he was assaulted by Beel Ganreri. I can quite understand that the impulse to a breach of the peace may be very strong when there is not enough water to go round and a party stationed higher up the channel is obstructing the flow; but these petitioners could not be permitted to take the law into their own hands in this way; and the sentences cannot be regarded as severe. I cannot interfere in this case and

the petitioners must surrender to their bail to serve out the unexpired portions of their sentences.

N.S./R.K.

Order accordingly.

A. I. R. 1939 Patna 316

WORT AND CHATTERJI JJ.

Mt. Kanizan — Plaintiff — Appellant.
v.

Mt. Latifan and others—Defendants —
Respondents.

Appeal No. 126 of 1937, Decided on 11th January 1939, from original decree of Sub-Judge, Gaya, D/- 30th April 1937.

(a) Mahomedan Law — Gift — Possession — Gift to daughter — Father and daughter living together on premises proposed to be delivered — Declaration of possession given to daughter is sufficient to give her possession.

When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession. This principle applies to a gift by Mahomedan father to his daughter and the declaration of possession given to daughter would be sufficient to give her possession at any rate of the house in which lived the family consisting of the donor and the donees of the gift: *A I R 1932 P C 13, Applied.* [P 318 C 1, 2]

(b) Mahomedan Law—Gift—Possession—No evidence regarding delivery of possession — Mere fact that donee entered into transaction of sale of land gifted to him would not be sufficient to establish possession.

The transactions of sale by donee of land gifted to him are not acts of possession although they are acts by which title to the property was asserted within the meaning of S. 18, Evidence Act. If the evidence is clear that no possession was given, the mere fact that the donees entered into this transaction would not be sufficient to establish the possession which it was necessary for them to establish in order to prove a completed transaction. But these transactions may be taken into consideration in all the circumstances of the case as corroborating or proving or helping to establish the evidence already given that possession had been handed over to the donees. [P 318 C 2]

B. P. Sinha and Harians Kumar —
for Appellant.

Sarju Prasad — *for Respondents.*

Wort J.—This is an appeal by the plaintiff in an action claiming partition of properties given in the schedule to the plaint, the plaintiff's share in the circumstances set out in the plaint being eight annas in those properties. The plaintiff Mt. Kanizan based her title on two gifts and in these circumstances: One Nazaf Ali Shah had two daughters, the first Mt. Mahbuban and the second Mt. Latifan who is defendant 1 in this case. The plaintiff is the daughter of Mt. Mahbuban, and she

claims that her mother's father (that is to say, her maternal grand-father) on 11th July 1921 executed a deed of gift of all his properties to her mother Mt. Mahbuban and her mother's sister Mt. Latifan to the extent of half and half; that on 6th April 1933 Mt. Mahbuban executed a deed of gift of her eight annas share in favour of the plaintiff; and that this deed of 6th April 1933 was preceded by an oral gift of six months before. It was in those circumstances that this action was brought claiming partition and possession of the property to the extent of eight annas share. Nazaf Ali Shah, the maternal grand-father of the plaintiff is still alive and is one of the defendants in the action. He gave evidence and his case was supported by a number of witnesses that the deed of gift executed by him in 1921 in favour of his two daughters was a farzi transaction, that no possession was given to his daughters and that he himself retained possession of the property, the subject-matter of the gift.

It will be seen from the short statement of facts I have given that the plaintiff's claim to eight annas share of the property depends upon the establishment of both the gifts, viz. the gift by Nazaf Ali Shah, and that by Mt. Mahbuban to the plaintiff. I should have stated that the learned Judge has accepted the evidence of the defendants for coming to the conclusion that the transaction of 11th July 1921 was a farzi transaction and dismissed the plaintiff's suit.

I propose in the first instance to deal with the second gift by the mother Mahbuban to the plaintiff which as I have said was preceded by an oral gift six months before. The extent of the plaintiff's share depends upon the proof of this transaction. If the plaintiff succeeds in proving the first gift of 1921 in favour of her mother and the second of 1933 in favour of herself, she will be entitled to eight annas share in the property of Nazaf Ali Shah. But if she establishes the first transaction and fails as regards the second, it is clear that she would be entitled to only four annas share in the property; while if the decision of the learned Judge stands, having regard to the fact that Nazaf Ali Shah is still alive the action, as the learned Judge in the Court below has decided, is bound to and must necessarily fail. Now, as regards the second gift which I propose to deal with first, it seems to me that there is nothing to support the plaintiff's case. I do not

propose to decide the question of law which was mooted during the course of the argument; but Mr. Sinha's argument in favour of the deed of gift by the mother to the plaintiff is based on the contention that the document of 6th April 1933 was not a transaction which affected the gift but was as I have already said and repeat preceded by an oral transaction six months before. In support of that contention evidence was given by plaintiff's witness 2 Sheikh Leagat Kharadi who stated that Mahbuban made a verbal gift of the properties about six months before her death "in my presence and the plaintiff was given possession by her mother over those properties." Apart from the statement by another witness to the same effect there is no proof whatever that the transaction was of the actual giving over of possession to the plaintiff which it was necessary to do for the purposes of establishing an oral gift under the Mahomedan law. It will be noticed from what I have said that there was nothing more than bare statements that possession was given. No acts which would constitute possession of the property were proved, and, unless we accept the witnesses' evidence at its face value, it would be impossible to hold that the transaction was established. Speaking for myself I am not prepared to say that the learned Judge was wrong in his conclusion that the evidence was unreliable. However, that is all I propose to say with regard to the matter.

But the earlier transaction by Nazaf Ali Shah in favour of the plaintiff's mother Mahbuban seems to stand on a somewhat surer footing. I find it unnecessary to go into details as regards the oral evidence, because when analyzed, it is found to consist very largely of bare statements both on behalf of the plaintiff and on the part of the defendants either for or against this transaction, the witnesses for the plaintiff stating that possession was given to the mother Mahbuban, the witnesses for the defendants asserting that the transaction was benami and that possession was not given, and, unless those statements receive support from other matters in the record, it would seem to me to be impossible to come to any definite conclusion with regard to the matter based upon the oral evidence itself. But as I stated a moment ago, the circumstances of the case have to be looked to for the purpose of coming to a conclusion as to whether the evidence ad-

duced in the case is to be accepted. The transaction was entered into, as I have said, on 11th July 1921. Nazaf Ali Shah executing the document recited the circumstances under which the gift was made. Nazaf Ali Shah was giving evidence in 1937 and in the witness-box he stated his age to be 100. Even allowing for discrepancies in the evidence of that character, he would be approximately eighty years of age when he executed the document of 1921. He recites that he is an old man, that he has two daughters Mahbuban and Latifan who are alive and then says as follows :

In consideration of my old age, and in order to serve me and attend upon me, both the daughters along with their husbands and children are living with me up to this time and, God willing, they will continue serving me attending upon me in the same way during the whole of my life-time.

He then recites that apart from these two daughters he has no other male or female issue, and then he makes the statement as to his age being as I have said about eighty. In the first place, taking the circumstances into consideration, particularly the fact that by the document he was not depriving any of his heirs of any share in the property it was not an unreasonable transaction to enter into having regard to his age. And then six years later, on 25th May 1927, certain properties were sold under the document of the date which I have mentioned. The executants of this deed were Nazaf Ali Shah himself and the two donees of the gift of 1921. In that document Nazaf Ali recites : "I, executant No. 1, made a gift of all moveable and immovable properties, jagirs, nakdi kasht land, etc." Then he states the fact that in the survey papers his name stands recorded and then the deed goes on to recite the following; "For these very reasons we, executants Nos. 1, 2 and 3, join as executants in all our transaction (deeds)." The other recitals or provisions in the deed are irrelevant for the purpose of the matter I am considering. Thus it would appear perfectly clear that not an unreasonable transaction was entered into in 1921 and then six years later in 1927 a deed was executed which by recitals therein contained confirmed in a sense the earlier transaction of 1921. It is not suggested, nor could it be suggested in the circumstances that there was any estoppel as against Nazaf Ali Shah by reason of these recitals. But the statements in the deed of 1927 are in my judgment very strong evidence in the light of which to consider the present state.

ments made by the same person and witness in his behalf. It must be remembered, that statements of witnesses with regard to this transaction are nothing more than bare statements on the one hand and denials on the other. Therefore considering (to repeat myself) the value of the evidence given, it does seem to me that the later transaction of 1927 throws a great deal of light as to the true facts of the case. It has been contended in this case that the evidence of possession which it was necessary for the plaintiff in this case to adduce is wanting. If by that argument is meant that witnesses have failed to give details of actual possession by the plaintiff or by Mt. Mahbubhan, then I must say I am in agreement. But it is contended by Mr. Sinha on behalf of the plaintiff-appellant that for the purposes of this part of the case the property may be divided into three parts: the house property, that is to say the house in which the family is living; the jagir lands and the raiyati lands.

So far as the possession of the house is concerned, Mr. Sinha on behalf of the appellant relies upon the decision of their Lordships of the Judicial Committee of the Privy Council in 59 I A 1¹ at p. 13, where their Lordships refer to the following passage in the decision of West J. in 9 Bom 146² at p. 150:

When a person is present on the premises proposed to be delivered to him a declaration of the person previously possessed puts him into possession.

Their Lordships then said that this statement of the law was followed in two cases of the Bombay and Allahabad High Courts as also in two Madras cases and then proceeded to observe:

It is not necessary for their Lordships to decide in the present case whether this principle is of universal application between Mahomedan donors and donees, but they think that as between a husband and his wife who are living together it is undoubtedly a reasonable interpretation of the requirements of the law.

It is true that this is a case of father and daughter and it seems to me for the purposes of this point at any rate that this principle would apply and the declaration of possession which according to the evidence of the plaintiff was given to Mahbubhan would be sufficient to give possession at any rate of the house in which lived the

family consisting of the donor and the donees of the gift.

With regard to the raiyati lands reliance was placed by Mr. Sinha upon the sale deed of 1927. As I pointed out during the course of the argument, the transactions themselves are not acts of possession although they are acts by which title to the property was asserted within the meaning of Sec. 13, Evidence Act. If the evidence were clear that no possession was given, the mere fact that the donees entered into this transaction would not be sufficient to establish the possession which it was necessary for them to establish in order to prove a completed transaction. But these transactions may be taken into consideration in all the circumstances of the case as corroborating or proving or helping to establish the evidence already given that possession had been handed over to the donees. It is not necessary to enter into an analysis of the oral evidence for the reasons which I have already stated, and it is with some reluctance that I come to the conclusion at which I have arrived. But in all the circumstances of the case it seems to me that the learned Judge in the Court below has not given due weight to the recitals in the documents about which there can be no possible dispute. For those reasons I come to the conclusion that the plaintiff was entitled to succeed in her action as regards 4 annas share in the property. The appeal is therefore allowed and the plaintiff will be entitled to a preliminary decree for partition to the extent of the share which I have stated. In the circumstances of the case both parties should bear their costs throughout.

Chatterji J.—I agree. The root of the plaintiff's title is the deed of gift (Ex. A) dated 11th July 1921. Defendant 2 who executed this deed of gift alleges that it is a farzi or benami transaction. The onus lies upon him to prove that it is so. On the other hand the plaintiff who claims his title by virtue of the gift has got to prove that the gift was accompanied by delivery of possession as required under the Mahomedan law. Let us first see whether the deed of gift was a farzi transaction. There is hardly anything on the record to show what motive other than natural love and affection there could be on the part of defendant 2 for executing the deed. At that time he was very old, about 80 years of age, and he was executing the deed in favour of his two

1. Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam, (1932) 19 A I R P C 13=136 I C 385 =59 I A 1=6 Luck 556 (P C).

2. Shaik Ibham v. Shaik Suleman, (1885) 9 Bom 146.

daughters who were his only heirs and were living with him, one of them being a widow. Apparently it was a most natural transaction. Then six years later in 1927, defendant 2 jointly with the daughters executed a sale deed (Ex. 1) in respect of some raiyati lands covered by the gift for a consideration of Rs. 650. In this sale deed defendant 2 clearly recites that he had made a gift of his property to the other two executants, and that the reason why all the three joined in executing the deed was that defendant 2's name stood recorded in the survey papers and the landlord's sharasta. The deed also recites that the executants were in possession of the vended lands. Thus, not only in 1921 did defendant 2 execute the deed of gift but in 1927 by the sale deed he confirmed the gift. There appears to be no reason why if at all any benami transaction was entered into in 1921 the benami show should still be kept up in 1927 when the sale deed was executed. The fact that defendant 2 joined in the execution of the sale deed is considered by the learned Subordinate Judge to be inconsistent with the gift being genuine and operative. But defendant 2 himself in the sale deed explains why he joined as an executant. On the other hand there is no explanation as to why the daughters figured as executants. To my mind the recitals in the sale deed rather strongly indicate that the deed of gift was a genuine transaction.

The learned Subordinate Judge has laid much stress on the fact that the donees did not get themselves recorded either in Municipal papers with regard to the house, or in the landlord's sherasta with regard to the raiyati lands. As regards the raiyati lands the explanation offered on behalf of the plaintiff seems quite plausible, namely that the lands being under the law then prevailing non-transferable, the landlord would demand heavy mutation fee. The donees, being the daughters and only heirs of the donor, might not have considered it necessary to obtain mutation on payment of heavy salami, particularly when the donor was too old, having one foot in the grave. When he would die his heirs were bound to be recognized by the landlord. It is a matter of common experience that even purchasers for valuable consideration do not readily get themselves recorded in the landlord's sherasta; and in fact in this very case it appears that the purchasers under the sale-deed (Ex. 1) of 1927 have not yet

got themselves recorded in the landlord's papers. As regards the house, it is abundantly clear from the evidence that the daughters all along lived with the father. So the question of the recording of the names of the daughters in the Municipal papers becomes immaterial.

The learned Subordinate Judge has also relied upon the fact that the original registered deed of gift (Ex. A) has been produced by defendant 2, but having regard to the circumstances of the case the custody of the deed in my opinion is of no practical importance. After registration defendant 2 who had presented the document took it back from the Registration office in the usual course of events. The daughters were living with him. One of them was a widow and in all likelihood the deed was handed over to the other daughter (defendant 1) whose husband was also living in the house and was presumably looking after the affairs of the family as defendant 2 was too old. Now that the widowed daughter (plaintiff's mother) is dead the surviving daughter (defendant 1) and her husband (D. W. 1) to serve their own interest deny the gift so that on the death of defendant 2 the properties may come by inheritance to defendant 1 to the exclusion of the plaintiff who would be no heir. Owing to the senility of defendant 2, it was not at all difficult for defendant 1 or her husband to win him over to their side. Thus the custody of the deed of gift may be explained away.

In view of the foregoing considerations I am unable to agree with the learned Subordinate Judge's finding that the deed of gift (Ex. A) is a farzi transaction. Now coming to the question of possession the learned Subordinate Judge has dealt in detail with the oral evidence adduced on both sides, and if we had to decide the case on the oral evidence alone, it would have been impossible to reverse his finding. But he has overlooked the broad features of the case and the most important recitals in the sale-deed (Ex. 1). This deed (Ex. 1) recites that all the executants were in possession. No doubt this recital implies that defendant 2 also was in possession, but what is more important is that the donee's possession which, but for the gift, would not exist was acknowledged. So far as the house is concerned possession is in a manner admitted. As regards the raiyati lands a major portion was sold by Ex. 1, the recitals of which I have just dealt with.

As regards jagir lands, the evidence shows that a rehan deed was executed by defendant 2 jointly with his daughters in favour of one Mt. Naurozi. Thus it appears that with regard to all the three classes of properties covered by the deed of gift the donees did exercise acts of possession.

D.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 320

DHAVLE J.

Mt. Bechan Kuer and another —

Petitioners.

v.

Maharaja of Chota Nagpur and others
— Opposite Party.

Criminal Revn. No. 289 of 1938, Decided on 14th October 1938, against order of Sub-Divisional Officer, Ranchi, D/- 20th December 1937.

Criminal P. C. (1898), Ss. 438, 439 — High Court will not entertain time-barred revision application in absence of exceptional circumstances — Pleader's ignorance of High Court practice or petitioner being pardanashin lady held not exceptional circumstances—Refusal to make reference under S. 438 does not give fresh start of limitation.

High Court will not, as a general practice, entertain, in the absence of the most exceptional circumstances, an application in its criminal revisional jurisdiction after the expiry of 60 days from the date of the decision or order impugned, and a fresh period of 60 days does not accrue from the date when the Sessions Judge or the Additional Deputy Commissioner refuses to make a reference under S. 438: *A I R 1929 Pat 404, Foll.*

[P 320 C 2]

The fact that the pleaders in the mofassil are not aware of the practice of the High Court and the petitioners include a pardanashin lady, who is in fact the principal petitioner can hardly be regarded as among the most exceptional circumstances.

[P 320 C 2]

K. K. Banerji — *for Petitioners.*

B. C. De — *for Opposite Party.*

Judgment. — This is an application in revision against an order passed by the Sub-Divisional Magistrate of Ranchi, on 20th December 1937. Dissatisfied with that order, the petitioners, who were the second party in a proceeding under Sec. 145, Criminal P. C., before the Sub-Divisional Magistrate, moved the Additional Deputy Commissioner of Ranchi who, on 10th March 1938, declined to interfere on the ground that there was no such defect of law or clear miscarriage of justice as would justify him in referring the matter to the High Court. The petitioners then applied to this Court on 9th May 1938, and on

11th May, Manohar Lall, J. issued a Rule. Mr. De, who appears for the opposite party, urges in limine that the application ought not to be heard in view of the principle laid down in 8 Pat 468¹ by a Bench of two Judges. That principle is that the High Court will not, as a general practice, entertain, in the absence of the most exceptional circumstances, an application in its criminal revisional jurisdiction after the expiry of 60 days from the date of the decision or order impugned, and that a fresh period of 60 days does not accrue from the date when the Sessions Judge (in the present case, the Additional Deputy Commissioner instead) refuses to make a reference under Sec. 438, Criminal P. C. Mr. Banerjee who appears for the petitioners, urges that the delay in applying to this Court was explained in para. 25 of the application in revision, and that Manohar Lall J. who issued the Rule, was satisfied with the explanation and must be taken to have condoned the delay. Upon this Mr. De points out that he was not a party before the Court when Manohar Lall J. issued the Rule.

The principle laid down in 8 Pat 468¹ is a principle of general application subject to what Macpherson J. called the most exceptional circumstances. Mr. Banerjee has endeavoured to make out a case of such circumstances by pointing out that pleaders in the mofassil are not aware of the practice of the High Court and that the petitioners include a pardanashin lady, being in fact the principal petitioner. But these can hardly be regarded as among the most exceptional circumstances. It is not pretended that there is any officially reported decision of this Court laying down anything to the contrary of what was laid down in 8 Pat 468,¹ nor does it appear that that decision has ever been dissented from in this Court, either in official or in other reports. If the petitioners' lawyer in the mofassil in the present case did not take care to acquaint himself with what appears to be the current of authorities on the point, that would only show that he was negligent, but would not make it one of the most exceptional circumstances. Nor can the pardanashin lady, who is the principal petitioner before me, make of her sex and parda an exceptional circumstance for the purposes of the Rule. My attention has been

1. *Kelu Patra v. Iswar Parida*, (1929) 16 A I R Pat 404=1929 Cr O 201=119 I C 401=30 Cr L J 1053=8 Pat 468=11 P L T 18.

drawn to at least one other case from 15 Patna Law Times in which 8 Pat 468¹ was followed, but it is unnecessary to deal with that case because it has not been urged on behalf of the petitioners that there is any case showing anything to the contrary.

I must therefore give effect to Mr. De's objection on behalf of the opposite party and discharge the Rule.

N.S./R.K.

Rule discharged.

A. I. R. 1939 Patna 321

JAMES AND ROWLAND JJ.

Mt. Naurozi—Defendant—Appellant.

v.

Najaf Ali Shah, Plaintiff and others, Defendants — Respondents.

Second Appeal No. 586 of 1938, Decided on 7th February 1939, from appellate decree of Sub-Judge, Gaya, D/- 4th April 1938.

(a) Civil P. C. (1908), O. 21, Rr. 58 and 63 — Claim under O. 21, R. 58 dismissed — Suit by objector under O. 21, R. 63—Pending this suit property sold in execution — Person instituting suit under O. 21, R. 63 held not obliged to implead auction-purchaser as party.

A decree-holder put his decree into execution attaching the property which had been mortgaged under O. 21, Rule 54. A person preferred a claim under O. 21, R. 58, which was dismissed. He then instituted the suit under O. 21, Rule 63, making the decree-holder and the judgment-debtors as defendants. During the pendency of the suit the property was brought to sale in the execution proceedings and was purchased by a certain person. This man was not a party to the suit :

Held that the person was entitled to institute a suit under O. 21, R. 63 against the persons who had been parties to the case under O. 21, Rule 58 and he was not obliged subsequently to implead the auction-purchaser unless he chose to do so.

[P 322 C 1, 2]

(b) Civil P. C. (1908), O. 21, Rr. 58 and 63 — Father making gift of his property to daughters—Property attached in execution of decree against daughters — Claim by father under O. 21, R. 58, dismissed — Suit by him under O. 21, R. 63 — Burden is on him to show that he was entitled to resist attachment.

A person made a gift of his property to his daughters. The property was attached in execution of a decree against the daughters. The father's claim under O. 21, Rule 58 having been dismissed he instituted a suit under O. 21, R. 63 :

Held that the burden was on him to show that he was entitled to resist the attachment of the property : A I R 1930 P C 255, Ref. [P 322 C 2]

(c) Mahomedan Law — Gift — Gift by father to daughter—Declaration of possession is sufficient to give possession of house in which lived donor and donee.

In case of a gift by a Mahomedan to his daughter, it is not necessary that the donor should phys-

cally depart from the premises with all his goods and chattels and the donee should then formally enter into possession. The declaration of possession given to daughter would be sufficient to give possession at any rate of the house in which lived the family consisting of the donor and the donees of the gift: A I R 1932 P C 13, Applied; A I R 1939 Pat 316, Foll. [P 322 C 2; P 323 C 1]

B. P. Sinha and Harians Kumar —

for Appellant.

Sarjoo Prasad — *for Respondents.*

James J.—This is a second appeal from the decision of the Subordinate Judge of Gaya reversing a decision of the Munsif. On 11th July 1921, Najaf Ali Shah executed a deed of gift whereby he purported to convey the whole of his property to his daughters Mt. Latifan and Mt. Mahbuban. In 1926 Najaf Ali and his daughters joined in executing a usufructuary mortgage of certain jagir land which had formed part of the subject-matter of the deed of gift to Mt. Naurozi, wife of Abdul Ghani. In 1935, Mt. Naurozi who had been ejected from the mortgaged property instituted a suit for the mortgage money and damages against Najaf Ali and his daughter. Mt. Mahbuban had died before the suit was decided and her daughter Mt. Kanizan was substituted as her personal representative. On 19th June 1935, Mt. Naurozi entered into a compromise with Mt. Latifan and Mt. Kanizan whereby it was agreed that the name of Najaf Ali should be expunged from the record as a person having no interest in the mortgaged property and that there should be a money-decree against the daughter and grand-daughter for the amount claimed. On 23rd September 1935, Mt. Kanizan instituted a partition suit against her aunt Mt. Latifan in which Najaf Ali was subsequently impleaded, while later still the purchaser of the property with which we are here concerned was added as a defendant.

Mussamat Naurozi put her decree into execution attaching the property which had been mortgaged under O. 21, R. 54. Najaf Ali thereupon on 16th March 1936 preferred a claim under O. 21, R. 58, which was dismissed on 21st of March apparently for default. He then instituted the suit out of which this appeal arises under O. 21, R. 63 making defendants Mt. Naurozi and his own daughter and grand-daughter. During the pendency of the suit the property was brought to sale in the execution proceedings when it was purchased by Umacharan Lal. This man was not a party to the present suit, but he was added as has been stated

above as a defendant in Mt. Kanizan's suit for partition. Najaf Ali prayed for a declaration that the property in suit belonged to him and not to his daughter and granddaughter; and he prayed for an injunction restraining Mt. Naurozi from putting up the property for sale; but, he failed to obtain an injunction before the execution proceedings came to an end. Mt. Naurozi by her written statement alleged that the plaintiff had acquiesced in the compromise in the mortgage suit and that the claim under O. 21, R. 58 had merely been made in order that it might be possible for Najaf Ali to institute a suit under R. 63. She put forward the deed of gift of 11th July 1921 and alleged that the plaintiff had not been in possession of the property of which title was transferred by the deed of gift.

At the trial of the case the issues between the parties were stated in very broad and general terms; but when the parties came to evidence the Munsif remarked that the plaintiff admitted execution of the deed of gift and the usufructuary mortgage, but alleged that both of these transactions were mere benami transactions carried out at the instance of Abdul Ghani, Mt. Naurozi's husband. There was no suggestion in the plaint that these transactions had been benami or collusive on which account the Munsif declined to consider the evidence on that point. For the rest, the Munsif found that possession had been given of the property conveyed by the deed of gift which was therefore valid and effective and he dismissed the suit. He also remarked that after the purchase by Umacharan Lal, it was necessary for the plaintiff if he wished to succeed to amend his plaint and pay *ad valorem* court-fees.

The decision was reversed on appeal by the Subordinate Judge who stated the points for determination as follows: (1) whether the suit is maintainable without a prayer for recovery of possession, and whether the court-fee paid on the plaint is insufficient, (2) whether the deed of gift by the plaintiff in favour of his two daughters is a farzi transaction, and whether the gift is invalid for want of delivery of possession of the property to the donees, and whether the property was liable to be attached in execution of the present defendant 1's decree against defendants 2 and 3 only.

On the first point he found in favour of the appellant and this matter need not now be further discussed, because the plaintiff was entitled to institute a suit under O. 21,

R. 63, against the persons who had been parties to the case under O. 21, R. 58, and he was not obliged subsequently to implead the auction-purchaser unless he chose to do so. On the second point the Subordinate Judge found in favour of the plaintiff. He remarked that it was incumbent upon the defendant who sought to set up the gift to show very clearly that all necessary formalities were observed by the plaintiff; and he went on to say that

a gift of immovable property of which the donor is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession.

Mr. B. P. Sinha on behalf of the appellant takes exception to each of these propositions. The burden of proof lay upon the plaintiff to show that he was entitled to resist the attachment of this property: 35 C W N 324.¹ Mr. B. P. Sinha is correct in the manner in which he states this proposition; but if this mere misstatement of the burden of proof stood alone; it would perhaps not be of very great importance, because on the whole, the evidence discussed by the learned Subordinate Judge is that which is adduced by the plaintiff; but, the learned Subordinate Judge apparently misdirected himself on the point of law when he stated that it was necessary that the donor should physically depart from the premises with all his goods and chattels and the donee should then formally enter into possession. Mr. Sinha cites the decision pronounced by Sir George Lowndes in 59 I A 1,² wherein it was observed that there was no necessity in the case of a gift by a husband to his wife of actual vacation by the husband and actual taking of separate possession by the wife; and it was remarked that the declaration made by the husband, followed by the handing over of the deed, were simply sufficient to establish a transfer of possession. This decision was relied upon by a Division Bench of this Court in First Appeal No. 126 of 1937³ wherein it was held that the same principle would apply in the case of father and daughter, and that the declaration of possession which was given to Mahbuban would be sufficient to give possession at any

1. Mohammad Ali Mohammad Khan v. Mt. Bismillah Begam, (1930) 17 A I R P O 255=128 I C 647=35 C W N 324 (P O).

2. Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam, (1932) 19 A I R P O 13=136 I O 385=59 I A 1=6 Luck 556 (P O).

3. Mt. Kanizan v. Mt. Latifan, Reported in (1939) 26 A I R Pat 216.

rate of the house in which lived the family consisting of the donor and the donees of the gift. The learned Subordinate Judge was thus misled in imagining that the donor had to do very much more than actually was necessary in order to validate his gift under Mahomedan law; and he has further made mistakes in dealing with the evidence in the case. He remarks that it is an undisputed fact that after the date of the deed of gift an usufructuary mortgage bond was executed jointly by the plaintiff and his two daughters in favour of defendant 1 and a sale deed was also executed jointly by the plaintiff and his two daughters.

He goes on to say that if the gift by the plaintiff to his two daughters had been valid, the plaintiff would not have joined in the usufructuary mortgage bond and the sale deed.

It is curious to observe that from the facts attending the execution of these two deeds, the Division Bench of this Court in the appeal in the partition suit came to a conclusion exactly opposite to that of the learned Subordinate Judge; and it appears that the learned Subordinate Judge erred in stating that it was an undisputed fact that these two deeds were executed, if by that he meant that it was admitted that the deeds were executed by Najaf Ali as the person who purported to be the owner of the property sold or mortgaged. The learned Subordinate Judge has also remarked that the husband of defendant 1 has stated in his evidence that the plaintiff's daughters got possession over the gifted property five or six years after the gift, wherein the learned Subordinate Judge has misread the record of evidence made by the Munsif. What the witness said was that the plaintiff's daughters got possession over the gifted property and that five or six years after the gift they mortgaged it to Mt. Naurozi.

I consider that in the circumstances the decision of the learned Subordinate Judge cannot be supported and the case in any event must be remanded in order that the appeal may be reheard. The lower Appellate Court should remember that the issues on which definite finding of fact is required are not whether the deed of gift was benami or collusive since that was not alleged in the plaint; but the questions are: (1) Did the plaintiff give actual possession to his daughters of the property conveyed by the deed of gift? or (2) Did he give constructive possession of this property? (3) If not, was the deed of gift inoperative? I would set aside the decision of the lower

Appellate Court and remand the appeal to the District Judge for disposal by himself or by a Court subordinate to him in accordance with law. Costs may abide the final event. I may add after hearing the judgment of my learned brother that I entirely agree with his observations.

Rowland J.—The trial was embarrassed by the state of the pleadings, the plaintiff having simply alleged in para. 6 of his plaint that the properties do not belong to defendant 2 or defendant 3 and the plaintiff has indefeasible right, title and interest and the plaintiff is still in possession and possession did not pass to defendants 2 and 3. He said nothing whatever in his plaint about the deed of gift. In the written statement in paras. 11 and 12, the contesting defendant denied the allegations in para. 6 and asserted that the plaintiff had gifted away the property in dispute to his two daughters and put them in possession. In para. 12 she added that thereafter the two daughters dealt with portions of the properties by several registered deeds and the plaintiff admitted their right to so deal with them. The plaintiff could have filed a rejoinder denying execution of the deed or denying the registered deeds referred to in para. 12 or denying his admission of any right of his daughters to deal with the properties. There is no such rejoinder or denial. The only point on which there is a direct contradiction of fact between the plaint and the written statement is as to possession. If the plaintiff wishes to controvert the other allegations in defendants' written statement, paras. 11 and 12, I would like to leave it open to the Subordinate Judge to permit him to do so, otherwise the statements of fact not controverted by him may be taken to be admitted. Should he contradict the statements I have referred to, the defendant should be permitted to give proof of those allegations. I agree with the proposed order.

D.S./R.K.

Case remanded.

* A. I. R. 1939 Patna 323

FAZL ALI J.

on difference between

MANOHAR LALL AND CHATTERJI JJ.

Madho Prasad and others —

Defendants — Appellants.

v.

Gouri Dutt Ganesh Lal, Plaintiff and others, Defendants — Respondents.

Appeal No. 157 of 1933, Decided on 6th February 1939.

(a) Partnership—Proof—Right to participate in profits is strong test—But real intention and contract of parties must be considered.

Although a right to participate in the profits of trade is a strong test of partnership and it may in certain cases be inferred from such participation alone, yet whether that relation does or does not exist must depend on the real intention and contract of the parties : (1872) *L R 4 P C 419, Foll.*

[P 325 C 2]

(b) Contract Act (1872), Ss. 25 (3) and 127—Mere acknowledgment of partnership debt by newly admitted partner without any promise to pay or without consideration does not create a new or a valid contract.

Where a newly admitted partner along with the existing partners acknowledges that on a particular day a particular amount is due from the partnership to their creditors, but the acknowledgment does not contain a distinct promise to pay the amount, the partner cannot be said to be doing anything beyond merely acknowledging the correctness of the amounts which stand in the khata of the existing firm, and the acknowledgment does not create a new contract so as to bind him, there being no consideration for the same : *A I R 1929 Pat 258, Rel. on ; A I R 1935 Pat 376, Foll.*

[P 327 C 1; P 328 C 1, 2]

(c) Contract Act (1872), S. 62—Novation—Acknowledgment of partnership debt by newly admitted partner which continues prior liability of other partners does not amount to novation of contract (Per *Fazl Ali J.*)

Novation of contract is not consistent with the original debtor remaining liable in any form. Hence where the partners of an existing firm along with a newly admitted partner acknowledge a certain amount to be due from the firm to their creditor such an acknowledgment does not amount to novation inasmuch as the prior liability of the partners does not become extinct : *7 A C 345, Rel. on.*

[P 328 C 1, 2]

(d) Practice—New case—High Court cannot spell out for the first time.

High Court cannot spell out a new case without any trace thereof in the pleadings and evidence and resting on no substantial evidence which can be believed.

[P 328 C 2]

(e) Practice—Precedents—Citation of English case law to consider Indian statutes not in *pari materia* is improper.

Citation of English authorities to consider Indian Statutes which are not in *pari materia* is not proper : *A I R 1924 P C 60 ; A I R 1930 P C 59 and A I R 1932 P C 161, Rel. on.*

[P 329 C 1]

(f) Interest—Customary rate about Rs. 2 per cent. compound—Plaintiff charging 2 per cent. compound—Court reducing it to Rs. 1½ per cent. simple up to date of suit—Discretion is wisely exercised.

Where the customary rate of interest which was charged from borrowers was in the neighbourhood of Rs. 2 per cent. which was charged by the plaintiffs and it also appeared to have been proved that compound interest was calculated only when the debtor came to meet his hisab on the Diwali for each year and the Subordinate Judge reduced it to 1½ per cent. simple :

Held that the discretion was wisely exercised.

[P 329 C 2]

(g) Usurious Loans Act (1918), S. 3—Applicability.

Where the circumstances undoubtedly point to the conclusion that the interest as claimed is excessive but it could not be held that the transaction is unfair as between the parties to the suit, no relief can be given under the Usurious Loans Act.

[P 329 C 2]

(h) Contract Act (1872), Ss. 25 (3), 62, 249—Debts borrowed by two persons—Subsequently another person along with these two persons signing hatchitta account book in respect of debts prior to his joining partnership—Such document held did not contain a promise to pay by such third person nor amounted to novation and as such third person held not liable by virtue of this document (Per *Manohar Lall and Fazl Ali JJ., Chatterji J. Contra.*)

Two persons who had entered into a partnership had borrowed money for their business. Subsequently another person joined these persons to form a new partnership and he along with the other two signed a hatchitta account book in respect of the debts incurred by the other two previous to his joining the partnership. In a suit seeking to make such third person liable on the basis of such document :

Held (Per *Manohar Lall and Fazl Ali JJ., Chatterji J. Contra.*)—On the construction of the document that the acknowledgment did not amount to a promise to pay, that it was not supported by consideration and that there was no novation and as such the third person was not liable : *3 Deac 365, Disting.*

[P 328 C 1, 2;

P 329 C 1, 2; P 336 C 2; P 338 C 2; P 339 C 1]

(When a new partner can be made liable for debts of old partnership explained.)

Mahabir Prasad, J. M. Ghosh, Tarakeshwar Nath and Syed Mehdi Imam —
for Appellants.

Sultan Ahmed and N. N. Ray —
for Respondents.

Manohar Lall J.—This is an appeal by defendants 3 to 7 against the judgment and decree of the learned Subordinate Judge of Chaibassa dated 29th July 1933, by which he decreed the suit of the plaintiffs which was brought to recover a sum of Rupees 65,756.3.0 as the amount due to them from the appellants as well as from other defendants (who have not appealed). The plaintiffs are a firm carrying on money-lending business at Jugsalai in this province and at Kharagpur in the neighbouring province and in other places. Defendant 1 with his son defendant 2 constitute a joint Hindu family. Defendant 3, along with his sons defendants 4 to 7, also constitute among themselves a joint Hindu family. The appellant Ram Sagar (defendant 6) is married to the daughter of defendant 1. (His Lordship then stated the circumstances which led to the institution of this suit and proceeded.) In the result I reject the contention of the learned counsel that this appellant never made the acknowledgment on 19th March 1928 by which he accepted the liability for Rs. 47,637.3.3. I now

proceed to consider whether it has been established to our satisfaction that defendant 3 was a partner of Bholanath from 1923 as alleged by the plaintiffs or from some later date in April 1926, as is the case of the defendants and in particular whether he undertook the liability for Rs. 47,637.3-3 on 19th March 1928 in his capacity as a partner for the partnership dues which were binding upon him.

It was strenuously contended on behalf of the respondent that the documentary evidence upon the record of this case leaves no manner of doubt that the appellant was a partner with Bholanath in Jharbera and other concerns from the beginning of 1923 and in particular it was pointed out that the appellant himself had admitted in his evidence and in the written statement that he was a partner with Bholanath from April 1926. Reliance was placed upon the statement in para. 10 of the written statement of the appellant and in particular upon his cross-examination at page 49 at line 4 where the appellant stated :

For Jharbera my advances were not as loans but were for carrying on work—Canposh work went on in name of Bhola for a few months in 1926 and so in 1927. In 1928, Bhola did work there as his own exclusively in his khas name. For karbar in his name in 1926 and 1927 I was a partner. I can't say if he worked in 1925. I made advances these years 1926-27 as partner for carrying on work I have khatas and bills showing my disbursements on Jharbera; they will show the date on which I became partner.

By the consent of the parties, the issue which was raised on this topic was Issue 5 which distinctly admitted that defendant 3 was a partner from April 1926; otherwise I do not see why the issue was framed as "Was defendant 3 a partner before April 1926." Mr. Mahabir Prasad relying upon the case in 4 All 74¹ contended that a man may erroneously think that he is a partner and even state he is a partner but such statements are not enough and that the test in every case is whether the person has acquired the rights of a partner or is a mere creditor. He argued that it was true that the appellant was anxious to be called a partner although in this case all the facts and circumstances pointed to the conclusion that his client was no more than a creditor however erroneously he thought himself to be a partner and however foolishly he prevailed upon the plaintiffs to put in his name as a partner in the books of the account by which he acknow-

ledged the debts of Bhola as partnership debts. His further argument was based upon the fact that there could be no partnership in law because the terms of the lease, granted by the Gangpur Estate to Bholanath and B. K. Sanyal, themselves admittedly contained an express stipulation that no partner could be introduced without the sanction of the estate and the previous sanction of the Bihar Government; in other words the argument of the learned counsel was that the appellant was neither in law nor in fact at any material time a partner with Bholanath however erroneously he believed it himself or represented to others by his assertion that he was a partner and that all that the evidence conclusively established was that Madho was really given 9 annas share in the profits and 9 per cent. interest on his advances in the capacity of a creditor. Before dealing with the facts which are established to our satisfaction in this case it is desirable to state that the law upon this point is very clear. It was decided as long ago as 1872 by their Lordships of the Judicial Committee in (1872) L R 4 P C 419² that :

It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held as a partner by estoppel. Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract It is sufficient for the present decision to say, that to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common.

These weighty observations must be carefully kept in view. (His Lordship then discussed evidence and proceeded.) But the appellant argues that he could never be a partner in law so long as the sanction of the Bihar Government and the Gangpur Estate was not taken and relies on the case in 13 C W N 638.³ In that case the plain-

1. *Bhaggu Lal v. De Gruyther*, (1881) 4 All 74=1881 A W N 122.

2. *Mollwo, March & Co. v. The Court of Wards*, (1872) L R 4 P C 419.

3. *Bipul Chandra Gupta v. Nasib Ali*, (1909) 13 C W N 638=1 I C 655.

tiff instituted a suit asking for a decree against defendant 1 and his brothers, for an account and for the money that might be found due to the plaintiff; the defence to the action was that S. 4, Companies Act, 1882, was a bar to the suit as the partnership consisted of more than 20 persons and was not registered under the Act. The learned Judges found that there was no partnership in that case at all, that the deed of partnership relied upon was not a deed executed by all the partners in favour of all, but one between defendant 1 on the one side and the other partners on the other and they pointed out that defendant 1 alone was the partner, who alone had the authority to carry on the business and that the business had commenced before the other partners were taken in and that these persons were taken under the express condition that they would have no power to interfere with regard to the carrying on of the business and that the other defendants had only a share in the profits. Upon these facts, it was found that the association carried on no business as an association and so did not come within the scope of the Companies Act; the judgment of the lower Court dismissing the suit was set aside and the case was remanded for disposal on the other points.

But what are the facts here? This is not a partnership action but an action by a creditor to recover moneys due from the appellant who has acknowledged the debt as a partnership debt. Whether there was a valid consideration in law to support this acknowledgment will be considered later. (His Lordship after discussing evidence proceeded.) The important questions which present themselves at this stage for consideration are, firstly whether the defendant is liable to the plaintiffs to pay the sum which he acknowledged by reason of the fact that as found by me above he was a partner on the date of the acknowledgment irrespective of the fact that the sum which he acknowledged was not a partnership debt; and in the alternative whether the acknowledgment can itself be made the basis of the suit, in other words whether the acknowledgment was for a valid consideration that can be recognized by law.

To take up the first question: the provisions of the Contract Act, embodied in S. 249 make it quite clear that although each partner is liable for debts and obligations incurred, while he is a partner, in the usual course of business by or on behalf

of the partnership, the person who is admitted as a partner into the existing firm (like the position of defendant 3) does not thereby become liable to the creditors of such firm for anything done before he became a partner. In the present case, I have held that the plaintiffs were merely the creditors of Bholanath before the appellant was agreed by him to be taken into partnership after April 1926. Upon this finding, it is unnecessary to consider the interesting argument which was advanced at great length before us as to what the position of the appellant would have been if it had been held that the debts due to the plaintiffs which amounted to Rs. 36,076-7-3 on 6th November 1926 were the partnership debts. It was argued however that it was not open to the appellant to contend that the debts which he acknowledged were not partnership debts by reason of the acknowledgment which he made on 19th March 1928 especially when it was one of the terms of the partnership that he would be taken in and treated as a partner only and in case only if he undertook to pay the debts of Bholanath. In my opinion, this argument cannot be accepted. There is no clear evidence upon the record as to the terms of the partnership which were agreed upon between defendant 1 and defendant 3. Unfortunately, Bholanath and Madho fell out and although the officer of the Gangpur Estate (P. W. 1) intervened he could not arrive at any final decision or settlement beyond interim negotiations or attempted settlement; in the course of such attempted settlements a draft agreement was prepared on some date in 1929 which is to be found at page 171 as Ex. 54. It shows that Bholanath (who is stated to be the first party in that agreement) had taken a lease from the Gangpur Estate on 11th September 1925 and started a business with his own capital and later thinking it desirable to introduce a financing partner he had agreed to admit Madho into the partnership and that the sums which defendant 1 had already spent should be fixed at Rs. 1,50,000 subject to the fixing of an exact figure after going through the account books and that he (Madho) will also deposit in a bank a further sum of Rs. 75,000 as a loan or advance to the partnership carrying interest at 9 per cent. annually. The only oral evidence on this point is the evidence of Bholanath's son Brij Behari at p. 42 already quoted above in these words:

He (Madho) was taken in on the condition that he would pay off all our previous liability and investments to the tune of 1½ lakhs of rupees.

But it lacks corroboration, is contrary to the case set up by the plaintiff and is interested. In my opinion, it is impossible to determine accurately the terms of the partnership and whether it was one of the conditions which was finally agreed upon between the parties that Bholanath would take in Madho as a partner only if he undertook to pay the liabilities of Bholanath. It is noticeable that this case is at variance with the entire case of the plaintiffs. It may be that Madho undertook to pay some of the liabilities of Bholanath to the creditors which were incurred in enlarging the Jharbera business in which he was being taken in as a partner, (as appears from the terms of the draft agreement which I have just quoted) or it may be that Bholanath being a *samdhi* of Madho prevailed upon Madho to pay all his private dues also. But be that what it may, I am unable to hold upon the materials now properly before me that when Madho acknowledged the debt on 19th March 1928, he was doing anything beyond merely acknowledging the correctness of the amount which stood in Bhola's khata.

This acknowledgment of debt by Madho on 19th March 1928 is a mere acknowledgment. By it and in it no promise to pay can be inferred on behalf of Madho to pay this debt. The true effect of an acknowledgment was pointed out by this Court in 8 Pat 706⁴ and it was held that there must be a distinct promise and not a mere acknowledgment before the party acknowledging can be saddled with any liability and that the rule which prevails in this country departs from the rule of English law where an acknowledgment of debt has always been understood to connote and imply a promise to pay but this doctrine has never found favour in India. It was also pointed out that there may be cases in which an acknowledgment is not merely an acknowledgment of the existing debt but the words there may be such from which a clear promise to pay may be made out thereby bringing the acknowledgment within the provisions of S. 25 (3), Contract Act, and that although an acknowledgment implies a promise to pay under S. 25, Contract Act, nevertheless a promise must be distinctly

expressed and a mere acknowledgment is insufficient to create a new contract as is contemplated under S. 25. I cannot forget the case of the plaintiffs that this was a mere acknowledgment of a pre-existing debt of Madho (jointly with Bhola). The case of the plaintiff on this point has already been indicated and it may be repeated here. The second witness for the plaintiff Suraj Mal, when cross-examined with respect to this acknowledgment stated as follows at page 33:

I cannot give any reason for adding the name of Madho in the khata. Madho asked us to do so—we would not have added had he not so requested; he did not give any reason.

The deceased partner of the plaintiff in his evidence in the Midnapur suit which is Ex. 56 stated to the same effect. At p. 116 he states as follows:

If Madho Prasad did not sign this *bathchitta* (new account) on 19th March 1928 we could have still made him liable for the Rs. 47,637 odd.

It is clear then that the case of the plaintiff is and has always been, that all the dues in this account which came up to Rs. 47,637.3.3 on 26th October 1927 were really the dues of Madho and Bhola and he simply acknowledged his own debt. But, as stated above, I have found that the facts established are just to the contrary, namely that Bhola was indebted on that date in a certain sum to the plaintiff and Madho simply acknowledged that debt as a debt due from Bhola. The important question which now arises for determination is what is the consideration which was the foundation of this new contract of the plaintiff with Madho assuming that the acknowledgment can be construed as a promise to pay the debt of another. The learned Subordinate Judge dealt with this matter at p. 75 and he sought to find some sort of consideration in the fact that Madho was getting nine-annas share in the Jharbera concern, that the initial outlay was to be Rupees 1,50,000 which sum he was to pay to Bhola and by executing that *bathchitta* he incurred no more liability than he had already undertaken orally in 1925 or 1926 or under the draft agreement (Ex. 54). I am unable to agree. Unless the terms of the partnership are accurately known, it would be dangerous to speculate. Indeed the plaintiffs did not suggest any consideration for this new contract which was made by Madho with them on 19th March 1928 by stating that they had abstained from doing anything by reason of this acknowledgment by Madho. This was the foundation of a

4. *Deoraj Tewari v. Indrasan Tewari*, (1929) 16 A I R Pat 258=120 I C 470=8 Pat 706=10 P L T 169.

serious contention raised by the learned counsel for the appellant before us that the plaintiff ought not to be allowed to make out a new case in the Appellate Court because he submitted that the plaintiff must succeed or fail upon proof that the liability of Rs. 47,637-3-3 was the old continuing liability of Madho (along with Bhola) and if the appellant was able to establish that this was never the liability of Madho the plaintiff's suit must be dismissed as against him. Sir Manmatha Nath Mukherji appearing for the respondent on the other hand argued that the appellant must be confined to his case, that he never signed this acknowledgment and that it was a forgery and that if we come to the conclusion that the acknowledgment was genuine we should not embark on a consideration of any other case and he pointed to para. 17 of the written statement of the appellant where-in he stated as follows :

That it is equally untrue to state that Rupees 47,637-3-3 or any money, was found due to the plaintiffs and by the defendants up to 26th October 1927. That the acknowledgment of this liability is not admitted. Even if it was so admitted by defendant 1 it was a collusive and fraudulent affair.

In my opinion, we should adopt the course accepted by their Lordships of the Judicial Committee in 33 All 344.⁵ The real question in the case before us is whether the plaintiff is entitled to recover the entire sum acknowledged by defendant 3 on 19th March 1928 or any portion thereof and it is open to this Court to consider this question so long as and only so far it is not inconsistent with the pleadings or with such of the evidence adduced by the parties which we may hold to be trustworthy. It was also pointed out by the appellant that the plaintiffs had based their cause of action in para. 13 of the plaint as the date of acknowledgment and therefore it was argued that if it is found that there was no consideration for this acknowledgment as suggested by the plaintiffs in their plaint and in evidence then the suit of the plaintiffs should fail. It was argued by Sir Manmatha Nath Mukherji in reply that the acknowledgment must be construed as a new contract or novation within the meaning of Sec. 62, Contract Act, and that the consideration for this contract was the wiping off of all the old liabilities of Bholanath by the undertaking of a new liability

by the appellant and Bhola in which the rate of interest was reduced from 2 per cent. to 1½ per cent. as mentioned in para. 10 of the plaint. The learned counsel for the appellant replied that the liability of Bholanath or his son was never wiped off, that their liabilities remained intact and that the case would have been different if Madho had undertaken the whole of the liability of Bholanath upon the plaintiffs discharging Bholanath and his son from their old liabilities or agreeing to reduce the rate of interest in consequence of his acknowledgment by Madho, and pointed out that this case was never sought to be made out by the plaintiffs throughout the protracted trial. This argument of the appellant must be accepted. It was then argued that the case falls within the provision of Section 127, Contract Act, which provides that

anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

In the present case nothing was done nor was any promise made for the benefit of the principal debtor. The case appears to be covered by illustration (c) which is as follows :

A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

I ask myself where is the consideration for this agreement and is this agreement not void ? Upon the facts found there can only be one answer to this question. There is no consideration for this agreement and therefore the agreement must be held to be void (*see the case in 16 P L T 897.*⁶) It would have been open to the plaintiff to allege and prove that were it not for this agreement of 19th March 1928, he would not have waited any longer but would have proceeded to sue Bholanath or that he reduced the rate of interest from 2 per cent. to 1½ per cent. only because Madho undertook the joint liability, but that is not the case made out either in the pleadings or in the evidence. It is impossible for this Court to spell out this case (argued as an alternative in the argument before us) without any trace thereof in the pleadings and evidence and resting on no substantial evidence which I can believe. It is against the pleadings and not supported by the evidence. Sir Manmatha Mukherji relied upon a case which is quoted in

5. *Umrao Singh v. Lachman Singh*, (1911) 33 All 344=10 I O 285=38 I A 104=14 O C 133=8 A L J 465 (P C).

6. *Janki Nath v. Dhokar Mall Kedar Bux*, (1935) 22 A I R Pat 376 = 156 I O 200 = 16 P L T 897.

Lindley on Partnership, Edn. 8, at pp. 252-253. It is the case in 3 Deac 365.⁷ The report of that case is not available here. It is stated at pp. 252-253 that in that case Warwick and Clagett became partners. Warwick, who had had dealings with merchants in America, informed them that he had taken Clagett into partnership, and requested them to make up their accounts, and transfer any balance due to or from him (Warwick) to the new firm. These instructions were repeated and confirmed by Warwick and Clagett, and were acted on. A debt owing from Warwick was placed to the debit of the new firm, and a bill was drawn on the firm for the amount of the debt and was accepted, but was dishonoured. On the bankruptcy of the firm, it was held that the debt in question had become the joint debt of Warwick and Clagett; and not only so, but that the joint liability of the two had been accepted in lieu of the sole liability of Warwick.

It is impossible for me to say anything more about this case (the report not being available) than this, that the law which prevails in this country as embodied in S. 43, Contract Act, is entirely different from the state of law in England or in America. In this country when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any (one or more) of such joint promisors to perform the whole of the promise.

In other words, the liability of joint promisors in India is both joint and several. It may be that in *Ex parte Whitmore*⁷ the reason for the decision was that in respect of the liability of Warwick the creditor had to look to the joint liability of the two persons and thereby the sole liability of Warwick was considerably reduced and that was the reason why this question was so decided in bankruptcy proceedings. In any event, I refuse to consider the applicability of a decision pronounced under a different state of law when this practice has been repeatedly condemned by their Lordships of the Privy Council who have pointed out that the citation of English authorities to consider Indian Statutes which are not in *pari materia* is not proper: see 3 Pat 279⁸ at p. 287, 57 I A 110⁹ and 59 I A 247.¹⁰

I therefore come to the unhesitating conclusion that there was no consideration at

7. *Ex parte Whitmore*, 3 Deac 365.

8. *Raghunath Prasad v. Sarju Prasad*, (1924) 11 A I R P C 60=82 I O 817=51 I A 101=3 Pat 279 (P C).

9. *Hunsraj v. Bejoy Lal Seal*, (1930) 17 A I R P C 59=122 I O 20=57 I A 110=57 Cal 1176 (P C).

10. *Maung Sein Done v. Ma Pan Nyun*, (1932) 19 A I R P C 161=137 I C 328=59 I A 247=10 Rang 322 (P O).

all in law and in fact to support the acknowledgment of 19th March 1928 and that the plaintiffs cannot enforce any liability against the appellant by reason of that acknowledgment beyond the sums, if any, which may be proved to have been taken by him from the plaintiffs and which may be included in this account. It would be convenient to discuss here if any such items have been proved in this case to have been taken by the appellant. [His Lordship then discussed evidence and proceeded.] It is now necessary to deal with two other matters. It was argued by the learned counsel for the appellants that the rate of interest charged by the respondent was very high and that a relief should be given under the provisions of the Usurious Loans Act on the ground that the claim of the plaintiff includes over Rs. 47,000 by way of interest and in particular that the sum of Rupees 9027.2.0 was calculated as interest for one year only up to October 1927. The learned Subordinate Judge granted partial relief to the defendants when he decreed the suit with simple interest on the hatchitta amount at 1½ per cent. per mensem simple and up to the date of the suit only. The interest is no doubt high but I am unable to hold that the learned Subordinate Judge has not exercised his discretion wisely considering all the circumstances of the case. The oral evidence given on behalf of the plaintiff is overwhelming to show that the customary rate of interest which was charged from the borrowers was in the neighbourhood of what was charged by the plaintiffs. It also appears to have been proved that compound interest was calculated only when the debtor came to meet his hisab on the Diwali for each year (see evidence of P. W. 5 at p. 37). The learned advocate for the respondent on the other hand contended that there was no reason why his client should be deprived of interest pendants lite or till the date of realization on the decretal amount. It is enough to say that the trial Court has a discretion in the matter as clearly provided in Sec. 34, Civil P. C. Here the circumstances undoubtedly point to the conclusion that the interest as claimed was excessive but as it could not be held that the transaction was unfair as between the parties to the suit no relief could be given under the Usurious Loans Act. The trial Court therefore in my view correctly appreciated the position and granted such relief to the defendants as he could from the time that the matter

of interest came within the domain of the Court. The circumstances which I find to exist in the present case are quite sufficient for us to refuse to interfere with the discretion exercised by the trial Court : see 18 P L T 787.¹¹ I think therefore there is no ground made out for interfering with the decision of the learned Subordinate Judge on this point and that the contention of the appellants and the respondents must both be rejected.

It was lastly contended by the learned counsel for the appellants that the sons of Madho should not have been made liable personally for the debt which was said to have been incurred by their father because this was an illegal debt not for the benefit of the joint family but in the nature of a speculative transaction. It is unnecessary to pronounce our opinion on this matter because the learned advocate for the respondent frankly stated that in case a decree is passed against the appellant Madho the plaintiff would be content to have the decree executed against the sons for such of the property as they will inherit from the father relying upon the doctrine of pious obligation of the sons to pay the father's debt and that the plaintiff would not ask for personal decree against the sons. This declaration therefore would be embodied in the decree that will be passed against the appellant.

For the reasons already indicated above, I hold that this appeal must be allowed in part and it should be declared that the plaintiff is entitled to realize from the appellant Madho only the sum of Rs. 7000 with interest at the rate of 1½ per cent. per mensem simple being calculated from 19th March 1928 up to the date of the suit. This is a personal liability of Madho as indicated above. As the appellants were themselves to blame for this litigation on account of defendant 3 deliberately signing the acknowledgment on 19th March 1928, the appellants and the respondents will bear their own costs of this litigation throughout as between themselves.

Chatterji J.—[His Lordship after stating facts proceeded.] Every partner is liable for all debts and obligations incurred while he is a partner in the usual course by or on behalf of the partnership (Section 249, part I, Contract Act). Madho will therefore be liable for the loans that were taken

from the plaintiffs for the partnership during the period from April 1926 to 28th December 1927. The total amount of these loans is, as already stated, Rs. 3200. The manner in which each particular item is entered in the partnership accounts may be relevant for the purpose of settling accounts as between the partners themselves, but it does not in any way affect the creditor's rights. On behalf of the appellants, it is contended on the authority in 42 I A 48¹² that as the plaintiffs advanced the amounts to Bhola on his own responsibility the fact that he spent the same for the partnership does not make the partnership liable for those debts. This contention is apparently in conflict with the provisions of S. 249 (part I), Contract Act. Nor does it receive any real support from the decision in 42 I A 48.¹² At p. 55 the proposition is thus stated :

Where goods are purchased or money raised for the joint adventures, and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. But there is no such responsibility for goods, etc. purchased on the credit of an individual adventurer *previously to the contract* though afterwards brought into stock as his contribution.

Exactly the same principle is laid down, though expressed differently, in Sec. 249, Contract Act. In the present case the advances, though made ostensibly to Bhola, were taken by him truly for the partnership and therefore the partners are liable. It is worth mentioning here that in the plaintiffs' own account books the amounts are debited not against Bhola individually but against Bholanath Brijbihari, the firm as it was then named. The second part of the proposition quoted above as is evident from the words underlined (here italicized) by me, refer to prepartnership debts and does not touch the point now under consideration.

As to the appellants' liability for the sum of Rs. 47,637.3.3 based on the acknowledgment Ex. 5, it is repudiated by their learned counsel on the following grounds: firstly, that the acknowledgment is not genuine, secondly, that it is a mere acknowledgment without any express promise to pay amounting to a new contract and as such it is ineffective to charge them with liability and thirdly, that even if it be regarded as a contract, it is without

11. Isri Prosad Singh v. Jagat Prasad Singh, (1937) 24 A I R Pat 628 = 172 I C 187 = 16 Pat 557 = 18 P L T 787.

12. Karamali Abdulla Allarakhia v. Karimji Jiwanji, (1914) 1 A I R P C 132 = 26 I C 915 = 42 I A 48 = 39 Bom 261 (P C).

consideration and therefore void. [After discussing evidence the judgment proceeded.] So far as the adjustment is concerned, it implies a contract to pay the sum of Rs. 47,637-3-3 found due with interest at $1\frac{1}{2}$ per cent. The former rate of interest was 2 per cent. per mensem. The effect of this adjustment is not merely to ascertain the amount due and acknowledge liability for it but to substitute for it a new liability with a reduced rate of interest. After this adjustment, could the plaintiffs enforce the old liability at the old rate of interest? The answer is, No. The adjustment thus creates a new liability and it cannot be regarded as a mere acknowledgment. Now the question is whether the position is different with regard to the acknowledgment Ex. 5. If it had stood by itself it would have been difficult to construe it as being in the nature of a new contract. But it cannot be considered independently of the adjustment, Ex. 4 because the two are parts of the same transaction. Though the acknowledgment, Ex. 5 was executed later, on 19th March 1928, it was intended to operate as if Madho himself was a party to the adjustment, Ex. 4. In this view the acknowledgment will have the same legal consequences as the adjustment and will therefore be regarded as creating a new contract. Now supposing that the acknowledgment, Ex. 5 does not create a new contract let us see how the plaintiffs' rights are affected. One consequence that will follow is that no suit will lie on the basis of the acknowledgment. The law on this subject is well-settled: *vide* 5 P L J 371.¹³ This won't affect the suit so far as it is based on the adjustment Ex. 4. The question then arises whether the plaintiffs will be entitled to any relief on the strength of the acknowledgment. I have already held that Madho was not a partner before April 1926. He cannot therefore be liable for the debts incurred previous to that period. This is expressly provided in S. 249 (second part) of the Contract Act which runs thus:

A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firms for anything done before he became a partner.

It is contended by the learned Advocate for the respondents that all that this part of the section means is that the mere fact

of a person being admitted as a partner does not make him liable for debts incurred before his admission but it does not prevent him being liable under a contract to the contrary. Reliance is placed on 35 C W N 593¹⁴ where it has been laid down that when a person is admitted as a partner into an existing firm he does not thereby become liable for any debt incurred prior to his admission, but he will be so liable if (1) the firm as constituted after his admission has assumed the liability to pay the old debts and (2) if the creditor has agreed to accept the new firm as his debtor and to discharge the old partnership from its liability. This decision has for its support the following statement of law to be found in Lindley on Partnership, Edn. 8 at p. 825:

A creditor of one person does not become the joint creditor of him and another who enters into partnership with him merely because the two partners have agreed between themselves that the debts of each shall be the debts of both. Unless the creditor accedes to that arrangement he is not bound by it, nor can he avail himself of it; his position in fact is unaltered, he does not lose his old right, nor does he gain any one.

Let us now apply these principles to the present case. I have already shown that Madho as a condition of his admission as a partner in the Jharbera concern had undertaken the liability for past debts of the partnership. This arrangement was between the partners themselves and could not be binding against the creditors so long as they did not accede to it. But the plaintiffs as creditors acceded to the arrangement when after the adjustment of accounts up to 26th October 1927 (the Dewali day) closed the account in the name of the old firm "Bholanath Brijbihari," opened a new account in the name of the new firm "Madho Prasad and Bholanath Brijbihari" with a debit balance of Rs. 47,637-3-3, the amount found due on adjustment from the old firm, and took a hatchitta on 28th December 1927 from Bholanath as representing a new firm for that amount. Lastly, Madho acknowledged the liability for that amount by making the entry Ex. 5 dated 19th March 1928 in the same hatchitta. Thus the old and new partners and the creditors all accepted the arrangement by which the partners as constituting the new firm assumed the liabilities of the old firm. In this view it is immaterial whether the acknowledgment Ex. 5 creates a new contract or not.

13. Suraj Prasad v. W. W. Boucke, (1920) 7 A I R Pat 161 = 56 I C 379 = 5 Pat L J 871 = 1 P L T 190.

14. P. D. Sarma v. Phanindra Nath Mukherji, (1931) 35 C W N 593.

It is quite enough if it implies a promise to pay as every acknowledgment does: 33 Cal 1047¹⁵ and 8 Pat 706.⁴ The principles laid down in 35 C W N 593¹⁴ and also in Lindley on Partnership are fully applicable to the facts of the present case. Consequently Madho and with him his sons are liable for the sum of Rs. 47,637-3-3.

The next question is whether there is any consideration for the contract that is supposed to be created by the acknowledgment Ex. 5. It cannot be disputed that there was good consideration as between Bhola and Madho because as the evidence shows the latter was taken in as a partner with nine annas share in the partnership business in consideration of his undertaking the liability for the past debts of the partnership. The learned counsel for the appellants however contends that to support the contract there must be consideration moving from the plaintiffs which is not even pleaded, much less proved. This argument loses sight of the fact that under the Indian law as enacted in Sec. 2 (d), Contract Act, consideration need not necessarily move from the promisee; it may move from any other person. Sec. 2 (d) runs as follows :

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something such act or abstinence or promise is called a consideration for the promise.

This affords a complete answer to the learned counsel's argument. He also refers to the following Illus. (c) under Sec. 127, Contract Act :

A sells and delivers goods to B. C afterwards without consideration agrees to pay for them in default of B. The agreement is void.

But if in this Illustration, B agrees to give C a share in the profits to be derived from the goods can the agreement by C to pay A be said to be without consideration? Certainly not. The position in the present case is almost similar. The plaintiffs advanced loans to Bhola. Bhola agreed to take Madho as a partner in the business for which the loans were taken. Madho in his turn agreed to repay the loans to the plaintiffs. Even assuming that some consideration directly moving from the plaintiffs was necessary, I think this is well established by the admitted or proved facts. The plaintiffs opened a new khata in the name of Madho jointly with Bhola and Brijbihari

and accepted Madho as a joint debtor. The old liability was wiped off and a new liability substituted instead at a lower rate of interest. This situation is sought to be met by the learned counsel for the appellants by pointing out that in view of the provisions of Sec. 43, Contract Act, Bhola and Brijbihari still remained liable. In other words, the contention is that there could be no novation of contract unless the old debtors Bhola and Brijbihari were altogether discharged. But on a reference to S. 62, Contract Act, which provides that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it the original contract need not be performed, it will appear that a new contract may be substituted either between the same parties or between different parties, the consideration being the discharge of the old contract. In the present case, as I have already shown elsewhere, the plaintiffs in the face of the new contract as embodied in the adjustment, Ex. 4 could not enforce the old liability. As regards parties to the contract, no doubt Bhola and Brijbihari are still there but under the old contract they were exclusively liable whereas under the new contract they are jointly and severally liable with Madho. The learned counsel for the appellants has drawn our attention to the following statement of the plaintiffs' munim P. W. 2.

I cannot give any reason for adding name of Madho in the khata. Madho asked us to do so; we would not have added had he not so requested; he did not give any reason; and also to the following statement from Ganeshlal's evidence (Ex. 56) in the Midnapur suit :

If Madho Prasad did not sign this hatchitta (new contract) on 19th March 1928 we could have still made him liable for Rs. 47,637 odd.

Upon these statements it is argued that on the plaintiffs' own showing there was no consideration moving from them for the new contract. So far as Ganeshlal's statement is concerned, it was just in keeping with his case that Madho was a partner from the very beginning. As regards the statement of P. W. 2, although he cannot give any reason for adding Madho's name in the khata he does say that this was done at Madho's request. Whatever may be the implication of these statements, the adjustment of accounts, the opening of the new khata and the acknowledgment by Madho are established facts and from these facts it is for the Court to draw the legitimate inference. With reference to the contention of the learned counsel for the

15. Maniram Seth v. Seth Rupchand, (1906) 33 Cal 1047=33 I A 165=2 N L R 130=4 C L J 94=10 C W N 874 (P C).

appellants that consideration was not pleaded, I should observe that the relevant facts are set forth in para. 10 of the plaint. It is stated there that

defendant 3 requested the plaintiffs to open an account in the joint names of defendants 1, 2 and 3 and square up the previous account standing in the names of defendants 1 and 2. Accordingly the plaintiffs opened an account in the names of defendants 1, 2 and 3 with an opening balance of Rupees 47,637-3-3 and squared up the previous account on 28th December 1927 Subsequently defendant 3 signed the hatchitta himself and thereby acknowledged his liability to the extent of Rs. 47,637-3-3 . . . The defendants by the said hatchitta promised to pay interest at the reduced rate of Re. 1-8-0 per cent. per mensem.

The defendants on the other hand in their written statement did not plead want of consideration. Considering the broad facts established in the case I am of opinion that there was good consideration for the contract represented by the acknowledgment, Ex. 5.

The plaintiffs' claim with regard to the sum of Rs. 7000 advanced on 19th March 1928 stands on a different footing because it was taken by Madho himself. Madho's case is that he borrowed this sum at the request of Bhola and made it over to him. The entry, Ex. 5a regarding this amount shows that it was taken for paying royalty to the State. The learned Subordinate Judge has shown in his judgment how Madho made various conflicting statements regarding the circumstances under which he borrowed this amount. The entry, Ex. 5a also is inconsistent with Madho's case that he borrowed the amount on behalf of Bhola. I have no hesitation in holding that his statement on the point is false and that he did borrow the sum of Rs. 7000. Even assuming that the sum was borrowed on behalf of Bhola it was obviously for the purpose of the partnership; in that view also Madho will be liable as a partner. Thus the appellants are liable for both the items of the plaintiffs' claim, namely Rs. 47,637-3-3 and Rs. 7000.

The next contention advanced by the learned counsel for the appellants relates to interest. The plaintiffs claimed compound interest with yearly rests at $1\frac{1}{2}$ per cent. on the sum of Rs. 47,637-3-3 from 26th October 1927 and on Rs. 7000 from 19th March 1928. The sum of Rupees 47,637-3-3 itself included compound interest at the rate of 2 per cent. with yearly rests. The plaintiffs' evidence shows that interest was compounded at the time of its adjustment. As there was no adjustment

subsequent to 28th December 1927 the learned Subordinate Judge has allowed simple interest only at $1\frac{1}{2}$ per cent. per mensem on Rs. 47,637-3-3 and Rs. 7000. As regards the sum of Rs. 47,637-3-3 the learned counsel's contention is that it includes a large amount of interest and that compound interest at 2 per cent. with yearly rests is usurious. The plaintiffs have adduced overwhelming evidence to show that according to the Mahajani practice interest is charged at not less than 2 per cent. per mensem and is compounded at the time of adjustment on the Dewali day of every year. That evidence has been accepted by the learned Subordinate Judge and nothing has been shown to us from which we can say that he was wrong. It cannot be said as a matter of general rule that 2 per cent. compound interest in the case of unsecured loans is necessarily high.

There is a cross-objection by the plaintiffs relating to interest because the learned Subordinate Judge disallowed compound interest on the sums of Rs. 47,637-3-3 and Rs. 7000 and also because he has refused pendente lite and future interest. As regards refusal of compound interest the learned Subordinate Judge has given very good reasons. The granting of pendente lite and future interest lies in the discretion of the Court. In view of the fact that the sum of Rs. 47,637-3-3 includes a large amount of compound interest the learned Subordinate Judge was quite right in exercising his discretion not to allow pendente lite and future interest. The cross-objection must therefore fail.

There is another small point. Defendants 4 to 7 are sons of defendant 3 and for his debts there cannot be a personal decree against them. The learned advocate for the plaintiffs-respondents concedes this. Therefore in the decree it should be made clear that it cannot be a personal decree against defendants 4 to 7. Subject to this modification I would dismiss the appeal and also the cross-objection. But in view of the fact that I have not accepted the plaintiffs' case that Madho was a partner from the very beginning of the transaction with the plaintiffs I would order that parties do bear their own costs in this Court. (On account of the difference of opinion, the case was placed before a third Judge who delivered the following judgment.)

Fazl Ali J.—This appeal was originally heard by a Division Bench of this Court, but owing to a difference of opinion be-

tween the learned Judges who constituted the Bench the following point has been referred to me for decision:

"Whether appellant 1 is liable by virtue of the acknowledgment dated 19th March 1928 (Ex. 5)."

In order to explain this point I shall briefly refer to certain facts. Appellant 1 Madho Prasad and his four sons (appellants 2 to 5) have preferred this appeal against a decree passed by the Subordinate Judge of Manbhum-Sambalpur under which they have been held to be liable along with respondents 2 to 4 to pay a sum of Rs. 61,070-7-6 besides the costs of the suit to the plaintiffs who are a firm of money-lenders. The plaintiffs have impleaded in the suit two groups of defendants, namely the appellant and respondents 2 to 4 who belong to different families. Madho Prasad (appellant 1) is the head of one of the families and Bholanath (now dead), who was defendant 1, was the head of the other family when the suit was instituted. The two families are connected by marriage as appellant 4 Ramsagar is married to the daughter of Bholanath and Madho Prasad and Bholanath jointly carried on certain business at Panposh, a place in the District of Singhbhum. The question to be decided by me is whether a sum of Rs. 47,637 odd to which Ex. 5 relates and which is the largest item in the plaintiffs' claim is payable by both sets of defendants or by respondents 2 to 4 only. It may be stated here that the principal amount claimed by the plaintiffs in the suit consisted of two main items, one of Rs. 47,637 odd and another of Rs. 7000. So far as the latter amount is concerned, both the learned Judges are agreed that it is payable by both sets of defendants.

It appears that Bholanath and his son Brij Bihari used to carry on business as contractors not only at Panposh but at two other places also, namely Amghat and Chakradharpur. For the purpose of conducting their business they had to borrow large sums of money from time to time since 1923 from the plaintiffs and the sums which they borrowed from and those which they paid to the plaintiffs towards their debts used to be entered in the plaintiffs' books under a khata which stood in some years in the name of Bholanath alone and in some years in the names of Bholanath and Brij Bihari. The account between these persons and the plaintiffs used to be adjusted periodically and the amount found due against them used to be noted in a

book called "hatchitta bahi". Previous to 1927 the entries in the hatchitta bahi were signed by Bholanath alone in acknowledgment of his liability for the amount stated therein. At the beginning of the year 1984 Sambat which corresponds to 26th October 1927 a khata was opened by the plaintiffs in the name of Bholanath Brij Bihari as well as Madho Prasad. The heading of this khata which precedes the relevant entries reads as follows:

The account of Madho Prasad and Bholanath Brij Bihari at present residents of Panposh dated 1st Kartik Sudi 1984 corresponds to 28th October 1927.

On 28th December 1927, Bholanath made the following entry in this bahi and put his signature below the entry across four stamps of one anna each.

The accounts having been compared the balance due up to 1st Kartik Sudi 1984 Sambat corresponding to 26th October 1927 is in words Rupees forty seven thousand six hundred thirty seven, annas three pies three only, on which interest will run at 1½ p. c. p. m. Rs. 47,637-3-3.

(Sd.) Madho Prasad and Bholanath Brij Bihari by the pen of Bholanath dated 26-10-27. Signed on 28-12-27.

The whole of the entry which was made on 28th December 1927 is marked as Ex. 4. On 19th March 1928 Madho Prasad wrote just below the entry Ex. 4 as follows:

Signed Madho Prasad by my own pen, 26th October 1927. Amount Rupees forty seven thousand six hundred thirty seven, annas three and pies three only, interest at one and a half per cent. Rs. 47,637-3-3. Date of signature 19-3-28.

This entry is Ex. 5 and is followed by a third entry showing that a sum of Rs. 7,000 was borrowed by Madho Prasad and Bholanath and Brij Bihari on the same day and below that entry are the signatures of Madho Prasad and Bholanath Madho Prasad signing for himself and Bholanath signing for himself and Brij Bihari. A question here arises as to why Madho Prasad's name was introduced for the first time in the hatchitta account book on 26th October 1927. The plaintiffs' case was that though the accounts previous to 1927 stood in the name of Bholanath and Brij Bihari only, all the loans entered therein had in fact been contracted both by Bholanath and Madho Prasad and it was at the request of Madho Prasad himself that his name was not disclosed in the books. It was stated on their behalf that Madho Prasad being in the service of the Bengal Nagpur Railway feared that the railway authorities would not approve of his carrying on contract work on his own account and so he

asked the plaintiffs not to enter his name in their books. It was also the case of the plaintiffs that Bholanath and Madho Prasad had taken a lease in respect of a limestone quarry at Jharbera from the Feudatory Chief of the Gangpur State within which Jharbera is situated and the sums of money borrowed by the defendants from the plaintiffs were all invested in that business which was jointly carried on by all the defendants. The case of Madho Prasad (appellant 1) on the other hand was that Ex. 5 was not in his handwriting nor did it bear his signature and that the sum of money to which Ex. 5 related was the exclusive debt of Bholanath and he was not liable for them. The learned Judges who originally heard this appeal have disbelieved both the plaintiffs and Madho Prasad on certain important points. The evidence on the record shows that in the year 1925 a lease was taken by defendant 1 and one B. K. Sanyal of a limestone quarry at Jharbera and both the learned Judges have held that defendant 3 became a partner of Jharbera business since April 1926. Thus the plaintiffs' case that all the debts for which the adjustment took place in 1927 were debts contracted for Jharbera business has been disbelieved and their case that the loans had been contracted by defendants 1 and 2 as well as defendant 3 since 1923 has also not been accepted. The learned Judges have further found that the entry Ex. 5 is in Madho's own handwriting and bears his signature.

Upon the findings of the learned Judges the points which are now beyond controversy are : (1) that respondents 2 to 4 who have not appealed from the decree of the trial Court are in any event liable for Rs. 47,637-3-3 and (2) that the appellant and respondents 2 to 4 are joint and severally liable for the sum of Rs. 7000 which was borrowed on 19th March 1928 by Madho Prasad and Bholanath expressly for the purpose of the business at Jharbera. The learned Judges, however, are not agreed as to the legal effect of Ex. 5 or in other words on the question as to whether by making the entry Ex. 5 Madho Prasad made himself in law liable jointly and severally with the other defendants for the sum of Rs. 47,637 odd. Manohar Lall J. has expressed the view that the words written by Madho Prasad did not imply a promise to pay and even if they did, the promise being without consideration cannot be enforced against him and his sons.

Chatterji J. has on the other hand given a number of reasons in support of the opposite view, namely that Madho Prasad has by means of the acknowledgment (Ex. 5) made himself liable for the entire amount stated therein.

It may be stated here that one of the points raised on behalf of the appellants was that even though Madho Prasad might have erroneously thought that he was a partner in the Jharbera business, his true position was that of a creditor and not that of a partner and this contention was based on the fact that under the terms of the lease relating to the Jharbera quarry no one could be taken in as a partner with the lessees except with the sanction of the Local Government obtained through the lessor and the Political Agent. That point has been decided against the appellant, but it does appear that after Madho Prasad had invested a large sum of money in the Jharbera business he and defendant 1 quarrelled with each other and in spite of the intervention of Mr. Christian, the Superintendent of the Gangpur State, they could not be reconciled. The result is that no deed of partnership has yet been executed and there is evidence on the record to show that Bholanath has been trying to take in another person Jairam Walji as his partner in preference to the appellant. Upon these facts the view which has been expressed by Manohar Lall J. as to why Madho Prasad acknowledged a debt for which Bholanath and Brij Bihari were liable is as follows :

But later on his evidence discloses that owing to some difference the appellant ceased to invest further sums before he got the written sanction of the Gangpur State which was to be granted on the settlement of the agreement of partnership, a draft whereof was actually reduced into writing, but unfortunately the agreement was never completed; the appellant being perhaps anxious to obtain some documentary proof as he suggested in the argument deliberately went and acknowledged the debt which was not his debt nor the debt of the partnership into which he thought he had entered and for which he was not getting any documentary evidence, but was a personal debt of Bhola. The plaintiff himself knew that Madho was being approached by Bhola as a financier even in May 1929 [see Ex. F (14) at p. 54]; this entirely demolishes the case of the plaintiffs that from 1923 onwards the moneys which he had advanced to Bhola were being advanced both to Bhola and Madho on account of Jharbera concern. It is also established that there was never any representation to the plaintiff (upon which he ever acted to his detriment) by or on behalf of Madho that he was a partner with Bhola. I have already stated more than once that it has been fully established that the plaintiff never started advancing money to

Bhola from 1923 onwards on the distinct understanding that Madho was to be held liable for these advances.

The learned Judges have stated in their order by which they desired this case to be referred to a third Judge, that they agree on all points except the point on which the reference has been made, but it appears that while Manohar Lall J. has proceeded on the assumption that the entire debt covered by Ex. 5 was the debt of Bholanath and Brij Bihari, Chatterji J. has expressed the view that Madho Prasad was liable for a small sum of Rs. 3500 which was borrowed from the plaintiffs for the purpose of the Jharbera business between April 1926 and 28th December 1927. The point of difference however is small and on the findings of both the Judges the debt as a whole may be regarded as essentially the debt of Bholanath. The question therefore which I have to answer is whether by virtue of Ex. 5 Madho Prasad is liable to pay a sum the whole or by far the greater part of which had been borrowed by Bholanath and his son Brij Bihari. The entry Ex. 5 which may be reproduced once more runs thus :

Sd. Madho Prasad. By my own pen, 26th November 1927. Amount, Rupees forty seven thousand six hundred thirty seven, annas three and pies three only, interest at (sic) one and a half per cent. . . . Rs. 47,637-3-3. Date of Signature 19th March 1928.

In this entry Madho Prasad has nowhere expressly stated that he was personally liable for the sum of Rs. 47,637.3.3 or that he had taken over the liability for the payment of this sum upon himself and so the entry standing by itself does not help the plaintiffs. Referring to this entry Chatterji J. says as follows :

If the acknowledgment had stood by itself that is without adjustment, it would have been difficult to construe it as being in the nature of a new contract.

Chatterji J. has rightly pointed out that this entry does not stand alone, but follows an entry in the handwriting of Bholanath under the heading "The account of Madho Prasad and Bholanath-Brij Bihari." All these entries however must be read in the light of the case put forward on behalf of the plaintiffs to explain them. The plaintiffs' case on the point has been throughout quite a clear and consistent one, namely that the debts to which the entries Exs. 4 and 5 relate were not only the debts of Bholanath and Brij Bihari but the debts of these persons as well as Madho Prasad and

the plaintiffs relied on the entries Exs. 4 and 5 as a strong piece of evidence in support of their case. That case however having been disbelieved Madho Prasad can be made liable only upon certain assumptions which are not warranted by the pleadings and which must necessarily be based more or less upon surmises. Ex. 5 has been called an acknowledgment, but it is not clear what is acknowledged therein. Does it acknowledge merely an existing liability or does it create a new liability? If the latter be the case, the entry does not show in what capacity Madho made himself liable for the large sum of money to which the entry refers nor does it show what consideration there was for his undertaking to become liable for that sum. In the course of the argument before me, it was contended among other things on behalf of the respondent that the present case is governed by Sec. 62, Contract Act, which provides that if the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed. In (1882) 7 A C 345¹⁶ Lord Selbourne explained novation as follows :

There being a contract in existence some new contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract.

But the question is whether there was really and truly a discharge of the old contract in the present case. Now novation of contract to have any real meaning is not consistent with the original debtor remaining liable in any form. But what we find here is that Bholanath and Brij Bihari were liable under the old contract and they continued to be liable under the new contract. It has been argued that whereas formerly Brij Bihari and Bholanath only were liable, they are now liable jointly and severally with Madho Prasad. But this simply shows that the creditor instead of having only two persons as his debtors agreed by Ex. 5 to have three persons without forgoing any rights which he had against his old debtors. On the whole therefore I am inclined to agree with the view expressed by Manohar Lall J. on this point.

It was next contended on behalf of the respondent that the appellant is liable on the principle enunciated in *Ex parte Whitmore*⁷ which has been referred to in Lindley

16. *Scarf v. Jardine*, (1882) 7 A C 345=51 L J Q B 612=47 L T 258=80 W R 893.

on Partnership as an instance where an incoming partner can make himself liable even for debts contracted by a firm before he joined it. The facts of the case have been set out in the judgment of Manohar Lall J., and I do not wish to reproduce them here. I wish however to emphasize that the case does not mark any departure from the law on the subject which is set out clearly in Lindley on Partnership as follows :

If an incoming partner chooses to make himself liable for the debts incurred by the firm prior to his admission therein, there is nothing to prevent him doing so. But it must be borne in mind, that even if an incoming partner agrees with his co-partners that the debts of the old shall be taken by the new firm, this, although valid and binding between the partners, is, as regards strangers, *res inter alios acta*, and does not confer upon them any right to fix the old debts on the new partner. In order to render an incoming partner liable to the creditors of the old firm, there must be some agreement, express or tacit, to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement, the incoming partner will be bound by it, but his liabilities in respect of the old debts will attach by virtue of the new agreement, and not by reason of his having become a partner.

Now, before the law so stated can be correctly applied, the facts of the present case must be clearly borne in mind. It appears to me that Bholanath and Brij Bihari borrowed money from the plaintiffs not as a firm but as members of a joint family for several enterprises in which they were interested. There is very little evidence to show that Bholanath Brij Bihari was the name of any firm, but on the other hand, there is evidence to the effect that these persons had business at least in four places, namely Amghat, Chakradharpur, Panposh and Jharbera and the business at some of these places was conducted under the name of Brij Bihari & Co., while the business at Jharbera was conducted in the name of Pioneer Trading Co. Even assuming however that Bholanath Brij Bihari was the name of a firm, it cannot be said upon the findings, which I must accept that when Madho Prasad acknowledged his liability, he did so as a partner of that firm. That firm, as the evidence shows, carried on business at four places including Amghat and Chakradharpur, but Madho had no concern with the business at these two places. Therefore apart from the question whether the agreement entered into between Madho Prasad and the creditors was founded on some sufficient consideration or not, it is clear

that the principle enunciated in *Ex parte Whitmore*⁷ is not applicable firstly, because the debt acknowledged by Madho Prasad was not the debt of a firm but of two individuals who were interested in a number of enterprises and secondly, because he never became a partner in the firm of Bholanath Brij Bihari, even assuming that there was a firm of that name in existence. The question therefore has to be examined purely on the footing as to whether an acknowledgment by one person of the debt owed by two other persons is by itself sufficient to make him liable for those debts in an action brought by the creditor to realize them from him.

To answer this question in the affirmative, we will have to assume in the first place that the acknowledgment implied a contract on the part of Madho Prasad to pay the amount acknowledged and secondly, that this contract was supported by sufficient consideration. In finding out what was the consideration for the alleged contract, we shall have to bear in mind that the plaintiffs' case upon which they wanted to make defendant 3 liable has failed, that case being that Madho Prasad was liable for every single debt contracted between 1923 and the date of the acknowledgment Ex. 5 and so Madho Prasad had merely acknowledged his own debt. Ex. 5 was used by the plaintiffs not merely as the basis of their claim but as a strong piece of evidence to support their case that all the loans which constituted the sums to which Ex. 5 relates had been taken jointly by Madho Prasad and Bholanath. This was undoubtedly a plausible case but it has failed and if the plaintiffs are to succeed now, we must make out a new case for them, a case quite different from that put forward by them in their plaint or evidence. In this connexion various alternative cases were put forward before the learned Judges who originally heard the appeal as well as before me as to the nature of consideration and I shall briefly deal with them. It was pointed out in the first place that at least under the terms of the agreement which gave Madho Prasad a share in the Jharbera business, he was bound to pay off the debts of that business amounting to a lakh and a half of rupees. This is a fact and is borne out by Ex. 54 in which it is stated that the second party will refund to the first party the sum of Rs. 1,50,000 or thereabouts as will be found due after going through the account books, the cash book and ledger kept by the first party in carrying on the mining business concern together

with the interest thereon and that sum will be deemed the present liability of the first party.

It is however to be remembered that Madho Prasad had undertaken to pay off the liabilities of Jharbera concern only. He had not undertaken to pay off the liabilities incurred by Bholanath and Brij Bihari not only on account of Jharbera business but also on account of some of their private enterprises. It is true that Brij Bihari has stated in his evidence that this was the contract but his statement is neither borne out by the draft agreement Ex. 54 nor has it been accepted by the learned Judges by whom the case was originally heard. Thus, it cannot be said that Madho Prasad acknowledged the debts in pursuance of the terms on which he was admitted as a partner in Jharbera concern. It was also suggested that a sum of Rupees 7000 had been taken by Madho Prasad and Bholanath jointly after Madho Prasad had signed Ex. 5 on 19th March 1928 and that might furnish the consideration in question. It is however not the plaintiffs' case that they would not have advanced Rupees 7000 to Bholanath if Madho Prasad had not signed Ex. 5. It has also been suggested that the plaintiffs had been induced to reduce the rate of interest from Rs. 2 to Re. 1.8.0 on account of Madho Prasad acknowledging the liability. This also is not fully supported by the evidence adduced in the case. The plaintiffs' witness (P. W. 2) has stated that after the date of the hatchitta interest was reduced in rate at the request of "these persons" and as the dues had become heavy. By "these persons" the witness undoubtedly meant Bholanath and Madho Prasad, but he did not state that if Madho Prasad had not agreed to sign the hatchitta, the interest would not have been reduced. On the other hand one of his statements is to the following effect :

I cannot give any reason for adding the name of Madho in the khata. Madho asked us to do so. We would not have added had he not so requested. He did not give any reason.

Again he stated :

If Madho did not come for Rs. 7000 on 19th March 1928 his signature would not have been there and the chita would have been without it. We did not think it essential to get his signature. When he came, he signed of his own accord; we did not request.

Similarly, plaintiff 1 who is now dead made the following statement in his deposition in another action which has been admitted in the present case under Sec. 33, Evidence Act.

I do not remember if any intimation was given to Madho Prasad about opening the new account in the three names according to his request. If Madho Prasad did not sign the hatchitta (new account) on 19th March 1928, we could have still made him liable for Rs. 47,637 odd.

In view of these statements which imply that Ex. 5 did not alter the legal position of the parties, the contentions advanced by the learned counsel for the appellants are (1) that on the plaintiffs' own case, Ex. 5 must be construed as mere acknowledgment of an existing liability and not as a contract creating a new liability; (2) that once it is found that the debt acknowledged by Ex. 5 was the debt of Bholanath and Brijbihari, the case against Madho must fail and the question of consideration does not arise and (3) that if there was any new contract between the plaintiffs and Madho Prasad by which the latter made himself liable for a sum which he would not have been liable to pay otherwise, that contract should have been put in proper legal form and should have been sufficiently explicit in its terms to enable a Court of law to determine what exactly Madho Prasad's liabilities were under it. In my opinion, these contentions cannot be lightly passed over.

The points in favour of the plaintiffs are (1) that Ex. 5 is in Madho's own handwriting; (2) that his case as to this document being a spurious one has been found to be untrue and (3) that he being a man of business it is not probable that he would have signed the document without understanding it or knowing the implication of what he was doing. Therefore if Ex. 5 is construed (sic) as a contract even slight evidence as to consideration, provided that it was reliable, would have been sufficient to make Madho liable for the sum referred to therein. In my judgment however the difficulty which the plaintiffs are confronted with is that inasmuch as the evidence adduced by them has been disbelieved as to the essential part of their case it is difficult now to find with any degree of certainty under what circumstances and with what motive Madho Prasad became a party to the transaction evidenced by Ex. 5. It may be that he wrote Ex. 5 for a good and sufficient consideration as would be expected from a shrewd man of business that he is represented to be; or he may have been duped by Bholanath who, as appears from the evidence, became his avowed enemy afterwards with the result that no agreement of partnership has yet been concluded. Indeed, if one is permitted to indulge in

speculation, it may be difficult to rule out of consideration the theory suggested by Manohar Lall J. to which reference has already been made as well as several other theories which were put forward in the course of the argument as to why Ex. 5 was written and signed by Madho. For these reasons after carefully considering the elaborate and instructive judgments of Manohar Lall and Chatterji JJ., I am on the whole inclined to agree with the view expressed by Manohar Lall J., and answer the difficult question referred to me in the negative. (The record of the case was then placed before Manohar Lall and Chatterji JJ. for passing final order.)

S.G./R.K.

*Answer in negative.***A. I. R. 1939 Patna 339****FULL BENCH****FAZL ALI, AGARWALA AND VARMA JJ.***Mahadev Maharaj — Defendant**— Appellant.*

v.

*Jagdev Singh and others, Plaintiffs
and others, Defendants—Respondents.*

Appeal No. 967 of 1936, Decided on 11th May 1939, from appellate decree of Sub.Judge, Monghyr, D/- 13th February 1936.

(a) Bengal Tenancy Act (8 of 1885), Ss. 65 and 167 — Sale of holding in execution of rent decree — Stranger purchaser has charge for decretal amount as against holder of mortgage of part of holding executed before purchase — His rights are similar to those of purchaser of holding in execution of decree on prior mortgage — Failure of purchaser to annul incumbrance under S. 167—He does not lose priority over holder of incumbrance.

A purchaser (not being a landlord) of a holding in execution of a decree for rent has a charge for the amount of the decree for rent as against the holder of a mortgage of the part of the holding executed before the purchase, and is entitled to the same rights as the purchaser of a holding in execution of a decree passed on a prior mortgage. If a purchaser in execution of a rent decree fails to annul an incumbrance under Sec. 167, the incumbrance will continue but he will not thereby lose his priority over the holder of the incumbrance. This priority is acquired by him as a matter of law in consequence of the rent being a first charge on the holding and it should not be confused with the special privilege conferred on him by Sec. 167 : *Case law reviewed; A I R 1927 Pat 63, Partly overruled; A I R 1922 P O 11, Applied.* [P 339 C 2; P 342 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 167 — Tenant of non-transferable holding mortgaging it to third person — Holding sold in execution of rent decree and purchased by landlord himself — Landlord can ignore mortgage without formally annulling it under S. 167 (*Obiter*).

If the tenant of a holding, notwithstanding the fact that the holding is not transferable, mortgages it to a third person, the landlord of the holding is not bound to recognize the mortgage or admit the mortgagee to be his tenant even though the mortgagee may have obtained a decree on the basis of the mortgage. In such a case, if the holding is sold in execution of a rent decree and the landlord himself purchases it, there is nothing to prevent him from ignoring the mortgage without formally annulling the encumbrance under Sec. 167 : *A I R 1928 Pat 234 and A I R 1929 Pat 222, Rel. on.* [P 341 C 1]

S. N. Bose and G. P. Das

— for Appellant.

K. Husnain, P. Misser and M. Rahman

— for Respondents.

Fazl Ali J. — This case was originally heard by my brother Agarwala and myself and we referred it to a Full Bench by our order, dated 5th May 1938, which runs as follows :

This appeal raises a question of considerable importance about which the decisions of this Court are unfortunately by no means clear. We consider that it is desirable that the appeal should be heard by a larger Bench, and therefore direct that it be laid before the Chief Justice for orders under R. 2, Ch. 5 of the Rules of the High Court.

The question which arises for decision is whether a purchaser (not being a landlord) of a holding in execution of a decree for rent, has a charge for the amount of the decree for rent as against the holder of a mortgage of the part of the holding executed before the purchase, or is entitled to the same rights as the purchaser of a holding in execution of a decree passed on a prior mortgage.

The question so formulated arose on the following facts. On 16th September 1929, respondents 5 and 6 executed a mortgage bond in favour of respondents 1 to 4 hypothecating several items of property including khata No. 325 which was part of a holding belonging to them. In 1929, the landlord of the village wherein the holding is situate brought a rent suit and in execution of the decree passed in his favour in that suit the holding was sold and purchased by the appellant on 10th March 1931. On 5th December 1933, respondents 1 to 4 brought the present suit to enforce their mortgage bond, impleading therein no less than 11 persons including the appellant as defendants. The suit was contested only by the appellant who was defendant 11 and by the guardian ad litem of defendant 3, a minor son of one of the executants of the bond. The latter attacked the bond on the ground that it was without consideration and not supported by any legal necessity and the appellant took two additional pleas among others, namely (1) that the incumbrance created by the mortgage had been annulled under S. 167, Ben. Ten. Act, and (2) that

the lands purchased by the appellant were not liable to be sold for the payment of the dues under the bond and that at any rate they could be sold only if the dues under the bond were not realized by the sale of the other mortgaged properties. The Munsif who tried the suit passed a mortgage decree against all the defendants including the appellant, holding inter alia that the mortgage bond was genuine and for consideration, that its execution was justified by legal necessity and that the proceeding under S. 167, Ben. Ten. Act was of no avail to the appellant, as he applied under that Section more than a year after having become aware of the plaintiffs' mortgage. The appellant then appealed to the District Judge, but as his appeal did not succeed he has preferred this second appeal.

The main ground which is put forward on behalf of the appellant in this Court is that he being the purchaser of the entire holding of the original mortgagors, has acquired with regard to khata No. 325 a title paramount to that of the plaintiffs and can use it as a shield in that suit. The question, as has been pointed out in the Order of Reference, is of some importance and require careful consideration. Sec. 65, Ben. Ten. Act, which has been reproduced with a slight variation in the Bihar Tenancy Act of 1935, runs as follows:

Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon.

In view of this provision, it was held by Mullick J. in 1 Pat L J 161¹ that a purchaser at an auction sale in execution of a decree for rent or road-cess (which is included in the definition of "rent") acquires a title paramount to that of a mortgagee of the same property even though the decree was obtained subsequently to the execution of the mortgage. The decision of Mullick J. was upheld on appeal under the Letters Patent and was cited with approval in *Surat Lal v. Lala Murlidhar*² wherein it was held that a purchaser in execution of a rent decree is not liable to be ousted by a person who purchases the same property in execution of a mortgage decree even though the mortgage has not been annulled under

S. 167, Ben. Ten. Act. The learned Judges who decided the last mentioned case observed in the course of their judgment that the purchaser under a mortgage decree might well be regarded as a second mortgagee. A similar view was expressed by the Calcutta High Court in 6 C W N 834.³ In that case one of the points urged before the High Court was that after the sale of a holding in execution of a rent decree, the rent charge must be taken to have been discharged, so that the plaintiff who was the mortgagee of the holding and whose encumbrance had not been annulled would be entitled to sell the property mortgaged free of that charge. The Judges who heard the case negatived this argument and remarked that the plaintiff may well be regarded in the circumstances as a second mortgagee, the prior charge being in the defendant. Similarly, in 17 Cal 301⁴ it was held that Sec. 65, Ben. Ten. Act, creates a first charge upon the tenure for its rent and puts the landlord in the position of a first mortgagee so far as the rent is concerned; and in 10 C L J 640⁵ it was laid down that a purchaser at a sale in execution of the landlord's claim for rent acquires a title to the whole of the holding preferential to that which a mortgagee by his purchase in execution of his mortgage decree acquires in portions of the holding. The same principle was reiterated in 9 C L J 234.⁶

These decisions which are all based on the language of S. 65, Ben. Ten. Act, show that the title acquired by the purchaser of a holding at a rent sale, whether he be a landlord or a stranger, is to be regarded as paramount to that of the mortgagee of that holding, even though the decree is obtained subsequent to the execution of the mortgage. The view however which has been taken in some of the later decisions of the Calcutta High Court is quite different in spite of the fact that the earlier cases appear to have never been overruled. The view which has been taken in these later cases is that a purchaser at a rent sale whether he be a landlord or anyone else, is bound to follow the provisions of S. 167 and if the mortgage is not annulled on the

3. *Meherunnessa v. Sham Sunder Bhuiya*, (1902) 6 C W N 834.

4. *Tariniprosad Roy v. Narayan Kumari Dabi*, (1890) 17 Cal 301.

5. *Bibi Taibatannessa Chowdhurani v. Pravabati Dasi*, (1909) 10 C L J 640=4 I C 750.

6. *Gopi Nath v. Kashi Nath*, (1909) 9 C L J 234=1 I C 35=13 C W N 412.

1. *A. B. Cheoditti v. Quadress*, (1916) 3 A I R Pat 385=46 I C 498=1 Pat L J 161.

2. (1918) 5 A I R Pat 99=46 I C 921=4 Pat L J 362.

expiry of one year from the date of the rent sale or from the date when the purchaser had notice of the encumbrance, the holding remains subject to the mortgage and the purchaser at a rent sale is not entitled to possession of the property unless he redeems the mortgage. Among the cases in which this view has been taken may be mentioned: 24 C W N 961,⁷ 35 C L J 1⁸ and A I R 1936 Cal 381.⁹ The view expressed in these cases is justified by Mookerjee J. in 35 C L J 1⁸ in these words:

In the first place, it was contended that the defendants were entitled to priority, as rent is a first charge on the tenure or holding under S. 65, Ben. Ten. Act. This argument, which may find apparent support from the decisions in 9 C L J 234⁶ and 10 C L J 640,⁵ is based upon a misapprehension of the true effect of Sec. 65, which only intends what is explicitly laid down in subsequent Sections of the Act, that is, those in Chapter 14, namely, that the charge should be enforced by the sale of the tenure or holding free of incumbrances, and if in any case the decree for rent either has not been or cannot be enforced by the sale of the tenure or holding, the charge created by Sec. 65 cannot be enforced in any other way.

It may be noted here that the decisions quoted above do not draw any distinction between a transferable holding and a non-transferable one or between a landlord purchaser and a purchaser who is not a landlord. It is clear that if the tenant of a holding, notwithstanding the fact that the holding is not transferable, mortgages it to a third person, the landlord of the holding is not bound to recognize the mortgage or admit the mortgagee to be his tenant even though the mortgagee may have obtained a decree on the basis of the mortgage. In such a case if the holding is sold in execution of a rent decree and the landlord himself purchases it, there is nothing to prevent him from ignoring the mortgage without formally annulling the encumbrance under Sec. 167, Ben. Ten. Act of 1885. This was very clearly pointed out by Dawson-Miller C. J. in 7 Pat 155¹⁰ in the following passage:

Can the mortgagee who has obtained a decree on his mortgage and purchased the property in execution claim possession from the landlord or the raiyat settled on the land by the landlord? Clearly

not without the landlord's consent. He has no right to hold the land as a raiyat against the will of the landlord and his incumbrance although never formally annulled and although still subsisting for what it is worth, is a barren right against the landlord when he seeks to enforce it by taking possession of the property. It is therefore of no consequence that the landlord did not seek to annul the mortgage, for the mortgagee could not step into the shoes of the original tenants and acquire a raiyati interest against the landlord's will. To hold otherwise would be, in fact, to allow the tenant of a non-transferable holding to transfer in a roundabout way to a stranger without the landlord's consent, by executing a mortgage in favour of the stranger and allowing the holding to be sold in execution of a mortgage decree. Such a sale can give him no right against the landlord without the landlord's consent or entitle him to oust the landlord or the tenant claiming under him.

The same view was reiterated by Sir Jwala Prasad in 8 Pat 439.¹¹ These cases have so far as this Court is concerned settled the rights of a landlord purchaser, but the position is not so clear when the holding is purchased by a person who is not a landlord. As I have already stated, the view expressed in the earlier decisions of this Court was that such a purchaser may well be regarded as a first mortgagee, but a contrary view has been expressed in 6 Pat 235.¹² In that case Adami J. quoted with approval in his judgment the decision of the Calcutta High Court in 24 C W N 961⁷ and 35 C L J 1⁸ and held that a purchaser at a rent sale, who has not under Sec. 167, Ben. Ten. Act, annulled a mortgage on the holding, is entitled to redeem the mortgage, but the mortgagee cannot redeem or otherwise exercise his right of redemption against the auction-purchaser. It is contended on behalf of the appellant that this decision should be ignored firstly, because it runs counter to the earlier decisions of this Court which have not yet been overruled; secondly, because Macpherson J. who heard the case with Adami J. merely "agreed to the order proposed" which shows that he did not concur in all the reasons given by Adami J. in support of his view; and, thirdly, because Adami J. seems to have wrongly assumed that in 3 P L T 362¹³ which was decided by Ross and Coutts JJ. the purchaser of the holding was the landlord of the village though in fact he was a

7. Bidhumukhi Dasi v. Bhaba Sundari Dasi, (1920) 7 A I R Cal 870 = 59 I C 868 = 24 C W N 961.

8. Sital Chandra v. Parbati Charan, (1922) 9 A I R Cal 82 = 69 I O 841 = 35 C L J 1.

9. Ananda Prosad v. Phanindra Bhusan, (1936) 23 A I R Cal 381 = 166 I O 740 = 41 C W N 277.

10. Badlu Pathak v. Sibran Singh, (1928) 15 A I R Pat 284 = 107 I O 810 = 7 Pat 155 = 9 P L T 241.

11. Sourendra Mohan Singh v. Kunjbihari Lal, (1929) 16 A I R Pat 222 = 116 I O 518 = 8 Pat 439 = 10 P L T 129.

12. Har Gobind Das v. Ramohandra Jha, (1927) 14 A I R Pat 59 = 97 I O 309 = 6 Pat 285 = 8 P L T 464.

13. Murlidhar v. Surat Lal, (1922) 9 A I R Pat 555 = 66 I C 152 = 3 P L T 862.

stranger. These facts no doubt detract to some extent from the authority of the decision in question, but as the view expressed in it has been shared also by some eminent Judges of the Calcutta High Court, it requires careful examination.

Section 65 is one of the Sections in Ch. 8, Ben. Ten. Act, and S. 167 occurs in Ch. 14 which is a different chapter. There is nothing in the Act to show that all the legal consequences which flow from the specific provision made in Sec. 65 of Ch. 8 that rent is a first charge on the holding were exhaustively provided for in Ch. 14 or that the only right which the purchaser of the holding at a rent sale has with reference to the mortgagee of the holding is to annul the mortgage under Sec. 167. If the latter view is correct, it will mean that the provision in S. 65 that rent is a first charge on the holding is redundant, because apart from this Section and without any reference to it S. 167 gives the right of annulling incumbrances to a purchaser of a holding in execution of a rent decree. It may be that the charge created under Sec. 65 was not intended to be enforced precisely in the same manner as a charge under S. 100, T. P. Act, but the fact remains that rent has been made a statutory charge on the holding and the charge is stated to be a first charge. The expression "first charge" is not an uncommon expression and the least it can connote in the present context is (1) that the rent can be realized by the sale of the holding itself and (2) that the claim for rent will have priority over other charges or incumbrances on the holding. It would thus be anomalous to hold that one who purchases a holding in execution of a rent decree occupies a position inferior to that of a mortgagee of a holding or a person who purchases it in execution of a mortgage decree.

In my opinion, the view taken in the earlier decision of this Court and the Calcutta High Court, namely that the position of a purchaser in execution of a rent decree is similar to that of a purchaser in execution of decree based on a prior mortgage is the better and more logical view. As in a rent suit the landlord is not obliged to implead the mortgagee of a holding as a defendant; if the holding is a non-transferable one, the latter should occupy the same position with reference to a purchaser in execution of a rent decree as a subsequent mortgagee occupies with reference to a purchaser in execution of a decree based on a

prior mortgage to which he was not a party. It was held by the Judicial Committee of the Privy Council in 48 I A 465¹⁴ that where the prior mortgagee having obtained a decree is sued by a puisne mortgagee whom he had not joined in the former suit, the former is entitled to use his prior mortgage as a shield, and to have the discharge of his decree made a condition to a sale decree in favour of a puisne mortgagee. I do not see why the same principle should not govern the relation between the purchaser of a holding in execution of a rent decree and its mortgagee. Thus, if a purchaser in execution of a rent decree fails to annul an incumbrance under S. 167, the incumbrance will continue but he will not thereby lose his priority over the holder of the incumbrance. This priority is acquired by him as a matter of law in consequence of the rent being a first charge on the holding and it should not be confused with the special privilege conferred on him by S. 167. Therefore while agreeing with the first proposition laid down by Adami J. in 6 Pat 235,¹² I respectfully dissent from his second proposition that the mortgagee of a holding cannot redeem or otherwise exercise his right of redemption against the auction-purchaser of the holding at a rent sale who has taken no steps to annul the mortgage under Sec. 167, Ben. Ten. Act. The first proposition laid down by Adami J. was that a purchaser at a rent sale is entitled to redeem the mortgage if he has not annulled it under S. 167, Ben. Ten. Act. That this must be so is evident from the fact that the auction purchaser is also a purchaser of the equity of redemption. In my opinion, the question referred to the Full Bench should be answered in the affirmative.

Now, so far as the present case is concerned, the appellant (defendant 11) is not prepared to redeem the plaintiffs' mortgage but both the appellant and the plaintiffs are agreed that if a charge is declared in favour of the former, the proportionate sum chargeable on khata No. 325 will amount to Rs. 350 and in that event khata No. 325 need be sold only if the mortgage dues are not satisfied by the sale of the other mortgaged properties and if khata No. 325 is sold the defendant No. 1 will be entitled to get Rs. 350 out of the sale proceeds. I would therefore partly allow this appeal

14. *Sukhi v. Ghulam Safdar Khan*, (1922) 9 A I R P C 11=65 I C 151=43 All 469=48 I A 465 (P C).

and direct that a mortgage decree be passed in favour of the plaintiffs on the following terms: That if the mortgage dues are not paid within four months from the date of this judgment the mortgaged properties other than the land of khata No. 325 shall be sold in the first instance. If the decree is not satisfied by the sale of those properties, then only the land of khata No. 325 shall be sold, but out of the sale proceeds of this khata the plaintiffs shall pay to defendant 11 a sum of Rs. 350. In case the plaintiffs themselves purchase khata No. 325 they will be entitled to retain possession thereof on payment of Rs. 350 to the appellant. If the decretal amount is not satisfied by the sale of the mortgaged properties including the land of khata No. 325 it will be open to the plaintiffs to take such proceedings as they are entitled to take under the law to realize the balance of the dues from the other properties, if any, belonging to defendants 1 to 5. Each party will bear his own costs in this Court and in the Court below but the order of the first Court as to costs will stand.

Agarwala J.—I agree.

Varma J.—I agree.

D.S./R.K. *Appeal partly allowed.*

A. I. R. 1939 Patna 343

SPECIAL BENCH

HARRIES C. J., MOHAMMAD NOOR
AND WORT JJ.

Kashi Nath Ratho — Petitioner.
v.

U. C. Patnaik, Pleader —
Opposite Party.

Civil Ref. No. 2 of 1939, Decided on 28th April 1939, reference made by Dist. Judge, Ganjam-Puri, D/- 8th February 1939.

(a) Legal Practitioners Act (1879), S. 14—Failure to formulate charge of offence under S. 13 (b) does not render proceedings illegal if it has not prejudiced pleader.

Where a pleader, alleged to be guilty of professional misconduct, is given full particulars of the complaint made against him and is given every opportunity to meet that complaint, but no precise charges have been formulated against him, failure to do so cannot be said to have prejudiced him and does not therefore render the proceedings illegal: *A I R 1930 P C 144, Ref.* [P 345 O 1, 2]

(b) Legal Practitioners Act (1879), S. 14—Charge of professional misconduct — Strict proof is necessary—Proof of facts giving rise to suspicion is not enough.

Charges of professional misconduct must be

clearly proved and should not be inferred from mere ground for suspicion however reasonable, or what may be mere error of judgment or indiscretion. Proving facts and circumstances giving rise to grave suspicion is not sufficient to establish a charge of fraudulent or grossly improper conduct in the discharge of professional duty: *A I R 1930 P C 144, Rel. on.* [P 345 O 2]

(c) Legal Practitioner — Duty of — Pleader retaining client's money as loan—Relationship of debtor and creditor must be proved—When proved, question of misconduct does not arise.

Lawyers should not, except in very special circumstances, accept loans from their clients. Where a lawyer has withdrawn money for a client and has been permitted to retain it as a loan, a document evidencing that transaction should in every case be drawn up. It is essential in cases, where the relationship of lawyer and client has been changed to one of debtor and creditor, that the clearest evidence of such a change should be obtainable. But once the relationship of pleader and client is changed into one of debtor and creditor, no question of misconduct can arise, because failure by the debtor to pay the money on demand does not amount to professional misconduct.

[P 346 C 1, 2 ; P 347 C 1]

Sir Sultan Ahmed, G. C. Das and P. Misra — *for Reference.*

G. P. Das, Public Prosecutor —
for Advocate-General, Orissa.

Harries C. J. — This is a reference by the learned Munsif of Berhampur made through the District Judge of Ganjam-Puri under S. 14, Legal Practitioners Act. On 25th April 1938, one Kashi Nath Ratho filed a petition in the Court of the District Judge of Ganjam-Puri complaining against the conduct of the opposite party U. C. Patnaik, a pleader practising in the Courts at Berhampur. As the misconduct was alleged to have taken place in the Court of the learned Munsif, the learned District Judge sent the application to that Court. The petitioner Kashi Nath Ratho did not himself file the petition in the Court of the learned Munsif, but on receipt of the petition from the Court of the learned District Judge the learned Munsif took cognizance of it and examined Kashi Nath Ratho on oath. Notice was sent to the opposite party, U. C. Patnaik, who duly appeared and filed a written statement. The learned Munsif heard evidence on behalf of the petitioner and the opposite party and eventually came to the conclusion that the pleader was guilty of fraudulent or grossly improper conduct in the discharge of his professional duty. The report was forwarded to the learned District Judge, who heard counsel on behalf of the parties. He came to a different conclusion and held that the pleader was not guilty of any misconduct. The learned District Judge has forwarded

the two reports to this Court, and we have heard counsel on behalf of the Pleader. The Advocate-General of Orissa, appeared through the Public Prosecutor for Orissa, Mr. G. P. Das. The latter informed the Court that he had been instructed to support the view taken by the learned District Judge. Consequently, no argument has been addressed to us on behalf of the view held by the learned Munsif. Sir Sultan Ahmed who appeared for Mr. U. C. Patnaik has dealt with the case very fully and has placed quite fairly before the Court all the materials which were before the lower Courts.

The petitioner, Kashi Nath Ratho, is a professional money-lender, and in the year 1935, he had instructed the opposite party to appear for him in certain execution cases. On 8th May 1935, Mr. Patnaik withdrew from Court a sum of Rs. 1065-1-0 which had been deposited to the credit of the petitioner. On 8th October 1935, Mr. Patnaik withdrew another sum of Rs. 460-15-0 which had been likewise deposited to the credit of the petitioner. These two sums had been deposited in Court by a judgment-debtor in execution case No. 76 of 1935. On 14th August 1937, Mr. Patnaik withdrew from Court a sum of Rs. 30 which had been deposited to the credit of the petitioner by a judgment-debtor in execution case No. 149 of 1937. It is common ground that Mr. Patnaik did not pay these sums over to the petitioner for some considerable time. On 4th November 1935, he paid to the petitioner a sum of Rs. 400 out of the sum of Rs. 460-15-0 which he had withdrawn on 8th October 1935. The next two payments were of Rs. 20 and Rs. 5 which were made on 12th June 1936, and 14th January 1937 respectively. It is admitted that these two payments were made to cover the travelling and other expenses of the petitioner. On 5th September 1937, a payment of Rs. 100 was made by the pleader to the petitioner out of which the petitioner had appropriated Rs. 10 towards his travelling and other expenses. According to the pleader, this was a payment towards interest but, according to the petitioner, the whole sum was paid towards travelling expenses, though in his books Rs. 10 only are appropriated towards such expenses. On or about 30th October 1937, a further sum of Rs. 20 was paid to the petitioner to cover expenses. On 23rd November 1937, the pleader paid to the petitioner a sum of Rs. 400 and on 13th January

1936, a further sum of Rs. 100. On 1st April 1938, Mr. Patnaik paid the petitioner a sum of Rs. 614 which represented the balance due in respect of the amounts withdrawn by the pleader and a further sum of Rs. 210 which the pleader alleges was paid as interest. On this date also the petitioner acknowledged that a sum of Rs. 42 had been spent by the pleader in expenses in connexion with the petitioner's litigation.

According to the petitioner, Mr. Patnaik concealed from him the fact that he had withdrawn these various sums and the petitioner only became aware of the fact as a result of the inquiries made in Court. He alleges that Mr. Patnaik wrongfully retained these sums and only made payments from time to time as a result of pressure. According to him, these moneys should have been handed over immediately they were withdrawn and consequently, it was urged that the pleader had been guilty of misappropriation of the moneys and wrongful detention of them for a considerable time. The pleader's defence was two-fold. With regard to the sum of Rupees 1065-1-0 withdrawn on 8th May 1935, he alleged that an agreement was entered into between the parties, whereby he was allowed to retain this sum by way of loan. On 5th September 1937 he alleges that he paid a sum of Rs. 100 by way of interest on this loan; but as I have stated, the petitioner alleges that this sum of Rs. 100 was paid to cover expenses. Admittedly a sum of Rs. 210 was paid on 1st April 1938, and this, according to the pleader, was the balance of interest due upon the loan. The petitioner admits that this sum was paid as interest; but he alleges that he was forced to accept it and to give a receipt. The learned Munsif held that the petitioner had not established that the pleader had concealed these withdrawals from him, and this finding is upheld by the learned District Judge. In my view there is no evidence upon which a finding of concealment could be based, and in fact the evidence points to the fact that the petitioner well knew that these sums had been withdrawn. The learned Munsif, however, rejected the pleader's defence that he had been permitted to retain the sum of Rs. 1065-1-0 as a loan. He further rejected the opposite party's plea that the balance of the moneys withdrawn by him had been retained by him to meet costs to be incurred in the litigation which was proceeding. The learned

District Judge, however, held that there had been no misappropriation of the moneys withdrawn and that the evidence established that Kashi Nath Ratho had permitted the pleader to retain the sum of Rupees 1065.1.0 withdrawn by him as a loan. He further held with regard to the other sum alleged to be misappropriated, namely Rs. 90.15.0 that the pleader was allowed to retain the sum to meet current expenses.

In the first place, it was argued in this Court that the inquiry by the learned Munsif was not a proceeding under S. 14, Legal Practitioners Act. The form of the learned Munsif's report is somewhat unfortunate. He appears to have thought that he had to make his report to the learned District Judge, whereas the report is really made for the High Court. The report is to be forwarded through the learned District Judge; but it is not in fact a report made on his behalf. The same point was taken before the learned District Judge, and in my view the latter rightly held that the proceeding before the learned Munsif was a proceeding under S. 14, Legal Practitioners Act. The learned Munsif found the pleader guilty of an offence under S. 13 (b), Legal Practitioners Act, and sent his report to the learned District Judge. It would have been better, however, if the learned Munsif had not framed his report in the way he did. However, on reading the whole report it is clear that the learned Munsif was conducting an inquiry under Sec. 14, Legal Practitioners Act, and as required by that Act he forwarded his report to this Court through the learned District Judge. It was also argued that the finding of the learned Munsif cannot be sustained by reason of the fact that no precise charges were framed. It might have been better if the learned Munsif had framed charges; but in my view the failure to formulate precise charges has led to no injustice in this case. The opposite party was given full particulars of the complaint made against him and was given every opportunity to meet that complaint. At no stage in the proceedings did the opposite party complain that he had been taken by surprise, and in my view these proceedings were not illegal by reason of the failure to formulate charges. It is to be observed that in A I R 1930 P C 144¹ their Lordships of the Privy Council laid down that

an inquiry in a serious case (such as professional misconduct on the part of a pleader) should proceed on formulated charges, not only in fairness to the person charged with professional misconduct, but in order that the evidence may relevantly bear on the particular issues, and, further that the evidence should be carefully taken and judged according to the ordinary standards of proof.

As I have stated, it would have been better in this case if precise charges had been formulated; but as the failure to formulate such charges has not prejudiced the pleader, I hold that such failure to formulate charges is not fatal to these proceedings. Before dealing with merits, it will be convenient at this stage to consider what standard of proof is required in cases of this kind. In the Madras case to which I have already referred, Lord Thankerton at p. 145 stated:

Before dealing with the charges it is right to state that, in their Lordships' opinion charges of professional misconduct must be clearly proved and should not be inferred from mere ground for suspicion, however reasonable, or what may be mere error of judgment or indiscretion. An appropriate guide may be found in S. 13, Legal Practitioners Act, 18 of 1879, under which a pleader or mukhtar may be suspended or dismissed, who is guilty 'of fraudulent or grossly improper conduct in the discharge of his professional duty.'

The petitioner in this case has charged the pleader with fraudulent or grossly improper conduct in the discharge of his professional duty and in order to succeed he must clearly prove these charges. Proving facts and circumstances giving rise to grave suspicion is not sufficient to establish such a charge. The petitioner's allegations were two-fold, namely that the pleader had wilfully concealed from the petitioner the withdrawal of these various sums of money and had wrongfully and fraudulently retained the money in spite of repeated demands. According to the pleader, the petitioner well knew that these sums had been withdrawn and that he had been permitted to withhold Rs. 1065.1.0 as a loan and to retain the balance, namely Rupees 90.15.0, to meet current expenses. As I have stated earlier in this judgment, both the Courts have held that the charge of concealment has not been established and in my view rightly. Had concealment of the withdrawals been established, then the retention of the money would obviously have been fraudulent. Having regard to the fact that the pleader did not conceal the withdrawals, the case put forward by the petitioner becomes very difficult to establish. Is it likely that a professional money-lender would allow a pleader to withhold substantial sums of money for a period of no less

1. A, a pleader v. Judges of the High Court of Madras, (1930) 17 A I R P C 144=123 I C 184=81 Cr L J 489 (P C).

than three years? It must be remembered that nothing was paid towards the sum of Rs. 1065-1-0 until Rs. 400 was paid on 23rd November 1937, Rs. 100 was paid on 13th January 1938, and the balance, namely Rs. 614, was not paid until 1st April 1938. Professional moneylenders as a class are alert, and, in my view, it is most unlikely that Kashi Nath Ratho would have allowed a sum of Rupees 1065-1-0 to have remained in the hands of the pleader for such a length of time unless some arrangement had been made between them which entitled the pleader to retain the money. (After dealing with the facts, evidence and the circumstances of the case his Lordship proceeded.) In my judgment the petitioner has failed to prove that the pleader misappropriated this sum of Rs. 1065-1-0. In my view, the circumstances suggest that there was some arrangement between the parties whereby Mr. Patnaik was allowed to retain this sum by way of loan. In all probability what happened was that Mr. Patnaik was allowed to retain the sum as a temporary accommodation and having spent it, he was unable to repay the whole for a period of nearly three years. If the relationship of pleader and client was changed into one of debtor and creditor, then no question of misconduct can arise. Had there been no arrangement entitling the pleader to use the money, then this would be a clear case of temporary misappropriation. However, there was, in my view, some arrangement which entitled Mr. Patnaik to keep and use this money, and that being so, the relationship existing between the parties was changed to that of debtor and creditor. Failure by the debtor to pay the money on demand does not, in my view, amount to professional misconduct.

A letter dated 17th January 1938, from Mr. Patnaik's clerk to Kashi Nath (Ex. Q), was put in evidence. In that letter reference is made to an auction sale and Kashi Nath is told to bring money for poundage and not to depend on the vakil to provide that sum. In my view, such a letter would never have been written if the vakil had been guilty of misappropriation. When that letter was written, it was known to both the parties that a large sum was still owing from Mr. Patnaik to Kashi Nath. Even so, the pleader's clerk wrote to Kashi Nath telling him to bring money and not to rely on the pleader. Such a letter might be written if the pleader was in the position of a debtor unable to pay his debts; but

I cannot imagine the letter being written if the pleader was in the position of a person who had wrongly misappropriated moneys. As to the sum of Rs. 90-15-0 alleged to have been misappropriated, the defence was that the pleader was allowed to retain this sum to meet expenses. Mr. Patnaik withdrew a sum of Rs. 460-15-0 on 9th October 1935 and on 4th November 1935 he paid Kashi Nath Rs. 400 out of this sum leaving a balance in his hands of Rs. 60-15-0. Kashi Nath signed a receipt for this sum in which he states that he is in need of money now and that he has taken a sum of Rs. 400. He says: "Afterwards I shall take the balance and sign the chittah and auarja. This is with my consent." It is clear that when Kashi Nath took Rs. 400 he knew that there was a balance due to him, but he was quite prepared to take that when an account had been settled. On 14th August 1937, the pleader withdrew another Rs. 30 for Kashi Nath and, according to him, he also retained this money to meet expenses. The difference between Rs. 460-15-0 and Rs. 400 which was paid and this sum of Rs. 30 makes up the sum of Rs. 90-15-0 alleged to have been misappropriated. When the final settlement was made on 1st April 1938, Kashi Nath acknowledged that a sum of Rs. 42 had been spent by the pleader on his behalf. Litigation was going on during this time in which Mr. Patnaik was acting for Mr. Kashi Nath and it may well be that the pleader was allowed to retain this small amount to meet current expenses. If Kashi Nath was prepared to accommodate the pleader to the extent of Rs. 1065-1-0, there is nothing strange in the fact that he permitted the pleader to retain a sum of Rs. 90-15-0 to meet current expenses. Having given the matter the fullest consideration I can, I am not satisfied that the petitioner has proved that Mr. Patnaik has been guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, and I would therefore reject the reference and find U. C. Patnaik not guilty of the charges made against him.

Though I find Mr. Patnaik not guilty of these charges, it must not be thought that I approve of his conduct in this case. In my view, lawyers should not, except in very special circumstances, accept loans from their clients. Where a lawyer has withdrawn money for a client and has been permitted to retain it, a document evidencing that transaction should in every case

be drawn up. It is essential in cases, where the relationship of lawyer and client has been changed to one of debtor and creditor, that the clearest evidence of such a change should be obtainable. In the present case Mr. Patnaik should have drafted a document setting out in precise terms the transaction and further should have shown in his books that the sum of Rupees 1065-1-0 was no longer money which he held on behalf of his client but was money which he had obtained from Kashi Nath as a loan. The sum always appeared in Mr. Patnaik's books as money due to Kashi Nath from Mr. Patnaik as his lawyer and Mr. Patnaik has no one but himself to thank for these proceedings. Where a lawyer conducts himself in the manner in which he (Mr. Patnaik) conducted himself in this case, suspicion is bound to arise, and a lawyer by so acting places himself entirely in the hands of an unscrupulous client. Further, Mr. Patnaik should not have accepted temporary accommodation from Kashi Nath when he must have realized that it would be extremely difficult for him to repay the money on demand. At this time Mr. Patnaik was in serious financial difficulties and he must have been aware that repayment of this money would be extremely difficult. In such circumstances, he should never have accepted a loan from a person who placed confidence in him. It is true that the failure of Mr. Patnaik to repay this money does not amount to professional misconduct, but borrowing money in such circumstances, is in my view most reprehensible. No lawyer should ever borrow money from a client unless he is sure that he can repay it when the client demands repayment.

Wort J.—I agree.

Mohammad Noor J.—I agree.

N.S./R.K.

Reference rejected.

A. I. R. 1939 Patna 347

JAMES J.

Raghubir Mahto — Plaintiff —
Petitioner.

v.

Ramasray Bhagat — Defendant —
Opposite Party.

Civil Revn. No. 466 of 1937, Decided on 24th November 1937, from order of Mun. sif, Samastipur, D/. 17th May 1937.

Negotiable Instruments Act (1881), S. 20 —
Right to bring suit—Suit by payee on pro-note

without endorsement — Opposite party cannot plead that payee is benamidar.

The only person who is entitled to sue upon a note is the person whose name appears on the note as payee. Any other person alleged to be entitled to bring a suit must first obtain an endorsement from the payee making such other person the holder in due course.

Therefore, in a suit brought by the payee on a note having no endorsement, it is not open to the opposite party to plead that the payee is a mere benamidar : 30 Mad 88 (F B) and A I R 1931 Cal 387, Rel. on. [P 348 C 1]

Baldeo Sahay and Mrs. Lal —

for Petitioner.

Janak Kishore — *for Opposite Party.*

Order.—The petitioner instituted a suit in the Small Cause Court of Samastipur based on a handnote which had been executed by Ramasray Bhagat, defendant 2 of the suit. The petitioner's name appears in the handnote as the payee, but the defendant took the plea that the petitioner was a mere benamidar. According to the defendant, the loan was advanced by one Munshi Lal Bhagat who at the time was joint with his brother Ram Prasad Bhagat. He gave to Munshi Lal Bhagat a blank paper, wherein he acknowledged receipt of the loan and liability to repay, which was to be filled up as a handnote. He said that he had subsequently repaid the loan to Munshi Lal's brother Ram Prasad Bhagat, but that Ram Prasad Bhagat said at the time of repayment that the handnote was missing and so he did not get back the handnote, nor did he obtain any receipt from Ram Prasad. The Small Cause Court Judge found that the loan had been taken from Munshi Lal Bhagat and that the handnote had been drawn up by Munshi Lal Bhagat in accordance with Sec. 20, Negotiable Instruments Act, but the defendant had not repaid the amount of the loan to Ram Prasad Bhagat. At the same time he held that the plaintiff could not recover the amount of the handnote in accordance with the provisions of Sec. 20, Negotiable Instruments Act, because he was not the holder in due course.

Mr. Baldeo Sahay on behalf of the plaintiff petitioner argues that it was not open to the defendant to take the objection that the payee whose name appeared in the handnote was a mere benamidar, citing the decision of the Full Bench of the Madras High Court in 30 Mad 88.¹ He does not accept the findings of the learned Small

1. Subba Narayan Vathiyar v. Ramaswami Aiyar, (1907) 30 Mad 88=16 M L J 509 (F B).

Cause Court Judge to the effect that the plaintiff was a mere benamidar and that Munshi Lal Bhagat was the real person who advanced the loan; but he argues that even on those findings the plaintiff was entitled to a decree. Mr. Janak Kishore on behalf of the opposite party suggests that the payee named in an instrument which has been drawn up under S. 20, Negotiable Instruments Act, cannot be treated as holder in due course unless he proves that consideration passed from him to the original person who was the first holder under S. 20 of the Act. Mr. Baldeo Sahay is in my judgment justified in the criticism which he makes of the findings of the learned Small Cause Court Judge to the effect that Munshi Lal Bhagat was the original holder and that it was he who advanced the money. The manner in which the defendant attempted to prove these facts and the fact of repayment is certainly open to suspicion. Munshi Lal Bhagat was called to support the statement that it was he who made the original loan, but the person to whom the payment was said to have been made was not examined, and Munshi Lal gave no explanation of why the handnote had been drawn up in the name of the plaintiff and not in his own name. But whether these findings that Munshi Lal was the real lender and that the plaintiff was a benamidar are correct or not, it is clear that on these findings the plaintiff was entitled to a decree. Even if all the findings of the learned Small Cause Court Judge should be accepted, the plaintiff still remained the only person who was entitled to sue upon the handnote and neither Munshi Lal nor his brother could have based a suit upon it unless they had first obtained an endorsement from the plaintiff making one of them the holder in due course. The plaintiff as the payee named in the promissory note was the only person who could institute a suit upon it; and it was not open to the defendant to plead that the payee was a mere benamidar: 30 Mad 88¹ and 58 Cal 752.²

I must therefore without endorsing the findings of the learned Small Cause Court Judge, that the plaintiff is a benamidar and that Munshi Lal was the person who advanced the money, set aside the order of the learned Small Cause Court Judge and allow this application. The plaintiff's suit

will be decreed in full, with costs in the Small Cause Court and in this Court. Hearing fee in this Court will be assessed at two gold mohurs.

N.S./R.K.

Application allowed.

A. I. R. 1939 Patna 348

AGARWALA J.

Ram Ranbijaya Prasad Singh and others — Petitioners.

v.

Ram Prasad Gupta and others — Opposite Party.

Criminal Revn. Nos. 2 and 9 of 1939, Decided on 16th February 1939, against order of Dist. Magistrate, Shahabad, D/- 27th October 1938.

Criminal P. C. (1898), Sec. 146 — Order of Collector under Bengal Survey Act is decision of competent Court within meaning of S. 146.

An order of the Collector as to the land under Bengal Survey Act is a determination by a competent Court of the rights of the person entitled to possession thereof within the meaning of S. 146: 37 Cal 331, *Foll.*; A I R 1926 Cal 316, *Disting.* [P 349 C 1]

B. P. Sinha (in No. 2) and D. N. Varma (in No. 9) — *for Petitioners.*

Tarkeshwar Nath (in both) — *for Opposite Party.*

Order.—Owing to a change in the course of the river Ganges in the District of Shahabad a dispute broke out regarding a large area of land between the proprietor and tenants of village Shohra Tribhuani on the one hand and the proprietor and tenants of village Piparpainti on the other hand. Proceedings under S. 145, Criminal P. C., were commenced and in the course of those proceedings a part of the area in dispute was found to be public domain. With that area these applications in revision are not concerned. The Magistrate was unable to find which of the parties was in possession of the remaining 1200 bighas. He therefore attached them under S. 146. Subsequently under the orders of Government, a survey and settlement of the area in dispute was made. A part of that area was found to be in possession of the tenants of Tribhuani and the remainder in the possession of the tenants of Piparpainti. Both the parties applied to the District Magistrate to release from attachment the areas of which they have been found to be respectively in possession by the survey officer. The District Magistrate of Shahabad has rejected the applications on the ground that the Record of

2. Harkishore Barua v. Gura Mia, (1931) 18 A I R Cal 387=131 I C 570=58 Cal 752=53 C L J 37=35 C W N 53.

Rights is not a decision of a competent Court within the meaning of Sec. 146. A case where the facts were similar to those of the present case is 37 Cal 331.¹ There also land was attached under S. 146. Subsequently one of the parties obtained an order in his favour from the survey authorities under S. 41, Bengal Survey Act. He then applied to have the attachment released in his favour. It was held that the order of the Collector as to the land under the Survey Act is a determination by a competent Court of the rights of the person entitled to possession thereof. It was also held that the order of the Collector is a determination of the rights of the parties to the original dispute, since the two parties in the original dispute were both before the survey officer. S. 146, Criminal P. C., empowers a Magistrate to attach land in dispute until a competent Court has determined the rights of the parties thereto or the person entitled to possession thereof. The facts of that case are indistinguishable from the facts of the present case and *prima facie* there is no reason why the decision in the Calcutta case should not govern the decision in this case.

The learned advocate for the opposite party, proprietor and tenants of Piparpainti relies on the decision in 30 C W N 646² in which it was held that an entry in the Record of Rights could not be regarded as constituting the final adjudication of a competent Court within the meaning of S. 146. The distinction between that case and the earlier Calcutta case is that it does not appear that in 30 C W N 646² there was an order of a survey officer under Section 41, Survey Act. That Section provides:

The Collector shall determine the boundary according to actual possession, and cause it to be secured by boundary marks; and the order of the Collector under this Section shall, until it be reversed or modified by competent authority, have the force of an order of any civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector.

The order of the Collector therefore is deemed to be an order of the Civil Court on the question of possession. Following the earlier Calcutta case I would therefore direct the District Magistrate to release the disputed land according to the finding of the survey officer under Sec. 41, Bengal

Survey Act. This order will govern the Criminal Revision No. 9 of 1939.

N.S./R.K.

Order accordingly.

A. I. R. 1939 Patna 349

MOHAMMAD NOOR AND VARMA JJ.

Shaikh Idris and others—Petitioners
v.

Emperor.

Criminal Revn. No. 539 of 1937, Decided on 19th November 1937, against order of Sess. Judge, Monghyr, D/- 28th July 1937.

Criminal P. C. (1898), S. 35 — Under S. 35, as it now stands, Court can pass separate sentences for offences under Ss. 457 and 380, Penal Code.

According to Sec. 35, Criminal P. C., as it now stands, there is nothing to prevent the Court to pass separate sentences for offences under Ss. 457 and 380 of the Penal Code. The question however is not of much practical importance as in an overwhelming large number of cases the punishment provided for any one of these two offences will be sufficient, and if the Court of appeal finds that the trial Court has wrongly passed two separate sentences but the sentences taken together are not excessive, they can be consolidated: *A I R 1925 Cal 1015; A I R 1918 Pat 227 and A I R 1929 Pat 263, Rel. on.* [P 350 C 1]

M. Azizullah — *for Petitioners.*

Assist. Govt. Advocate — *for the Crown.*

Mohammad Noor J. — The three petitioners were convicted by a First Class Magistrate of Monghyr under Ss. 457 and 380, I. P. C. The order portion of the learned Magistrate's judgment though not very happily worded makes it clear that he has passed separate sentences of three months' rigorous imprisonment on each of the petitioners for each of the two offences and has added a fine of Rs. 15 on each of them under Sec. 380, I. P. C. The learned Magistrate not having specified that the two sentences of three months' rigorous imprisonment on each of the petitioners were to run concurrently, they must be held to have been ordered to run consecutively under Sec. 35, Criminal P. C. The appeal of the petitioners was dismissed by the Sessions Judge and the petitioners have come up for revision.

A limited rule was issued by a learned Judge of this Court to examine the legality of the separate sentences under Secs. 380 and 457, I. P. C. Prior to the amendment of the Criminal Procedure Code in 1923, there were a number of decisions of this Court to show that such sentences were illegal and it was clearly so under the illustration

1. *Ambler v. Somi Ahmed*, (1910) 37 Cal 331=8 I O 545=11 C L J 417.

2. *Kutiswar Mondal v. Jitendra Nath*, (1926) 13 A I R Cal 816=87 I O 975=26 Or L J 1055=30 C W N 646.

which was given in S. 35, Criminal P. C. The Section empowered the Court to pass separate sentences for distinct offences and provided that such separate sentences would run consecutively unless ordered to run concurrently. The Illustration said that breaking into a house with intent to commit theft and stealing property therein were not distinct offences. Now by the amendment the word "distinct" has been deleted and also the Illustration. My view is that as the Section now stands, there is nothing to prevent the Court under Sec. 35 of the Code to pass separate sentences for offences under Ss. 457 and 380, I. P. C. This view is taken by the Calcutta High Court in A I R 1925 Cal 1015.¹ But there are certain observations in two cases which seem to go the other way. One of them is the decision in 8 Pat 274² in which a Bench of this Court (Courtney-Terrell C. J. and Allanson J.) held that the change in S. 35 of the Code has made no difference and they held that a separate sentence under Secs. 326/149 and S. 147 was illegal. This decision is not of much help in a case under Ss. 457 and 380 inasmuch as these two, in my opinion, are separate offences while rioting and constructive offence under S. 149, I. P. C., cannot be said to be separate offences. Apart from the question of legality, even after the amendment of the Act in 1923, it has been held that in A I R 1928 Pat 326³ that such separate sentences are unjustified. In my opinion the question is not of much practical importance as in an overwhelmingly large number of cases the punishment provided for any one of these two offences will be sufficient and if the Court of Appeal finds that the trial Court has wrongly passed two separate sentences but the sentences taken together are not excessive, they can be consolidated: see 3 P L J 641⁴ and 8 Pat 272,² already referred to. Therefore it is not necessary to pursue this matter any further. The sentences taken together are of six months' rigorous imprisonment and a fine of Rs. 15. There would have been no difficulty in

consolidating them if we thought that three months' rigorous imprisonment under the circumstances of the case was inadequate or if we thought that the sentences were excessive we could reduce it.

Now in connexion with the sentence, we had to examine the facts of the case rather in detail and in our opinion the case seems to us to be very doubtful if not altogether false. (The judgment then discussed the evidence and proceeded.) The accused have been in jail for more than three months. Though it would have been sufficient to remit the unexpired portion of the sentences but having gone into the evidence we find the case very suspicious and the accused must be acquitted. The accused will therefore be acquitted and will be set at liberty at once. The fine if paid will be refunded.

Varma J. — I agree.

R.M./R.K.

Order accordingly.

A. I. R. 1939 Patna 350

AGARWALA J.

Anant Teli and others — Appellants.

v.

Ramdhan Puri and others —

Respondents.

Appeals Nos. 321 to 346 of 1936, Decided on 16th December 1938, from appellate decrees of District Judge, Gaya, D/- 23rd December 1935.

Landlord and Tenant — Permanent tenancy — Facts leading to inference that tenancy is permanent stated.

The question whether on the facts found a particular tenancy is a permanent one or not is a mixed question of fact and law. The fact that substantial structures have been erected is not conclusive proof of a permanent right in land. The onus of proving permanency lies on the tenant, but where the origin of the tenancy is unknown, it is open to the tenant to show that the correct inference is that the right granted and enjoyed by him is a permanent one. In considering these cases it is necessary to bear in mind certain general considerations of fact applicable to Indian conditions prior to the Transfer of Property Act of 1882. Where a tenant has succeeded in proving that the holding has consistently passed by succession and that the transfers have been made as of right and that the rent has remained uniform it would be difficult to resist the conclusion that the tenant is a permanent one. But where these elements are missing, the mere fact that the landlord has not objected to a tenant's heir continuing the tenancy or to some transfers that have been made, is not necessarily an indication that he recognized the permanency of tenant's rights. If, on the one hand, the owner of the land hoped to induce traders to establish themselves in the bazar by permitting them to erect buildings which would serve for their business and residential purposes, it may reasonably be inferred on the other hand that per-

1. Kanchan Molla v. Emperor, (1925) 12 A I R Cal 1015 = 88 I C 997 = 26 Cr L J 1258 = 41 C L J 563.

2. Bajo Singh v. Emperor, (1929) 16 A I R Pat 263 = 1929 Cr C 23 = 120 I C 311 = 31 Cr L J 83 = 8 Pat 274 = 10 P L T 353.

3. Mt. Champa Pasin v. Emperor, (1928) 15 A I R Pat 326 = 108 I C 81 = 29 Cr L J 325.

4. Paltu Singh v. Emperor, (1918) 5 A I R Pat 227 = 48 I C 677 = 20 Cr L J 37 = 3 Pat L J 641.

sons who proposed to establish businesses in this bazar would put up substantial buildings only if they contemplated staying there permanently. The fact that the buildings put up were not in the majority of cases pucca buildings, is not a decisive factor. The correct test is not the materials used but the substantiality of the structure.

[P 351 C 1, 2]

S. M. Mullick and R. S. Chatterji —
for Appellants.

Baldeo Sahay, N. K. Prasad II and G. P. Singh — for Respondents.

Judgment.—The plaintiff-respondent is the owner of the land on which Gobindpur Bazar is built. The defendant-appellants are traders who have their shops and houses in the bazar. The plaintiff sued to eject them on the ground that they were tenants-at-will, alleging that they were inducted on to the land in 1896. The defence of the tenants was that their tenancies had existed for over 100 years, that the sites of which they were in possession were granted for the purpose of building shops and residences and that they have built substantial structures on those sites. The Court of appeal below has come to the following findings: (1) that the tenancies were created prior to the passing of the Transfer of Property Act of 1882; (2) that the original settlement was for business, and residential purposes; (3) that the buildings put up by the tenants were put up with the knowledge of the landlord (it may be mentioned that 22 of these buildings are double-storied); (4) that transfers of the sites which have taken place have not always been recognized by the landlord; (5) that the rent has not been uniform, and (6) that the evidence did not establish that the holdings were heritable although in some cases there had been succession which had been recognized by the landlord. From these findings of fact, the Court of Appeal below inferred that the tenancies were not permanent. The question whether on the facts found a particular tenancy is a permanent one or not is a mixed question of fact and law. The fact that substantial structures have been erected is not conclusive proof of a permanent right in land. The onus of proving permanency lies on the tenant, but where the origin of the tenancy is unknown, it is open to the tenant to show that the correct inference is that the right granted and enjoyed by him is a permanent one. As was observed by Rankin, C. J. in 56 Cal 738¹:

1. Kamal Kumar v. Nanda Lal, (1929) 16 A I R Cal 87 = 116 I O 378 = 56 Cal 738 = 38 C W N 211.

In considering these cases it is necessary to bear in mind certain general considerations of fact applicable to Indian conditions prior to the Transfer of Property Act of 1882. Where a tenant has succeeded in proving that the holding has consistently passed by succession and that transfers have been made as a right and that the rent has remained uniform, it would be difficult to resist the conclusion that the tenancy is a permanent one.

But where these elements are missing, the mere fact that the landlord has not objected to a tenant's heir continuing the tenancy or to some transfers that have been made, is not necessarily an indication that he recognized the permanency of the tenant's rights. The learned District Judge who heard the appeal in the Court below observed :

We have to judge the purpose of the settlement from the manner in which the holding is actually being used, and from surrounding circumstances. As to this, the evidence clearly shows that the holdings are being used both for residential and for business purposes. This is a usual thing in most Indian bazars. The ordinary village shopkeeper does not keep separate buildings for residential and for business purposes. Nor is there any evidence to the effect that this happened in Gobindpur. The idea of the maliks when they established the market, would be to keep the shopkeepers in the village, so that the bazar might become established. They would hardly do this, if they insisted that the shopkeepers must not use their holdings for residential purposes. From the circumstances therefore we may reasonably infer that the settlement was for residential and business purposes.

This settlement of the object of the owner of the land is to my mind an extremely important clue to determine what the parties intended by the settlement that was made. If, on the one hand, the owner of the land hoped to induce traders to establish themselves in the bazar by permitting them to erect buildings which would serve for their business and residential purposes, it may reasonably be inferred on the other hand that persons who proposed to establish businesses in this bazar would put up substantial buildings only if they contemplated staying there permanently. The fact that the buildings put up were not in the majority of cases pucca buildings, is not a decisive factor. In India, where many buildings are built less substantially but with no idea that they should be merely temporary erections, the correct test appears to be not the materials used but the substantiality of the structure. In the present case, as I have already stated above, a large number of the buildings put up are double-storied. Another very important clue to the intention of the parties in the present case is the evidence of Kedarnath who was a landlord of the

village from 1896 to 1920. He deposed on behalf of the tenants and stated that he had always looked upon the tenants as permanent. The learned District Judge said that he regarded this witness as most reliable. The evidence of this witness taken in conjunction with the known object of the landlord in inducing the tenants to take up building sites in the bazar clearly indicates, I think, that permanent tenancies were in contemplation when the tenancies originated.

I would therefore set aside the decision of the learned District Judge and restore the decree of the first Court. The appellants are entitled to their costs.

D.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 352

MANOHAR LALL J.

Harihar Prasad — Appellant.

v.

Anant Prasad and another —

Respondents.

Appeal No. 269 of 1937, Decided on 16th December 1938, from appellate decree of Sub-Judge, Second Court, Gaya, D/- 15th January 1937.

Landlord and Tenant—Sharahmoaiyan holding—Suit for arrears of rent—Tenant occupying house on holding has right to claim set-off in respect of municipal tax of house paid by him.

In a suit for arrears of rent on a sharahmoaiyan holding, a tenant who resides in a house situated on one of the plots of the holding is entitled to a set-off in respect of the municipal tax which he pays for the house. [P 352 C 2]

B. P. Sinha and Harians Kumar —

for Appellant.

K. Dayal and N. K. Jha —

for Respondents.

Judgment. — This is an appeal by the plaintiff arising out of a suit for recovery of arrears of rent on a holding which is sharahmoaiyan with an area of 2.07 acres in Mauza Katrabagh, Tauzi No. 2494 now situated within the Gaya Municipality. The claim of the plaintiff is limited to 8 annas being his share of this holding. The rental fixed was Rs. 57.7-6. The holding consists of a number of plots: one of them is a house in which the defendant, who is a tenant, resides. The only question which is now in controversy before me is whether the defendant is entitled to set off with respect to the municipal tax which he pays regarding the house. The claim is limited again to set off for the house tax

only—the original claim for latrine tax and water tax had been given up during the course of the trial. The learned Subordinate Judge upon a consideration of Ss. 100 and 109, Municipal Act, came to the conclusion that under Cl. 2 of S. 109 a tenant is entitled to deduct from the rent the municipal tax which he pays for the land and then he fixed the amount which should be allowed to be deducted for the years in suit upon a basis which I shall consider in a moment. Hence the appeal before me.

The learned Government Pleader appearing for the plaintiff-appellant argues that the defendant has no right to claim a set-off for the house tax and that the defendant must be treated to be the "owner" of the holding on account of the fact that the holding is sharahmoaiyan and therefore the tenant has an unrestricted right of transfer. I do not agree with this contention. The word "owner" has been defined in the Act and in sub-cl. 18 of S. 3 it is stated to include every person who is entitled for the time being to receive any rent with respect to the land whether from the occupier or otherwise. It cannot be denied that the plaintiff receives some rent (whether it is fixed or variable is immaterial) from the defendant. Anybody cannot even in common parlance far less in legal language describe the defendant, who is a tenant, as the owner. I am therefore of opinion that the learned Subordinate Judge was right in deciding that the defendant has a right to claim a deduction for the amount of the municipal tax paid on the holding.

The next question is whether the learned Judge was correct in fixing Rs. 3-6-0 on account of the defendant's share of the municipal tax. The learned Judge found that there was nothing to show what was the value of the holding in suit. Now if that is so the very basis of the calculation disappears. Nevertheless the learned Judge relied upon the receipts (Ex. A series) showing that the plaintiff had been giving deduction at the rate of Rs. 3-6-0 per year on account of his 8 annas share. But these receipts are for a period anterior to the Record of Rights and are in no way admissible to show the true valuation of the holding for the year in suit. I therefore come to the conclusion that the defendant has been unable to prove the amount which should be deducted from the tax payable or paid for the holding for the years in suit. It would be open to the defendant in any subsequent year to place proper materials as to

the actual valuation of the holding in suit so that the Courts may proceed in accordance with law to determine the amount which should be deducted. The result is that the appeal is allowed but as the plaintiff himself had been giving deduction at the rate of Rs. 3.6.0 in the previous years and this induced the Court to grant a similar deduction, I disallow him the costs of this appeal. The plaintiff will be entitled to his full rent without the deduction as ordered by the learned Subordinate Judge and he will also get his costs in the Courts below.

N.S./R.K.

*Appeal allowed.***A. I. R. 1939 Patna 353**

AGARWALA J.

Raja Gope and others — Petitioners.

v.

Sukan Singh and another —

Opposite Party.

Criminal Revn. No. 643 of 1938, Decided on 6th December 1938, against order of Sub-Divisional Magistrate, Gaya, D/- 3rd September 1938.

(a) Criminal P. C. (1898), S. 145—Landlord claiming possession of number of plots — Various tenants claiming different plots separately — Amalgamation of all plots in one proceeding under Sec. 145 is not illegal or irregular if parties are not prejudiced thereby.

It is not necessarily illegal or irregular to combine a large number of plots in a proceeding under Sec. 145 where dispute is between a landlord who claims a large number of plots on one side and different sets of tenants who claim different plots on the other. But in doing so particular care is required to ensure that the parties are not prejudiced by the amalgamation of a number of plots in one proceeding : *A I R 1938 Pat 511, Foll.; AIR 1937 Pat 413, Disting.* [P 353 C 2; P 354 C 1]

(b) Criminal P. C. (1898), S. 145 — One set of cosharer landlords is capable of representing entire body in proceedings under Sec. 145.

In case of cosharer landlords possession of one is the possession of all and hence one set is capable of representing the entire body in a proceeding under Sec. 145 : *28 Cal 446, Disting.* [P 354 C 1]

G. P. Das — *for Petitioners.*G. P. Singh — *for Opposite Party.*

Order.—This application arises out of a dispute regarding possession of immovable property in respect of which an order has been passed under Sec. 145, Criminal P. C., declaring that the first party, the landlords, are in possession, and restraining the second party, the tenants, from interfering with the possession of the landlords. It

appears that the land in dispute consisted of ten plots appertaining to khata No. 84 of village Sawanpur. Notices under S. 145 were issued to the interested tenants and they filed written statements, each of them specifying which plots he claimed. The Magistrate has found that the land, as already stated, is in the possession of the landlords.

The first ground on which that order is challenged is that the claims of a number of tenants in respect of different plots of land should not have been amalgamated in one proceeding under S. 145. Reliance was placed on a decision of Rowland J. in 18 P L T 824.¹ The facts of that case however were very different from the facts of the present case. There a large area of land, in 21 different khata with 16 tenancies, which were put up for sale by the landlord in a number of rent sales and purchased by him and of which the tenants claimed to be in possession was concerned. The tenants did not file any written statement and there was nothing on the record to indicate which of the plots each of the tenants claimed to be in possession of. The Magistrate treated the proceeding as if the lands were claimed by all the tenants jointly, but there was no evidence in the case that they were jointly entitled to the lands, or in fact, that they claimed to be jointly entitled to the lands. The Magistrate, nevertheless, passed an order in favour of the tenants. Rowland J. pointed out that this order had resulted in the absurdity of a dead man being found to be in possession of one plot and a person who disclaimed possession of another plot being found to be in possession of it. In the present case the tenants in their written statements specified the particular plots of which each of them claimed possession, and there could be no objection from anybody as to that matter. The learned Magistrate gave his reason for disbelieving the second party: in specifying the lands they have made conflicting claims which indicated that they themselves did not know what lands they were claiming. In *A I R 1938 Pat 511*² Mohd. Noor J. pointed out that it was not necessarily illegal or irregular to combine a large number of plots in a proceeding under S. 145 where the dispute is between a

1. *Ram Kishun Singh v. Faujdar Gope*, (1937) 24 A I R Pat 413=170 I O 90=38 Cr L J 842=18 P L T 824.

2. *Gulab Kuer v. Ganouri Koeri*, (1938) 25 A I R Pat 511=178 I O 393=40 Cr L J 17.

landlord who claims a large number of plots on one side and different sets of tenants who claim different plots on the other. His Lordship pointed out that when this is done particular care is required to ensure that the parties are not prejudiced by the amalgamation of a number of plots in one proceeding. There is no indication in the present proceeding that either party has been prejudiced by the procedure adopted.

The next point argued by the learned advocate for the second party petitioners was that at the time when the proceeding under S. 145 was initiated, the crops of 27 out of the 35 bighas of land in dispute had actually been harvested. He contended therefore that there could be no dispute between the parties with regard to the 27 bighas. The police report however was to the effect that the dispute was not only with regard to the crops but with regard to the land, and the learned Magistrate who drew up the proceeding was satisfied that there was a dispute with regard to the land which was likely to cause a breach of the peace. There is no substance in this point.

Lastly, it was contended that the opposite party consisted only of some of the cosharer landlords and that the others had not been impleaded. The learned advocate contended that this rendered the proceedings in the Courts below illegal. The authority for this proposition is a decision in 28 Cal 446³ which was not a case in which some of several cosharers only had been impleaded in the proceeding but a case in which there were different sets of landlords and some of these distinct sets were not parties to the proceeding. That case is quite different from the present and has no bearing on the question. In a case of cosharer landlords possession of one is the possession of all and one set is capable of representing the entire body in a proceeding under S. 145, Criminal P. C. There is no substance in this application which must be dismissed.

N.S./R.K. *Application dismissed.*

3. Anesh Mollah v. Ejaharuddi Mollah, (1901) 28 Cal 446=5 C W N 428.

A. I. R. 1939 Patna 354

WORT AND AGARWALA JJ.

Lachhmilal and others — Defendants
— Appellants.

v.

Firm Srinivash Ram Kumar and others — Plaintiffs — Respondents.

Appeals Nos. 613 and 743 of 1937, Decided on 12th October 1938, from decision of Sub-Judge, Shahabad, D/- 21st June 1937.

Civil P. C. (1908), S. 47 and O. 21, Rr. 58 and 63—Person having two capacities, one as representative of judgment-debtor and another as his personal capacity—Objection in his personal capacity to property taken in execution—He is not limited to objection under Sec. 47 but may adopt procedure under O. 21, R. 58.

If a person has two capacities there is no reason why his objection should be limited to one. Hence where a person who has two capacities, one as representative of the judgment-debtor and another as his personal capacity comes forward and objects in his personal capacity that the property is his own personal property there is no reason why he should be limited to the objection under Sec. 47. His objection can be treated as falling under O. 21, R. 58 and if he fails in that claim he can proceed to bring a suit under O. 21, R. 63: 39 Cal 298, *Foll.*; 17 Cal 711 (*F B*) and *A I R 1922 Pat 572, Expl. and Disting.* [P 355 C 2; P 356 C 1]

S. M. Mullick, Yusuf and M. Rahman—*for Appellants.*

D. N. Varma and I. B. Saran —*for Respondents.*

Wort J. — The only point in this case, apart from the minor question to which I shall in a moment refer, is whether this suit lay. It is contended by Mr. Sushil Madhab Mullick that the application which at one time was treated as an application under O. 21, R. 58, was in fact an objection under S. 47, Civil P. C., and that that decision is final and would bind the parties failing an appeal, which in this case, has not been preferred. The appeal was not preferred because the plaintiff who is the respondent before us in this appeal, treated the former application (as I have already indicated) as an application under O. 21, R. 58, and having failed in that claim case, proceeded to bring a suit under O. 21, R. 63. It is only when he got into the Court of the Munsif that he was met with the objection to which I have already referred. Now the other point raised by Mr. Sushil Madhab Mullick on behalf of the defendant-appellants relates to the last part of the order of the Munsif which runs thus :

The suit as against defendant 1 is hereby dismissed but in view of my other findings against him, I make no order as to costs.

To explain the position it is only necessary to make one statement. The property

which was the subject-matter of the proceedings to which I have referred was held by the Judges in the Courts below to be the joint family property and not the separate property of defendant 1 as alleged. But it being the joint family property, the Judges in the Courts below have divided the property in the sense of making that share of the property, which would represent the share of the deceased father, liable in execution. It seems to me that what the learned Judge of the trial court meant was that the share of defendant 1 was released from execution, and in that sense and to that extent, the suit was dismissed against defendant 1. It was contended (as perhaps what I have observed indicates) that, as the claim case failed and as the suit against defendant 1 was dismissed, the effect would be that defendant 1 is entitled to have the whole of the property released from execution; and, as no appeal was preferred from the decision of the Munsif on this point, the effect which I have indicated as being the substance of the argument would result. In my view however, the common sense view has got to be taken of the Munsif's judgment and I interpret his words in the way I have stated (it is impossible to interpret it in any other way), namely that the share of defendant 1 was not liable to attachment and sale in execution.

The other point can be very shortly stated and Mr. Sushil Madhab Mullick in support of the point relies upon the decision of the Full Bench of the Calcutta High Court in 17 Cal 711,¹ in which it was held that the objection between the representatives of the judgment-debtor and the decree-holder in relation to property taken in execution is an objection under S. 47, Civil P. C., or the then S. 244, and not a case under Ss. 278 to 283 of the then Code, or O. 21, Rr. 58 and 63 of the present Code. There is another Full Bench decision of the Calcutta High Court in 39 Cal 298,² in which the judgment-debtor raised an objection purporting to be under the then S. 278, Civil P. C., with regard to a property which he claimed to be the property of a deity of which he was the shebait; and the learned Judges deciding that case held that 17 Cal 711,¹ to which

I referred a moment ago, was the converse of the case before them. I understand that to mean that whereas in the case in 17 Cal 711¹ it was held that the application was under S. 244, in the circumstances of the case then before them, the Judges were bound to hold that it was a case under S. 278 and S. 283, and not under S. 244 of the then Code. I repeat that that is what I understand to be the meaning from the following words in the judgment :

It does not however decide the question now in controversy, but merely deals with the converse question.

This observation was made while referring to the decision in 17 Cal 711.¹ The essence of the decision is that if a person has two capacities, there is no reason why he should be limited to one. Mr. Sushil Madhab Mullick contends that the position of a person who was the judgment-debtor on the one hand and the shebait of a deity on the other may be treated in two separate capacities, and that is not the case (so it is contended) in the appeal before us. It is the same person merely objecting to the execution against the property which is his own personal property. In my judgment I find it quite impossible to distinguish the case before us from 39 Cal 298.² The appellant was not a judgment-debtor, indeed it would have been an entirely different position had he been so. But he was a representative of the judgment-debtor, and that was a capacity which was quite distinguishable from the capacity in which he came forward and claimed the property to be his own personal property. The decision in 3 P L T 613³ has followed the Full Bench decision in *Punchanun's case*, reported in 17 Cal 711.¹ In 3 P L T 613³ Mrs. Stephen never contended that she was anything other than the representative of the judgment-debtor and indeed the Court treated her as such. So it was in 17 Cal 711¹ where the Manager died during the proceedings and after his death further proceedings were taken in execution against his widow as his representative and her objection was not that she was not the legal representative but that the property which the decree-holder sought to sell in execution was her own personal property. Had the Courts been minded or had they been forced, in the circumstances of the case, to

1. *Punchanun Bundopadhyaya v. Rabia Bibi*, (1890) 17 Cal 711 (F B).

2. *Kartick Chandra Ghose v. Ashutosh Dhara*, (1912) 39 Cal 298 = 12 I O 168 = 14 O L J 425 = 16 O W N 26.

3. *Naurattan Lal v. Margaret Anne Stephen*, (1922) 9 A I R Pat 572 = 68 I O 869 = 3 P L T 618.

consider whether she was the representative or not, it might have made a considerable difference. If we are to treat 17 Cal 711¹ as conclusive with regard to this matter as well as 3 P L T 613,³ then it amounts to this: The decree-holder has merely to make the assertion that a person is the representative of the judgment-debtor (however far that may be from the truth) and once that assertion is made, the parties are confined to an objection under S. 47 and are not entitled to adopt the procedure laid down in the Civil Procedure Code under O. 21, R. 58.

The learned Judge of the Calcutta High Court has stated, perhaps with some diffidence, that the law as laid down in 17 Cal 711¹ is good law: but 39 Cal 298² has never been overruled and it seems to me that the only possible way to distinguish the cases is that in 17 Cal 711¹ the complainant was in fact and was treated as the representative of the judgment-debtor but here we have entirely different state of affairs. Here the complainant was held not to be the representative of the judgment-debtor although in the decision of the learned Judge in the Court below from which this appeal is preferred, it has been held that in the sense that the son of a deceased member of a joint family holds the property of the deceased within the meaning of S. 53, the complainant was the representative of the judgment-debtor. I would decide this appeal on the footing of the statement made by the learned Judges of the Calcutta High Court in 39 Cal 298² to the effect that if a person has two capacities, there is no reason why his objection should be limited to one. Here the appellant proceeds in the matter in his personal capacity and there is no reason why he should be limited to the objection (if such it may be treated) under S. 47, Civil P. C., to the effect that he was not the legal representative of the judgment-debtor.

There is another aspect of the case which seems to me to be material and that is that it seems difficult to hold that once the appellant has successfully contended that he is not the legal representative of the judgment-debtor, how can we now allow him to be heard in stating that he is the legal representative? The decision in *Naurattan Lal's case* reported in 3 P L T 613,³ is binding upon us, but in my judgment that decision does not govern this case for the reason which I have stated. The appeal fails and is dismissed with costs.

In appeal No. 743 of 1937 the appellants were judgment-debtors, there is no dispute about that. There is no objection by them to the sale of the property and it is rather surprising to learn that they took part in the proceedings in this case. Costs have been awarded against them, but they should have been, had they insisted, dismissed from the suit. We cannot now dismiss them from the suit as they have taken part in the proceedings in the Court below, but we would set aside the order of the Judge in the Court below ordering them to pay costs. To that extent the appeal is allowed. There will be no order for costs in regard to that appeal in this Court.

Agarwala J.—I agree.

D.S./R.K.

Order accordingly.

A. I. R. 1939 Patna 356

HARRIES C. J. AND WORT J.

Mt. Deoki Kuar — Defendant —
Appellant.

v.

Shiva Prosad Singh — Plaintiff —
Respondent.

Letters Patent Appeal No. 7 of 1938, Decided on 4th January 1939, from decision of Chatterji J., Reported in A. I. R. 1938 Pat 379.

Landlord and Tenant—Rent—Suspension of—Tenant dispossessed by landlord from certain plots in holding — Plots treated by landlord as forming part of one holding at lump sum rent and not at rate per bigha—Tenant is entitled, on dispossession, to total suspension of rent : A I R 1938 Pat 379, Reversed.

Where a tenant is dispossessed by the landlord from certain plots in a holding, and it appears that the plots have been treated throughout by the landlord as forming a part of one holding at a lump sum rent and not at a rate per bigha, the tenant is entitled, on being dispossessed, to total suspension of rent. [P 357 C 1]

Even if equitable principles are held to apply to the case so as to disentitle the tenant to total suspension of rent, still, where the trial Court and the Court of first Appeal have exercised their discretion in the circumstances of the case and have come to the conclusion that it would be equitable to award a total suspension of rent it is not open to the Judge of High Court to reverse the decision of the lower Appellate Court: A I R 1938 Pat 379, Reversed; A I R 1925 P C 97 and A I R 1933 Cal 566, Rel. on; A I R 1935 Pat 38, Ref. [P 357 C 2]

Rajkishore Prasad — for Appellant.

Kameshwar Dayal and C. P. Sinha —
for Respondent.

Wort J. — This is an appeal from the decision of a Judge of this Court sitting

singly and arises out of an action for rent. The question which fell to be decided throughout, in all Courts, was whether the defendant-tenant was entitled, and to what extent, to suspension of rent by reason of the fact that he had been dispossessed of two plots out of the holding, namely plots Nos. 787 and 788. There were materials before the Court from which it might have been held that these plots were held separately and not as part of one holding; but throughout, from the judgment of the Court of first instance to the judgment of this Court, it has been held that these plots were treated by the landlord plaintiff as forming a part of one holding at a lump sum rent and not at a rate per bigha. The importance of this will be noticed in a moment. It seems to me that the decision of this case can be very briefly stated, but the brevity of my observations show no lack of respect to the judgment of the learned Judge of this Court whose judgment we are reversing. In the first instance, I propose to refer to a decision of their Lordships of the Judicial Committee of the Privy Council in which this matter has been dealt with, 52 I A 160¹ more particularly at p. 166 where the decision of their Lordships of the Judicial Committee of the Privy Council was expressed by Lord Salvesen as follows :

The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha.

This decision has been analysed by Mukerji J. in 37 C W N 301,² where the learned Judge came to certain conclusion as to what the decision meant. The case to which I have referred has been relied upon by the parties before us in appeal. The decision of the Additional District Judge in this case affirmed the decision of the Munsif who tried the suit and was to the effect that the tenant, by reason of the fact of his being dispossessed by the landlord, was entitled to total suspension of rent. On appeal to this Court, the learned Judge made this observation :

I fail to see how in the circumstances of this case it will be equitable to allow suspension of the entire rent.

Then he makes reference to the area of the holding, the area of which the tenant-defendant was dispossessed, being approximately one-quarter of the whole. "In my opinion," says the learned Judge,

it would be pushing the doctrine of suspension of rent too far if it were to be applied to the facts of the present case. I consider it fair and equitable that the defendant should pay proportionate rent for the area in her possession.

It would appear that the learned Judge in his statement that equitable principles apply to this case, had in mind the judgment of Macpherson J. in 14 Pat 323,³ where in not dissimilar circumstances the Court allowed total suspension of rent which was confirmed by the decision of this Court. But in the course of his judgment Macpherson J. made this observation :

It would be disastrous in this province if the doctrine of suspension of rent as applied to a tenancy with a lump rental should be whittled down. And even in the very improbable event that it could be shown that the land of this or any other long-standing holding in this province is held at so much per bigha, it would generally not be in accordance with equity to decree the rent for the balance of the annual rental after deducting the proportion of rent

The observations of the learned Judge, with respect, were not necessary for the decision of that case, both learned Judges agreeing that total suspension of rent should be decreed in the case, but it is unnecessary to enter into that question for considerations to which I shall now refer if, as contended by the respondent landlord, the equitable principles apply, then the learned Judge from whose decision this appeal had been preferred, exercised, what might, I think be correctly described, his discretion in the circumstances and came to the conclusion that it would be equitable to award a total suspension of rent. With great respect to the learned Judge of this Court, in those circumstances it was not open to him to reverse the decision of the lower Appellate Court. On the other hand, if the equitable principles did not apply, then quite clearly applying the rule as stated by their Lordships of the Judicial Committee in the case to which I have made reference, which by implication meant total suspension of rent, the tenant in the circumstances of the case (this not being a holding held at a rent per bigha) was entitled to total suspension.

1. *Katyayani Debi v. Uday Kumar Das*, (1925) 12 A I R P C 97=88 I O 110 = 52 I A 160=52 Cal 417 (P O).

2. *Sakhisona Dasi v. Prankrishna Das*, (1939) 20 A I R Cal 566=146 I O 898=87 C W N 301.

3. *Dalip Narayan Singh v. Suraj Narayan Missir*, (1935) 22 A I R Pat 38=153 I O 298=14 Pat 829.

It must not be understood by this decision that I am deciding any general principle of law but dealing with the facts and circumstances of this case. It will be seen therefore from whichever point of view this case is looked at, the landlord was in these circumstances, bound to fail in this Court, the learned District Judge having come to the conclusion that the tenant was entitled to a total suspension of rent. With these observations I would allow this appeal and restore the decision of the learned Judge in the Court below with costs.

Harries C. J.—I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1939 Patna 358

DHAVLE J.

Gaya Prasad Sah and others —

Appellants.

v.

Ram Prasad Pathak and others —

Respondents.

Second Appeals Nos. 960 and 990 of 1936, Decided on 3rd November 1938, from decision of Sub-Judge, Motihari, D/- 23rd May 1936.

(a) Bihar Tenancy Act (8 of 1934), Ss. 26-O and 26-E—Transferee has no valid title against landlord until landlord's fee is paid in accordance with Sec. 26-E.

Under the Bihar Tenancy Act as amended, the transferee has no valid title as against the landlord until the landlord's transfer fee is paid in accordance with the provisions of Cl. (b) of sub-sec. (1) of Sec. 26-E on such acceptance, or if it is deposited with the Collector, in accordance with the provisions of Cl. (c) of sub-s. (1) of S. 26-E.

[P 359 C 1]

(b) Landlord and Tenant—Interest of recorded persons that of tenants-at-will—There is no accession to mortgaged property if mortgagee acquires these plots by buying these persons out—Landlord on redemption is entitled to possession of plots in their original condition.

If the interest of recorded persons is that of licensees or tenants-at-will, there is no accession to the mortgaged property if the mortgagee acquires the interest by buying those persons out and the landlord on redemption is entitled to the possession of the plots in their original condition because the landlord can bring about the disappearance of these persons without any costs.

[P 359 C 2;
P 360 C 1]

Janak Kishore — for Appellants.

S. M. Mullick, J. C. Mullick and N. N. Sen — for Respondents.

Judgment.—These appeals arise out of a suit for redemption of a bharna or usufructuary mortgage of brit rights executed

in December 1896. Defendants 1 and 2 are sons of the original bharnadar, and defendants 3 to 5 are his grandsons, defendants 3 and 4 being sons of defendant 1. There was a partition in the family of the defendants of the original bharnadar, in accordance with which the bharna fell to the share of defendant 1 and his sons. Defendants 1, 3 and 4 are the appellants in Second Appeal No. 990, while defendant 2 is the appellant in Second Appeal No. 960 before me. The former appeal is concerned with four plots numbered 2396, 2389, 2390 and 2597 at the Revisional Survey, while the latter is concerned with plots Nos. 2395, 2216, 2391 and 2392. Of these eight plots, two, namely Nos. 2389 and 2390, are raiyati plots, while the other six plots were shown in the Cadastral Record of Rights in the gairmazrua-am khata with houses and the possession of certain people noted in the remarks column. The appellants claimed to have acquired these eight plots, mostly by purchase. In fact, the only exception is a part of plot No. 2395, which in the Cadastral Survey was numbered 2168, as to which their defence was that the plot had been abandoned by one Mangar Kunjra and thereupon settled by defendant 1 with defendant 2. The lower Appellate Court has held that the appellants, as representing the bharnadar, are entitled to compensation in respect of the two raiyati plots Nos. 2389 and 2390, but that as regards the other six plots with which I am concerned, they are not entitled either to keep the plots or to any compensation for them, because their purchases were purchases of an interest which is described as the interest of a licensee, or tenant-at-will, or as otherwise not binding upon the landlord.

The learned advocate for the appellants has raised two points before me: One relates to the raiyati plots Nos. 2389 and 2390. As I have already said, the lower Appellate Court has awarded to the appellants (defendants 1, 3 and 4) compensation in respect of these plots, having regard to the price that they paid for the purchase of these raiyati lands. The learned advocate has cited 59 I A 366¹ and contended that the plaintiffs mortgagors are not entitled to recover on redemption these lands included in the brit tenure as the mortgagee had acquired them for his own benefit and

1. Sorabjee v. Dwarkadas Ranchhodas, (1932) 19 A I R P C 199 = 138 I O 557 = 59 I A 366 (P C).

without availing himself of his position as mortgagee. It was however pointed out in 158 I C 162² that the decision in 59 I A 366¹ has no application to non-transferable raiyati lands. Upon this the learned advocate has contended that all occupancy holdings are transferable since the amendments of our Tenancy Act in 1934. S. 26-B, he has pointed out, provides that an occupancy raiyat shall have power to transfer his occupancy holding, or any portion thereof, together with the right of occupancy therein, by sale, exchange, gift or will. But the Section goes on to provide that except as provided in sub.s. (2), no such transfer shall be valid against the landlord unless he has given, or is deemed under Sec. 26-F to have given his consent thereto. On the face of it, this means that non-transferable holdings cannot be transferred and the transfer held valid against the landlord unless the landlord has given, or is deemed to have given, his consent thereto.

Reference has also been made to S. 26-O, sub.sec. (1) which deals with transfers of occupancy holdings made after 1st January 1923 and before 10th June 1935, when the amendments came into force, and provides that the transferee may, in accordance with the provisions of sub.s. (1) of S. 26-E, pay to the landlord, or deposit with the Collector a certain fee. But it is obviously of little avail to the appellants that the transferee is empowered to pay the fee to the landlord or deposit it with the Collector: for they do not claim to have paid the fee at all. The transfer of the raiyati lands in the present case was dated December 1931, and sub.s. (3) of Sec. 26-O provides that the consent of every person claiming an interest as landlord in the holding or portion transferred shall be deemed to have been given to the transfer if the landlord's transfer fee is paid in accordance with the provisions of Cl. (b), sub.s. 1, S. 26-E, on such acceptance, or, if it is deposited with the Collector, in accordance with the provisions of Cl. (c), sub.s. (1), Sec. 26-E, on the date on which the receipt for the same is granted by the Collector. From the time such consent is deemed to have been given, the transferee has a good title against the landlord. But it seems clear that under the Bihar Tenancy Act as amended, the transferee has no valid title as against the land-

lord until this is done. It is not pretended that in the present case the transferees did anything in the matter of the landlord's fee so as to entitle them to the benefit of the provision that the consent of the landlord shall be deemed to have been given to the transfer. The contention of the learned advocate that the appellants in Second Appeal No. 990 were entitled not merely to compensation for these raiyati lands as allowed by the lower Appellate Court, but were entitled to continue to hold them, must therefore be overruled.

The second and only other contention raised before me by the learned advocate relates to the other six plots. He has urged that compensation should have been given to the appellants—the three appellants in Second Appeal No. 990 in respect of two gharari plots and defendant 2, the sole appellant in Second Appeal No. 960, in respect of four gharari plots. It has been found by the lower Appellate Court that the interest of the persons whose names we find in the Record-of-Rights against these plots was the interest of a licensee or tenant-at-will. This was in accordance with the decision in 14 P L T 685,³ and has not been challenged before me. But the learned advocate has argued that even if the interest of the recorded persons was that of licensees or tenants-at-will, the landlord would not have been able to turn them out except by incurring the cost of civil suit. It is not pretended that a tenant-at-will in particular requires so much as a notice to be given to terminate the so-called tenancy, but stress is laid on the fact that in respect of his title, the landlord could not take the law into his own hands and that the action of the appellants in acquiring the gharari plots from the recorded persons has enabled the landlords to obtain quiet possession of the plots without the cost of civil suits. But if the landlord was entitled to get possession of these plots by bringing civil suits, the decrees in the civil suits would presumably have awarded to him the costs of the suits as well. What the appellants took from the recorded persons was nothing at all as against the landlords, and I am not impressed by the contention of the learned advocate that there has been an accession to the mortgaged property by reason of the disappearance of the recorded persons from the

2. *Parmeshwar Rai v. Ramrudra Prasad Sinha*, (1935) 22 A I R Pat 860=158 I O 162.

3. *Ramkishun Pande v. Bibi Sohila*, (1933) 20 A I R Pat 561=145 I O 567=14 P L T 685.

plots in question — a disappearance which the appellants claim to have brought about by buying those persons out. The landlords on redemption were entitled to the possession of these plots in their original condition. If that meant the houses of the recorded persons and the interest of those persons was no more than the interest of a licensee or a tenant-at-will, the landlord could have brought about the disappearance of these persons without any cost that he could not have obtained from the Civil Court: and it is from this point of view that I am not prepared to agree that there has been any real accession to the mortgaged property in respect of these six gharari plots. The appeals both fail and must be dismissed with costs.

D.S./R.K.

Appeals dismissed.

A. I. R. 1939 Patna 360

HARRIES C. J. AND MANOHAR LALL J.

*Mukteswar Trigunait and others —**Defendants — Appellants.*

v.

Satya Charan Srimani — Plaintiff — Respondent.

Appeal No. 144 of 1937, Decided on 6th January 1939, from original decree of Sub-Judge, Dhanbad, D/- 17th February 1937.

(a) Contract Act (1872), S. 74—Compound interest—Provision for 18 per cent. per annum is not penal.

A contract to pay compound interest at 18 per cent. per annum if it is the rate of interest on the principal debt is perfectly legal and does not amount to a stipulation by way of penalty: 34 Cal 150 (P C), *Foll.* [P 361 C 2]

(b) Usurious Loans Act (1918), S. 3 — Scope of.

In order to avail himself of the provisions of the Act the debtor has to establish that the interest is excessive and that the transaction between him and the creditor is unfair, but where the loan cannot be secured on easier terms compound interest at 18 per cent. agreed upon between a receiver and a mortgagee is reasonable and commercial and not excessive and the Act cannot be applied: A I R 1924 P C 60 and A I R 1928 P C 64, *Foll.*

[P 361 C 1, 2]

(c) Bihar Money Lenders Act (3 of 1938), S. 11—Applicability.

Section 11, Bihar Money Lenders Act of 1938, being repugnant to the provisions of S. 2, Usury Laws Repeal Act of 1855 which is an earlier existing Indian enactment, is to the extent of the repugnancy void, and hence not applicable to a transaction which took place in January 1929: A I R 1939 Pat 55 (F B), *Foll.* [P 361 C 2]

Dr. D. N. Mitter, S. C. Mazumdar and Ramanugrah Narain — *for Appellants.*
S. M. Mullick and U. N. Banarji — *for Respondent.*

Manohar Lall J.—This is an appeal by the defendants against a decision of the learned Subordinate Judge, dated 17th February 1937, by which he decreed the suit of the respondent, which was instituted to recover the amount secured on a mortgage, dated 31st January 1929. The mortgage was for a sum of Rs. 5000, the interest stipulated was at the rate of Re. 1-8-0 per cent. per mensem and the due date fixed for the payment of the principal was February 1930. There was a further stipulation that the mortgagor would pay interest at the rate stipulated every month, but in case he did not do so the amount of interest will be treated as principal at the end of six months, in other words, this was a usual term of interest to be compounded at the expiry of every six months. The suit was instituted on 15th February 1936. The defence to the action, so far as it is relevant for the purposes of this appeal, was that the stipulation in the mortgage bond as to payment of interest was excessive and unfair and therefore came within the mischief of S. 3, Usurious Loans Act of 1918. Before us a new contention has been advanced that the stipulation for paying compound interest amounted to a stipulation by way of penalty within the meaning of S. 74, Contract Act. It was lastly argued that by virtue of S. 11, Bihar Money Lenders Act of 1938, the respondent should be prevented from recovering any sum in excess of Rs. 5000, the principal.

No evidence whatsoever was adduced in the Court below showing the conditions under which the loan was taken in January 1929. But there are indications upon the record; for instance, in Ex. 2 (a) an order of the Subordinate Judge of Dhanbad who gave sanction to the receiver on 30th January 1929, that the Court considered that the compound interest on the loan was quite justifiable. It appears that originally an agreement was arrived at between the mortgagor and the mortgagee that the interest should be charged at the simple rate of 18 per cent. and a draft was approved in that form by the Court, but later on the mortgagee refused to advance unless stipulation by way of compound interest was also added in the bond. The Court upon receiving a petition from the receiver who

recommended that he could not secure a loan without paying at the compound rate, accepted the proposal in these terms: "In the circumstances I sanction addition of the clause of compound interest." It appears to me that this evidence is quite sufficient to shift the onus upon the defendants. The plaintiffs have discharged any onus which initially lay on them by showing that they satisfied the Court who was in a much stronger position to know whether the loan could be secured upon easier terms: see 11 Cal 379.¹ The Subordinate Judge of Dhanbad was the proper person to act upon the report of the receiver. No evidence is to be found in the record which would indicate in the slightest that the receiver was acting in collusion with the mortgagee or that fraud was practised by the mortgagee in obtaining the Court's sanction.

The question then arises whether upon these facts the appellant has been able to bring his case within the express terms of S. 3, Usurious Loans Act of 1918. In order to avail himself of the provisions of that Section, the appellant has to establish that interest is excessive and that the transaction as between the parties thereto was substantially unfair. It was argued that the very fact that the interest charged is to be compounded at the rate of 18 per cent. shows that the interest is excessive. I do not agree with the contention. In a large number of cases decided in India as well as by their Lordships of the Judicial Committee, it has been established that contract to pay compound interest is perfectly legal. Indeed in many cases, contracts to pay compound interest at the rate of 18 per cent. or 24 per cent. have been upheld: see 5 P L T 72.²

In 7 Pat 294³ Viscount Sumner in delivering the judgment of the Judicial Committee, explained the meaning of the phrase to borrow upon "reasonable commercial terms", which was often loosely used in this country, and pointed out that the word "commercial" should be understood in a case like the present, of a community, which was not a commercial community, and of transactions which no one would

call mercantile, as a comprehensive, but convenient term for such terms as can be arranged freely between borrower and lender under the circumstances of the particular case. In the present case, as I have already held, the terms which were arranged were between the receiver and the mortgagee and these terms were arranged freely with the sanction of the Court and therefore the present rate of interest which was agreed upon, must be held to be a reasonable commercial rate between the parties to this transaction. The only thing which I find in the present case is that the amount of interest has become excessive by reason of deliberate non-payment by the mortgagor for the last ten years. But we cannot take that into consideration in reducing the rate of interest agreed upon and make out another contract between the parties. I therefore hold that upon the facts established in this case, the learned Subordinate Judge was right when he held that the circumstances do not attract the operation of S. 3, Usurious Loans Act.

I now deal with the other question raised whether the stipulation to pay compound interest is a stipulation by way of penalty. We were referred to the well known decision of the Privy Council in 34 I A 9.⁴ But in that case itself at p. 18 Lord Davey, in delivering the judgment of the Board, pointed out :

Compound interest is in itself perfectly legal but compound interest at a rate exceeding the rate of interest on the principal moneys being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty.

I therefore do not see how the stipulation to pay compound interest at the same rate as on the principal can be held to be a stipulation by way of penalty. The illustration (d) relied upon by the learned counsel for the appellants does not support the argument at all.

It remains to deal with the contention that S. 11, Bihar Money-lenders' Act of 1938, should be applied in favour of the appellants in this case. The matter was considered by a Full Bench of this Court in 20 P L T 1,⁵ and we are bound by the decision in that case and must hold that S. 11 cannot be applied to give any relief to the appellant.

1. *Ganga Pershad Sahu v. Maharani Bibi*, (1885) 11 Cal 379=12 I A 47=4 Sar 621 (P O).

2. *Raghunath Prasad Sahu v. Sarju Prasad Sahu*, (1924) 11 A I R P O 60=82 I O 870=51 I A 101=8 Pat 279=5 P L T 72 (P O).

3. *Sunder Mal v. Satya Kinker Sahana*, (1928) 15 A I R P O 64=108 I O 887=7 Pat 294=55 I A 85 (P O).

4. *Rani Sundar Koer v. Rai Sham Krishen*, (1907) 34 Cal 150=34 I A 9=5 O L J 106=11 O W N 249 (P O).

5. *Sadanand Jha v. Aman Khan*, (1939) 26 A I R Pat 55=179 I O 879=20 P L T 1=18 Pat 18 (F B).

In the result the appeal fails and must be dismissed with costs. The appellant is entitled to the issue of a certificate in the terms of S. 205, Government of India Act of 1935 that this case involves a substantial question of law as to the construction of those Sections of the Government of India Act of 1935 which have been elaborately considered in 20 P L T 1⁵ referred to above and is therefore fit to be taken to the Federal Court.

Harries C. J.—I agree. We are bound by the Full Bench decision in the case in 20 P L T 1⁵. The point under the Bihar Money-lenders' Act does raise a substantial question on the construction of certain Sections of the Government of India Act, and I accordingly agree that a certificate should be granted entitling the appellants to appeal to the Federal Court.

S.G./R.K. *Appeal dismissed.*

A. I. R. 1939 Patna 362

MANOHAR LALL J.

*Hari Shankar Lal Sahu and others —
Plaintiffs — Appellants.*

v.

*Mt. Chandu Urain — Defendant —
Respondent.*

Appeal No. 468 of 1937, Decided on 15th December 1938, from appellate decree of Deputy Commr. Sub.Judge, Ranchi, D/- 25th May 1937.

(a) Land Tenure—Service tenure—Inference of permanent heritable character when cannot be justified.

The holder of a service tenure did not produce any sanad nor proved otherwise that the grant was of estate burdened with certain services but merely contended that the land had been allowed to devolve from father to son and that the tenure was created from many years and that the zamindar did not avail himself of the services but allowed her to hold on :

Held that there was no justification in law for the inference that the grant was of a permanent heritable character : 22 Cal 938, *Foll.* [P 363 C 1]

(b) Landlord and Tenant—Service Tenure—Burden to prove right to hold adversely to landlord lies on tenant.

Once a tenure is held to be service tenure the onus to prove that the holder of the tenure had the right to hold the same in his own right adversely to the zamindar lies on the holder : A I R 1922 Pat 541, *Foll.*; 1 Bom 586, *Ref.*

[P 363 C 1]

(c) Landlord and Tenant—Service Tenure—Tenant refusing service is liable to be ejected without notice to quit.

Where the holder of a service tenure refuses to perform the services on the ground that no services can be demanded from her, such tenant is liable

to be ejected without notice to quit : 4 Cal 67, *Foll.* [P 363 C 2; P 364 C 1]

L. K. Chaudhury — *for Appellants.*

Rai Parasnath and Radha Krishna Sahai
— *for Respondents.*

Judgment.—This is an appeal by the plaintiffs against the decision of the learned Deputy Commissioner Subordinate Judge of Ranchi dismissing the suit of the plaintiffs which was brought for ejectment of the defendant from 4.55 acres of land in village Looiyo recorded in the revisional settlement record under khata No. 180. Defendant Chandu is the widow of one Manna Uraon, the son of Chanku Uraon, who was recorded in respect of this land in the cadastral survey record of 1910. The land stands recorded as rent free nokrana in the name of Chanku in lieu of service and has been recorded as nokrana in the name of the defendant in the revisional survey. Chanku died 8 or 9 years ago; since then the defendant is in possession of the land enjoying the produce thereof without doing any work.

The plaintiffs' case was that during his lifetime Chanku rendered services to the landlord as dhangar and that he enjoyed the land free of rent as a service tenure. The defendant, on the other hand, asserted that the entry in the Record of Rights describing the holding as nokrana was wrong and she claimed the land as a raiyati holding in which her husband Manna and her husband's father Chanku and before him their ancestors held as a raiyat since 1869 on payment of rent to the landlords; and in the alternative asserted that even if the holding is held to be nokrana she has obtained rights of a permanent tenant as a result of her being in possession continuously as a tenant from a very long time. The final Court of fact has disbelieved the case of the defendant and found that the land in suit is nokrana as recorded both in the original and revisional settlements, that the entry in the Record of Rights is correct and that the defendant has failed to prove that the land is raiyati. As regards the case of the plaintiffs, the Courts below have found that the plaintiffs have not adduced any evidence to prove when this service tenure was created and what were the conditions attached to it. The Courts also found that the plaintiffs did not adduce any reliable evidence to prove that Chanku ever rendered any service to them. The Courts then took the view that as the defendant and her predecessors-in-interest have

been in continuous cultivation of the land for over 12 years without paying any rent or rendering any services in lieu of rent to the plaintiffs or their ancestors the defendant has acquired a title over the land in suit by adverse possession and therefore dismissed the suit as being barred by limitation. Hence the appeal before me.

The first question to decide is if the defendant has been able to prove whether the particular service tenure is the grant of an estate burdened with this service of nokrana. The defendant has not produced any sanad nor has she proved otherwise that the grant was a grant of an estate burdened with certain services but merely contended relying upon the circumstances that the land has been allowed to devolve from father to son and that the tenure was created from many years ago and lastly that the zamindar did not avail himself of the services but allowed the defendant to hold on. In these circumstances the principle laid down by the Calcutta High Court in the leading case in 22 Cal 938¹ applies and I am of opinion that there is no justification in law for the inference that the grant was of a permanent heritable character.

In the present case it having been found by the final Court of fact that the grant was a service tenure the plaintiffs are required to prove nothing else. In my opinion, the learned Subordinate Judge was in error in requiring the plaintiffs to prove that they had actually received services in the past from Chanku or the defendant. The onus was on the defendant to prove that they, who were allowed to be in possession of the land as service tenure, had the right to hold the land adversely to the plaintiffs in their independent right. The case of the defendant must be borne in mind that she asserted not that she had any independent right but that she and her predecessors were paying rent to the landlord for this holding, and she sought to establish this by producing rent receipts which were not accepted as genuine.

In 1 Pat 292² it was held that the fact that no service has been rendered to the grantor of a service tenure by the grantee for more than 12 years before the institution of suit after resumption by the former is not sufficient to show that the grantee or

his successors have held the tenure adversely to the grantor from the time when the service was last rendered. The Court relied upon the decision in 1 Bom 586³ which decided that the period of limitation begins after resumption of the land from the date of the death of the original grantee as the services could no longer be performed by him. I therefore do not see any answer to the claim of the plaintiff to recover possession of the lands in suit. The suit is within 12 years of the date when Chanku died and also within a very few years of the date when the present defendant openly refused to perform services, viz. in 1932.

But it was argued that the defendant is liable to ejectment only on notice of termination of the service. The plaintiffs asserted that the defendant was holding the land as service tenure and as the plaintiffs were not willing to keep the defendant as dhangar she had stopped performing services and that they sent a registered notice to the defendant on 5th February 1935 asking her to give up possession and before that they had also sent a notice of the same kind to Chanku on 18th December 1929 the trial Court held that the notice of 1929 had not been proved to have been served. With respect to the notice on the defendant herself the trial Court says :

Nearly two years after this the plaintiffs appear to have sent another notice on 5th February 1935, (Ex. 1) asking the defendant to give up possession of the land. This subsequent notice seems to have been prompted by spite.

But on the last page of the judgment the trial Court appears to hold that as the defendant denied having received any notice that notice has not been legally proved to have been served on the defendant. The lower Appellate Court did not deal with this question at all. It appears however that serious disputes arose in respect of this land between the parties resulting in a criminal case in 1932. Ex. 4, the judgment of the Criminal Court acquitting the men of the plaintiffs on 10th February 1933, gives an idea of the disputes which then arose between the parties and also shows that the defendant openly asserted to the plaintiff that she refused to perform the services.

To such a state of affairs the principle in 2 C L J 403⁴ applies, namely that this is a case where the tenant refuses to perform

1. Radha Pershad Singh v. Budhu Dashad, (1895) 22 Cal 938.

2. Nand Lal Sahu v. Tikait Srinivas Hukum Singh Deo, (1922) 9 A I R Pat 541=69 I O 703=1 Pat 292.

3. Kaval Kuber v. Talukdari Settlement Officer, (1875-77) 1 Bom 586.

4. Ansar Ali Jamadar v. O. E. Grey, (1905) 2 C L J 403.

the services on the ground that no service can be demanded from her. The tenant therefore is liable to be ejected without a notice to quit. This follows from the remarks by Sir Richard Garth C. J., in 4 Cal 67⁵ to the effect that :

A distinct refusal by a tenant to perform service incidental to his holding renders him liable for ejectment on the principle that inasmuch as the tenant holds the land by the performance of services, as soon as he distinctly refuses to perform such services, the consideration for his being allowed to continue in possession wholly fails.

I am therefore of opinion that the defendant is liable to be ejected without service of notice. I would therefore reverse the decision of the Courts below and grant a decree to the plaintiffs for ejecting the defendant with costs throughout. I would like to add that instead of remanding the case, if I had taken a different view on the legal position than what I have stated above, I would have unhesitatingly come to the conclusion that notice was actually served on the defendant in February 1933. I have looked into the evidence and do not believe even for a moment when she says that she never received any notice. In the whole of her examination-in-chief she did not say a word as to the non-receipt of notice but she merely stated this as the last line in her cross-examination. The presumption from the general course of conduct in sending a registered notice which has been proved to have been posted properly addressed to the defendant has not been rebutted. Leave to appeal is granted.

S.G./R.K.

Appeal allowed.

5. Hurrogobind v. Ramrutno De, (1879) 4 Cal 67.

A. I. R. 1939 Patna 364

WORT AND AGARWALA JJ.

*Ram Rambijaya Prasad Singh —
Plaintiff—Appellant.*

v.

*Krishna Madho Singh and others —
Defendants — Respondents.*

Second Appeals Nos. 1048 to 1061 and 1237 of 1933, 97 and 690 of 1937, 558 and 559 of 1935 and 12 and 13 of 1938, Decided on 31st January 1939, from decisions of Sub-Judge, Arrah, D/- 15th March 1933, 8th September 1936, and from Addl. Dist. Judge, Arrah, D/- 28th June 1937.

(a) Second Appeal—Question of law—Decision, as to how much land was subject-matter of settlement in touzi, depending upon construction of Rubkari, is question of law.

A decision as to how much area was the subject-matter of a settlement of a touzi at the time of its settlement, which is arrived at on the construction of a Rubkari is a question of law so far as the question of construction of Rubkari is concerned. [P 367 C 1]

(b) Settlement Proceedings—Demarcation — Presumption—Mere fact that there is no evidence to show that particular land settled in touzi was demarcated does not give rise to presumption that there was no demarcation.

The mere fact that there is no evidence to show that certain land, which is the subject-matter of a settlement in a touzi, was demarcated, does not give rise to a presumption that there was no demarcation, such an assumption is clearly against the statute of the land. If an official act has been proved to have been done, it must be presumed to have been regularly done : *A I R 1934 Pat 485, Ref.* [P 367 C 2]

(c) Revenue Sale—Presumption — Mere fact that purchaser at revenue sale has not taken possession of land sold does not give rise to presumption that possession of old proprietor continued as before and was adverse to purchaser.

The mere fact that a purchaser at a revenue sale held for arrears of revenue, has not taken possession of the land after the revenue sale, does not give rise to a presumption that the possession of the old proprietor continued as before and that his possession was adverse to the purchaser. If it be once shown that the lands passed by the revenue sale, there can in law be no presumption that the old proprietors remained in receipt of rent from the agricultural tenants. [P 367 C 2]

(d) Hindu Law — Widow — Accretions — Widow inheriting estate from her husband purchasing property at revenue sale out of income of estate—Property purchased must be deemed to be accretion and part of estate — Widow not taking possession of property — Possession of old proprietor does not become adverse against the reversioners till the death of widow.

Where a widow coming into possession of the properties of her husband, receives the income and does not spend it, but invests it on the purchase of other property, the intention of the widow must be prima facie deemed to keep the estates of her husband as an entire estate and the property purchased would prima facie be intended to be an accretion to the estate. [P 368 C 1]

Where therefore a Hindu widow inheriting an estate (Raj) from her husband purchases certain property at a revenue sale, out of the income of the estate, the property purchased becomes part of the Raj estate and possession of the land by the widow is on behalf of the estate and enures to the benefit of the reversioners for purposes of limitation and if possession of land purchased is not taken by the widow, the possession of the old proprietor does not become adverse to the reversioners till the death of the widow. Limitation begins to run against the reversioners only after the widow's death and a suit for possession of the land brought by the reversioners within 12 years of her death is not barred by limitation : *14 Cal 387 (P C), Rel. on ; 20 Cal 433 (P C), Disting.* [P 368 C 2]

(e) **Adverse Possession—Interruption—Effect**
—Interruption in possession of person claiming title by adverse possession breaks period of adverse possession.

An interruption in the occupation or possession of the person claiming title by adverse possession is sufficient to break the period of adverse possession. [P 368 C 2]

S. M. Mullick, B. P. Sinha and Ramnandan Prasad — *for Appellant.*

Dr. D. N. Mitter (in 1051.52), B. N. Rai (in 1048, 1055, 1057, 1059 and 1061), Jadubans Sahay (in 1049, 1050 to 1052, 1058, 1060, 1237, 12 and 13), B. N. Mitter, Ajit Kumar Mitter and Tarkeshwar Nath (in 97), J. N. Sahay (in 690) and K. K. Sinha (in 558 and 559) — *for Respondents.*

Wort J.—These appeals relate to a claim to certain lands the particulars of which are given in the Schedule to the plaint in Second Appeal No. 1048 of 1933. The claim is in respect of tauzi No. 1504 and accretions thereto since the date upon which this touzi was settled. The settlement, as will appear from the statement of facts I propose to make, was made in 1862. I propose to state my reasons for my conclusions briefly, although the argument in the case lasted for a considerable time. There were only two points in the case: first, what was the subject-matter of the settlement of 1862, and, secondly, whether the plaintiffs in Second Appeal No. 1048 of 1933 had acquired a title to the property in suit by adverse possession. The defendant's title to the land dated from the year 1903 when this touzi No. 1504 was sold by Government for arrears of revenue and purchased by the Maharani of Dumraon. The plaintiffs or their predecessors-in-title were the defaulting proprietors. Some time prior to the year 1862 it was found, after survey, that mahal Sheopur Diar Gangbarar showed an excess of some thousands of bighas more than the proprietors were entitled to hold, and it was under those circumstances that the settlement was made. The question in this case and in a number of other cases that have arisen out of the same facts is whether the subject-matter of the settlement was the excess of 2877½ bighas which was found to exist or was 569 bighas odd as was contended for. The matter was determined in a previous suit (to which I shall make reference) on the construction of a rubkari (Ex. 12) made at the time of the settlement.

By a decision of this Court in Appeal from O. D. No. 57 of 1916¹ Das J. as he then was and Foster J. came to the conclusion that the subject-matter of the settlement was 2877½ bighas and not, as contended for by the defendants in the action, 569 bighas. I make reference to this matter at this stage of my observations as the alternative argument on behalf of one of the respondents is different from that which was advanced in the Court below. It is perfectly clear from the plaint, the written statement, the issues framed and the judgments of both the Courts that the question upon which the parties made their case to depend was whether the settlement was of 2877½ bighas or the lesser area to which I have referred, and which according to the plaintiff had never been defined or demarcated. It is quite clear from the plaint that it was contended that the lesser area was the subject-matter of the settlement by Government in 1862, that that settlement was in a sense a mere paper transaction; that the 569 bighas, the subject-matter of the settlement, were to be found somewhere in the excess area of 2877½ bighas; that the balance between the 569 bighas and the 2877½ bighas formed at the time of the settlement, and afterwards a part of the plaintiff's estate; that the plaintiff remained continuously in possession; that the sale for arrears of revenue (to use the words of the Judge) was misconceived; that the Maharani purchased nothing and did not, as a result of that purchase, obtain possession. It is not difficult to see the reason why this case and this case only was advanced by the plaintiff. I am not forgetting the fact that since the date of the settlement there were accretions to touzi No. 1504 and the alternative argument was that the defendants were in possession of something more than what they were entitled to even if their title to tauzi No. 1504 were established. It seems to me that the whole case was made to depend and did depend upon the question whether 2877 bighas was the subject-matter of the settlement or not. I repeat what I said a moment ago that it is not difficult to understand the reason why the plaintiffs advanced this case, the reason being that if they could only show that the subject-matter of the settlement was for the lesser area, it not being denied (in fact there being no dispute) that they

1. Babu Tilakdhari Singh v. Maharaja Kesho Prasad, A. F. O. D. No. 57 of 1916.

always remained in possession of their estate Gangbarar, it would necessarily follow (if the area 569 bighas was undefined and undemarcated) that they remained in uninterrupted possession of the whole subject-matter of the settlement of 1862.

The two points to be decided are, first, whether the subject-matter of the settlement was, as is contended for by the plaintiffs in Second Appeal No. 1048 of 1933 or as was decided by this Court in 1919 in the case to which I have made reference, and, secondly, whether, even if title passed by the sale and purchase of 1903, the plaintiffs remained in possession by having acquired title by adverse possession, or, to put it more accurately, by their title having revived by their remaining in adverse possession.

The next fact to be noticed after the settlement of 1862 was the sale of 1903 for arrears of revenue. According to the Judge in the Court below possession was not acquired by the purchaser, but in 1911, the Maharani having died in 1907, the new Maharaja brought the action out of which Appeal from Original Decree No. 57 of 1916¹ arose. He claimed possession of the tauzi which was purchased in 1903 and succeeded in the trial Court, succeeded also in this Court, and an appeal before the Judicial Committee of the Privy Council was dismissed. The same argument which is advanced in this case was advanced in that case, and Das J. during the course of his judgment, more particularly on the construction of Rubkari of 1862, came to this conclusion :

The important passage in the document runs as follows : 'It is clear that by the measurements made by the Tahsildar and the Kanungo 2877 bighas 10 kathas was found in excess to the 18977 15 kathas of the survey area out of which 1923 bighas occupied by the river Ganges which having devastated the cultivated etc. area out of the survey area is now flowing and 384 bighas 8 kathas is uncultivable. Bhagar and Nala lying below the Karara on the south, and 569 bighas 12 kathas is found culturable and fit for assessment of rent.' It is in my opinion impossible to misunderstand the meaning of the Deputy Collector. 569 bighas 12 kathas was found fit for assessment of rent. This does not mean that 569 bighas 12 kathas were to be formed into a separate estate. This argument in my opinion is inadmissible on the admitted history of the accreted lands of Sheopur Diar.

The learned Judge then goes on to refer to the fact that it had been the history of that particular estate that an area less than the whole in every new settlement had been assessed to revenue. I refer to

that passage because the learned Judge in this case comes to a conclusion different from that arrived at by Das J. in that case on the ground that there has been another and more accurate translation of the Rubkari, and, secondly, that there are other documents which throw light on the meaning of the Rubkari. It is to be noted in this connexion that subsequent to the settlement of 1862 the new tauzi was transferred from Ballia, a district in the United Provinces, to Shahabad Collectorate, and it is on the entries in the Shahabad Collectorate that the learned Judge in this case depends for his view that the estate known as tauzi No. 1504 consists of 569 bighas and not 2877½ bighas. In my judgment the decision of the learned Judge in the Court below on the footing that the translation of the Rubkari was more accurate is quite unjustified. According to Das J. the translation of the Rubkari, so far as this particular matter was concerned, was this: that 569 bighas "was found culturable and fit for assessment." The passage, as translated by the trial Judge, was "that 569 bighas 12 kathas which was cultivated was found suitable for settlement and assessment of revenue."

It seems to me to be perfectly clear that the learned Judge of this Court in construing that document was not in any way influenced by the use of the word translated as 'rent' in contradistinction to 'revenue', emphasis was being placed, as is placed in this case by both the Courts below, on the word 'settlement'. It is perfectly clear that what the Government was considering at that time was not whether the land was fit to be settled, but whether the land, being fit for settlement with tenants, was assessable to revenue. And Das J. came, and in my judgment rightly came, to the conclusion that what was being settled was 2877 bighas and that 1900 odd bighas were allowed to remain free of revenue by reason of the fact that the shifting of the Ganges northward had inundated that quantity of land of the plaintiffs or their predecessors in title and that they therefore had lost, from their revenue-paying estate, that area. The same conclusion was arrived at by two Judges of this Court in 15 P L T 342² at p. 347, where Rowland J., who delivered the judgment of the Court, observed :

2. *Mt. Dharichna Kueri v. Ramyed Kuar*, (1934) 21 A I R Pat 485=154 I C 1032 = 15 P L T 342.

It is true a demarcation did not follow. The fact however that one sum of revenue was assessed on Gangbarar and a different sum separately assessed on Naubarar, is in itself an indication of the intention of the revenue authorities to keep the latter as separate property separately liable for its own arrears. Had it been otherwise a lump sum of revenue would have been fixed for the entire combined estate, and in case of default the entire estate would have been liable to sale. In my opinion the new estate comprised the area of 2877½ bighas bounded on the north by plot No. 920 and this definite block of land was the security charged with the payment of Rs. 1104.

It seems to me that the only point which could possibly arise in this Court is whether the decision of the learned Judge in the Court below, which is on appeal before us, is a decision on a question of fact or a question of law. In my judgment so far as the question of the construction of the Rubkari is concerned, it is a question of law, and, if we come to the conclusion at which this Court on a previous occasion has arrived (which in my judgment is the proper construction in the case), it seems to me irrelevant to consider the entries in the Collectorate books, as the Judge in the Court below did, for the purpose of construing that document which does not appear to me to suffer from anything in the form of a latent ambiguity. Now, the other conclusion at which the learned Judge in the Court below has arrived, namely that it was a settlement of 569 bighas undefined and undemarcated, is a finding which in my judgment cannot stand, and I cannot express my reasons for coming to that conclusion better than what Das J. did in the case to which I have referred. The learned Judge, referring to this argument which was then advanced by Mr. Sushil Madhab Mullick, made this observation :

One inevitable result of the acceptance of the argument advanced by Mr. Mullick has been entirely overlooked by him. The regulations provide that in the case of a settlement by the Collector, the lands are to be deemed sufficient security for the payment of the revenue.

I might observe here that Rowland J., in the judgment to which I have referred, makes the same or a similar observation. Das J. then goes on :

Mr. Mullick's argument is that the Collector settled 569 bighas 12 kathas of unascertained and unascertainable lands. The result of such a settlement would be that such lands could never be sold for non-payment of Government revenue, because the purchaser would never get possession of such lands. In other words in this case, the land was not a security sufficient or otherwise for non-payment of Government revenue.

Then the learned Judge made this observation which seems to me to conclude the matter : such an assumption is clearly against the statute of the land, *omnia praesumuntur rite esse acta*, and if an official act is proved to have been done, it must be presumed to have been regularly done.

The conclusion of the learned Judge in the Court below therefore cannot stand, although, as I have already indicated, it was not so much the evidence upon which the learned Judge in the Court below relied for coming to his conclusion that the land was not demarcated as the lack of any evidence on the point. That there could be a presumption in the circumstances that there was no demarcation in my opinion is untenable.

Having come to a conclusion on that point, the only other question to be determined is whether the plaintiffs' title which disappeared by the sale of 1903 revived by adverse possession, as the Judge in the Court below has held. Now the conclusion of the Judge was that the Maharani never got possession in 1903. Had all the present parties been parties to the proceedings which arose out of the action of 1911 there would have been an end of this case in favour of the defendants, but they were not parties is admitted. As regards the sale of 1903 the matter may be disposed of on the same reasoning as adopted by their Lordships of the Judicial Committee of the Privy Council in the decision reported in 18 P L T 257,³ where reference was made to the conclusion of the Judge of this Court which was to the effect that the Raj had not taken possession after the revenue sale and the presumption was that the possession continued as before and that presumption is supported by the fact that an action was brought in 1911. Their Lordships say that :

Their Lordships cannot agree that the approach in the present question is accurate. If it be once shown that the lands in dispute passed by the revenue sale of 1903, there can in law be no presumption that, contrary to the purchaser's rights, the old proprietors remained in receipt of rent from the agricultural tenants.

Even if there is anything in the argument which was advanced that the present plaintiffs were not bound by the sale of 1903, it seems to me that the question of adverse possession can be determined on other grounds. The Judge in the Court

3. Kesho Prasad Singh v. Bhagjogna Kuar, (1937) 24 A I R P O 69=167 I C 329=16 Pat 258=31 S L R 242=18 P L T 257 (P O).

below has held that adverse possession ran from the year 1903; that by 1916, when delivery of possession was given, the plaintiffs' title revived. In my judgment that is an erroneous conclusion. If adverse possession was running from the year 1903 and if the learned Judge in the Court below has held that the plaintiffs were in adverse possession from that date, then that conclusion would ordinarily be a conclusion of fact and would be binding on this Court in second appeal. But the real question in dispute is whether as a matter of law limitation did run from 1903. The learned Judge decides that it did, because it was a purchase by the Maharani and the reversioners who brought their suit in 1911 got possession somewhere in 1916. They were already barred by reason of adverse title which would revive. That conclusion is on the footing that this property was not a part of the Raj estate but was the stridhan of the Maharani. Several decisions have been relied upon for that contention. One is the case in 14 I A 63.⁴ Before referring to that case I would refer to the decision in 20 I A 12⁵ which was relied upon. Their Lordships observed at p. 23 of the report:

The appellant's counsel contended that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate. Without examining the precise result of the decisions, it is sufficient to say that in this case there is no room for any such presumption, for the corpus of the estate never came to the widow, but was taken by Sham Churn Mullick under the will.

It does not seem in my judgment to be a clear authority on this point, but the case to which I referred earlier does in my judgment settle the principle. There their Lordships observed:

Where a widow comes into possession of the properties of the husband, and receives the income, and does not spend it, but invests it on the purchase of other property, their Lordships think that, *prima facie*, it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would, *prima facie*, be intended to be accretions to that estate.

Here I do not think there is any doubt that the property was purchased from the savings of the income of the widow. There is no evidence to the contrary, nor indeed

is it suggested that there was any income from her stridhan property. In the absence of evidence it seems to me that the rule, which their Lordships laid down must be applied in this case and therefore *prima facie* this was a part of the Raj estate. In those circumstances the widow having died in 1907 limitation would run from that date. Quite clearly therefore by 1916 there was not sufficient time for the revival of the plaintiffs' title. It was contended however, from 1907 till the date of the commencement of this suit there was more than 12 years and that therefore their title had revived during that period. In my judgment that is a contention which cannot be supported either on the facts or the law. It was not the plaintiffs' case in Second Appeal No. 1048 of 1933 nor was evidence directed to that question. Para. 13 of the plaint says:

The cause of action of this suit arose on 24th April 1916, the day of delivery of possession as well as the commencement of the survey settlement operations at Buxar.

Further reference is to be made in this connexion to para. 9 of the plaint. Rowland J. has noted in the judgment to which I have made reference that an interruption in the occupation or possession of the person claiming title by adverse possession is sufficient to break the period. I would come to the conclusion that it is not open to the plaintiff to contend that a title by adverse possession was obtained between the year 1916 and the date of this suit. As I stated at the commencement of my judgment, the parties made their case to stand or fall on two points, viz. whether it was a settlement of 2877 bighas in 1862 and secondly whether title by adverse possession was acquired before the year 1916 and on those points alone, and on those points the plaintiff fails. In my judgment the appeals succeed and must be allowed with costs throughout. This judgment will govern all the appeals except Second Appeals Nos. 12 and 13 which will be governed by the decision in Second Appeal No. 1056 of 1933 which is not before us.

Agarwala J.—I agree.

R.M./R.K.

Appeals allowed.

4. Babu Sheo Lochun Singh v. Babu Saheb Singh, (1887) 14 Cal 387=14 I A 63=5 Sar 1 (P C).

5. Sowdaminee Dassee v. Administrator-General of Bengal, (1899) 20 Cal 438=20 I A 12=6 Sar 272 (P C).

A. I. R. 1939 Patna 369

WORT J.

*Chintaman Mahto and others —**Defendants — Appellants.*

v.

Babu Amar Singh, Plaintiff and others,
Defendants — Respondents.

Appeal No. 894 of 1936, Decided on 15th November 1938, from appellate decree of Judicial Commissioner, Chota Nagpur, Ranchi, D/- 17th July 1936.

(a) Chota Nagpur Tenancy Act (6 of 1908), S. 139, Proviso—Rent suit filed in Court of Deputy Commissioner—Question of title having arisen, suit transferred to Civil Court — Suit will be governed by Rules of Civil P. C. — Appeal from decision in suit lies to Judicial Commissioner.

Where a suit for rent is instituted in the Court of the Deputy Commissioner but by reason of a question of title having arisen owing to the introduction of some intervenors, the Deputy Commissioner transfers the case to the Civil Court, the suit will be governed by the ordinary rules of Civil Procedure Code, and not by the provisions of Chota Nagpur Tenancy Act and therefore an appeal from the decision of the Civil Court in such suit will lie to the Judicial Commissioner of Chota Nagpur : *A I R 1934 P C 81 and A I R 1918 Cal 556, Rel. on.* [P 869 C 1 ; P 370 C 1]

(b) Chota Nagpur Tenancy Act (6 of 1908), S. 177—Scope—S. 177 does not apply to suit commenced before Deputy Commissioner but transferred by him to Civil Court.

Section 177 applies only to a case tried before a Deputy Commissioner, but where a suit having been commenced in the Court of a Deputy Commissioner is subsequently transferred by him to Civil Court for the purpose of deciding a question of title, S. 177 does not apply to such a suit : *A I R 1918 Cal 556, Ref.* [P 370 C 1]

B. C. De and U. N. Banerjee —

*for Appellants.*L. K. Chowdhury — *for Respondents.*

Judgment.—In this appeal two questions are raised : one is the competency of the appeal to the Judicial Commissioner of Chota Nagpur and therefore to this Court ; and the other with regard to the scope of the issue to be tried in the suit which was a suit for rent by the respondent. Certain persons who are represented in this Court by Mr. De were joined as intervenors. The suit was commenced before the Deputy Collector of Chota Nagpur, and in the ordinary course, would have been tried by him with the rights given in such a suit under the provisions of the Chota Nagpur Tenancy Act. But by reason of the question of title which was raised by the introduction of the intervenor, the case was transferred by the Deputy Collector under the Proviso to S. 139 of the Act. I notice in passing that

the words of that Proviso are of the widest possible terms ; it makes no condition and gives apparently no limits. It provides that the Deputy Commissioner may transfer to the Civil Court any class of suits or a particular suit ; and I assume in the circumstances, as I have already stated, that the reason of this transfer was the question of title which was this. The plaintiff had purchased the property and redeemed a person who was in the position of a zar-peshgidar. His name is Chohan Mahto and the question was whether the defendant-tenants had paid the rent to him or to the clients of Mr. De who claimed that they were the zar-peshgidars, that they lent the money in the name of Chohan Mahto. This question was raised under Issue 1, perhaps an Issue which is not very aptly expressed ; the Issue was—"Does the relationship of landlord and tenant exist between the parties?" Evidence was gone into and in the trial Court the present appellants succeeded, but the decision of the trial Court was reversed by the Judicial Commissioner.

Mr. De argues that although the suit was transferred, it was governed by the terms of the Chota Nagpur Tenancy Act, that is to say, there was an appeal not from the Munsif's decision to the Judicial Commissioner but from the decision of the Munsif to the Deputy Commissioner and it suffered from all the disabilities and restrictions of a rent suit under the Chota Nagpur Tenancy Act. In my judgment it is an argument which cannot possibly be accepted under any circumstances. The argument in effect is this : that although, to use a colloquialism, the Deputy Collector, by reason of this question of title, had wiped his hands off the suit and put it into the hands of the Civil Court, yet the Civil Court was bound not by the statutes and by the Civil Procedure Code governing suits in that Court, but by the restrictions of the Court which had transferred the matter. In my opinion the matter is governed by the principle laid down by their Lordships of the Judicial Committee of the Privy Council in 61 I A 158¹ where their Lordships say at p. 161 of the Report as follows :

The respondent raised a preliminary objection to the competency of the present appeal maintaining that under S. 4, sub-sec. 2, Provincial Insolvency Act, the decision of the District Court was final subject only to a limited right of appeal to the High Court under S. 75, sub-sec. 2, any right of

1. Maung Ba Thaw v. Ma Pin, (1934) 21 A I R P O 81=148 I O 1=12 Rang 194=61 I A 158 (P O).

further appeal being thereby excluded. But in their Lordships' opinion this objection is not maintainable in view of the decision of this Board in 43 I A 192² in which a similar objection was taken.

It was held that when such a right of appeal is given to ordinary Courts of the country, the procedure, orders and decrees of that Court will be governed by the ordinary rules of the Code of Civil Procedure. That, in my judgment, if I may say so, is a weaker case than the one which I have before me. In that case it was held that once it gets into a Court, the rules of that Court and that Court alone will govern the matter and there will be no further right of appeal. This case is stronger than that case by reason of the fact that it was not an appeal to the Civil Court, but it was a transfer out and out; and once the case got there, the suit was governed by the rules of the procedure of that Court. In my judgment that point fails.

Now, it has been held in a number of cases and I myself have been a party to a number of decisions of this Court that in a suit of this kind tried by the Deputy Commissioner, the only issue is—whether the rent has been paid, and if paid, the person to whom and under what conditions it has been paid. I refer to S. 177, Chota Nagpur Tenancy Act. To put the matter in other words, the only issue possible in a case of that kind is the issue which the Section indicates. But this case was transferred for the purpose of deciding the question of title. There was nothing to prevent a suit by an intervenor in an ordinary Civil Court trying a question of title, and in my judgment S. 177 applies only to a case tried before the Deputy Commissioner. That Section provides:

When in any suit before a Deputy Commissioner under this Act between a landlord and a tenant, etc.

The answer to the argument is that this was not a suit before the Deputy Commissioner although the suit had commenced in that Court but had been transferred. In my judgment both the points fail and I am supported in my view of the first point and to some extent of the second point, in addition to the decision of the Privy Council, from which I get support by inference, directly by the decision of the Calcutta High Court in 27 C L J 281.³ The appeal

is dismissed with costs. Leave to appeal is refused.

N.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 370

HARRIES C. J. AND MANOHAR LALL J.

Sital Prasad Singh and others —

Defendants — Appellants.

v.

*Ajablal Mander and others, Plaintiffs
and others, Defendants —*

Respondents.

Appeal No. 33 of 1936, Decided on 30th January 1939, from decision of Sub-Judge, Bhagalpur, D/- 30th July 1935.

Hindu Law — Alienation — Coparceners — Legal necessity — Whether alienation is for legal necessity must be decided on facts of each case — Adult members purchasing property — Mortgage of ancestral property executed for paying purchase price — Profits of purchased property more than sufficient to cover interest on mortgage—Purchase held for benefit of estate and family — Mortgage held executed for legal necessity and could not be challenged by minor members.

Legal necessity is not confined to transactions of a purely defensive nature. If transactions are entered into which benefit the family and the estate and are such as a reasonably prudent man would enter into such can be said to be supported by legal necessity : *Case law discussed ; A I R 1938 Pat 44, Dissented.* [P 373 C 1]

It is impossible to lay down any hard and fast rule as to what should be and what should not be regarded as a purely speculative transaction in a particular case. In every case the Court of fact will consider prominently and accurately whether the transaction which is sought to be enforced in a particular case was for the benefit of the estate and this must be decided not from any *a priori* arguments but upon the facts of each case. [P 374 C 2 ; P 375 C 1]

All the adult members of a joint family executed a mortgage of the ancestral property. The consideration of the mortgage was to be applied towards the part payment of the purchase price of a certain property which the family had purchased. The purchased property was in the village in which the family already owned other properties. From the financial point of view the purchase was a profitable transaction and its approximate profits were more than sufficient to cover the amount of interest on the mortgage amount :

Held that the purchase transaction was for the benefit of the estate and family. The mortgage which was therefore executed to pay the purchase price was one for legal necessity and hence it could not be challenged by the non-executant minor members of the family. [P 371 C 1, 2 ; P 373 C 2]

K. N. Maitra — *for Appellants.*

L. K. Jha and K. N. Lal — *for Respondents.*

Harries C. J. — This is a defendants' appeal from a decree of the learned Sub-

2. Secretary of State v. Chelikani Rama Rao, (1916) 3 A I R P C 21=35 I O 902=39 Mad 617=48 I A 192 (P O).

3. Kshirod Gobinda v. Rajendra Narain, (1918) 5 A I R Cal 556=38 I O 94=27 C L J 281.

ordinate Judge of Bhagalpur decreeing the plaintiffs' claim in a mortgage suit. The plaintiffs brought the suit out of which this appeal arises to enforce a simple mortgage dated 21st February 1921, which had been executed by defendant 1 for himself and as guardian of his minor sons, defendants 4 to 7, by defendant 2 for himself and as guardian of his minor son, defendant 8, and by Deo Narain Singh, since deceased, for himself and as guardian of his minor sons, Anant Lal Singh and Sital Prasad Singh, defendant 3. The mortgage was for a sum of Rs. 2000 which was to carry interest at the rate of 12 per cent. per annum compoundable yearly. The mortgagee was Saukhi Mandar, deceased father of plaintiff 1 and grandfather of plaintiff 2 and great-grandfather of plaintiffs 3 and 4. The consideration for this mortgage, namely Rs. 2000, was required for the payment of part of the purchase price of certain property purchased on behalf of the defendant family and to pay an antecedent debt and household expenses. Certain payments were made from time to time and the suit was brought to recover Rs. 6838.12.0 being the amount of principal and interest then due. The learned Subordinate Judge held that the plaintiffs were entitled to a mortgage decree, but he was of opinion that the rate of interest, namely 12 per cent. per annum compoundable yearly, was excessive. He allowed simple interest at 12 per cent. per annum and accordingly decreed the claim for Rs. 4402. Against this decree the defendants other than the executants of the mortgage bond have preferred the present appeal. The defendants form a joint Hindu family and by way of defence it was pleaded by the minor members of the family that the mortgage bond in suit was not for legal necessity and such has been the contention before us today.

In the first place it was argued that the part of the consideration for this mortgage, viz. Rs. 1425, which was applied towards the payment of the purchase price of property bought by the family, could not possibly be regarded as money borrowed for legal necessity. It appears that on the day before this mortgage was executed, i. e. the 20th February 1921, the three adult members of the family, who executed the mortgage deed, purchased certain property from Pareyag Kapri in Mauza Kenuar and Rs. 1425, part of the money borrowed from the plaintiffs, was applied in paying Pareyag Kapri for this property. Both the sale deed

and the mortgage were registered on the same day, namely the 23rd February 1921. It has been urged on behalf of the defendant-appellants that the plaintiffs wholly failed to prove that there was any need whatsoever for the family to purchase this property and that mortgaging the ancestral property in order to pay the purchase price was a speculative and risky transaction. The learned Subordinate Judge held that it was a transaction beneficial to the estate and family and such as a reasonably prudent manager of an estate would enter into. Before us it has been contended that there is no evidence whatsoever to support this finding. Plaintiff 1 himself gave evidence and stated that the holding purchased by the defendant family was a productive holding and yielded more paddy than did the plaintiffs' own holding which was contiguous to it. According to the plaintiffs, their own land yielded 4 to 5 maunds of paddy per bigha. If the purchased property was more productive, then it is clear that it would yield some 90 maunds of paddy at the rate of about 6 maunds per bigha, the purchased property being 15 bighas odd. If 90 maunds of paddy could be raised from the purchased land, then it would yield approximately a profit of about Rs. 180. Such would be more than sufficient to cover the interest at the rate allowed by the Subordinate Judge. Counsel for the appellants argued strenuously that the Court should not rely upon a general statement such as that made by the plaintiffs in this case. He has argued that the plaintiffs should adduce definite evidence of the actual amount of produce raised by the defendants yearly from the land in suit. Clearly the plaintiffs can never be in a position to give such evidence. All the plaintiffs can do is to produce the best evidence they can to show that the purchase of the property by the defendant family was a transaction which at the time it was entered into was beneficial to the estate.

In the present case they have shown that the produce of the land is more than sufficient to pay the interest; but that is not all. The transaction was entered into by the three adult members of the family, and a Court may safely assume that these three members would not act unreasonably. Clearly, they must have thought at the time that the transaction was for the benefit of the family, and it appears to me that subsequent events have abundantly established this. The family has retained this

property and actually owns it today. In these circumstances, it is very difficult for any Court to hold that the transaction was not for the benefit of the estate. Further, the defendants held land in this village and at the time they entered into the transaction under discussion they also purchased shares in the village from other persons. In short, the defendants were increasing their holding in this village, presumably, with a view to making it more productive and economic. In those circumstances, the learned Judge accepted the plaintiffs' contention that this transaction was for the benefit of the family. The only evidence adduced by the defendants is hardly worthy of notice. One so-called independent witness was called to state that the purchased property was not productive. The witness held property near by, and when he was asked how many maunds of paddy he raised per bigha, he wanted the Court to believe that he did not know. When a witness of that kind is put forward, it is impossible to say that the learned Judge was wrong in rejecting the defendants' evidence.

Reliance has been placed by counsel for the appellants upon a case of this Court, 5 P L J 622.¹ In that case it was held that actual compelling necessity was not the sole test of the validity of an alienation by a manager acting without the express consent of the other members and a Bench laid down that when it could be shown that the transaction was one which was clearly beneficial to the interests of the family as a whole, such was valid, and the consent of the other members would be implied though not expressly given. In this particular case it was eventually held that a purchase of property was not beneficial to the estate and that money borrowed to finance the purchase was not borrowed for legal necessity. Certain observations of Dawson Miller C. J. have been relied on by the appellants; but in my view those observations must be confined to the particular facts of the case. At page 627 the learned Chief Justice observed :

It is not desirable to lay down any general proposition which would limit and define the various cases which might be classed under the term beneficial as above used. It is clear however that all transactions of a purely speculative nature would properly be excluded.

The Court appears to have thought upon the evidence that the transaction was a

risky and speculative one and nowhere does the learned Chief Justice lay down that facts such as established in this case do not prove that the transaction was beneficial to the estate and the family as a whole. This case to which I have referred was cited in 7 Pat 798² where a Bench of this Court held that a manager of a joint Hindu family has power to charge ancestral property by loan or mortgage in case of need or for the benefit of the estate. The test in each case is whether it was a transaction into which a prudent owner would enter in the ordinary course of management in order to benefit the estate. In this case the case in 5 P L J 622¹ was closely considered and the effect of the decision discussed. It is pointed out that the earlier case laid down no general proposition and was a decision upon the facts of that particular case. The question has been very recently considered by this Court in 17 Pat 549³ in which it was held that the karta of a joint Hindu family being merely a manager and not an absolute owner, the Hindu law has, like other systems of law, placed certain limitations upon his power to alienate property which is owned by the joint family. The Hindu law-givers however could not have intended to impose any such restriction on his power as would virtually disqualify him from doing anything to improve the conditions of the family. The only reasonable limitation which can be imposed on the karta is that he must act with prudence, and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct. The manager is not allowed to enter into any transaction which is speculative or fraught with risks or which may involve a possibility of loss to the family and the Court will not encourage him either to part with the joint family property or to encumber it merely in order to increase the immediate income of the property, because a prudent person will not sacrifice a certain and stable income in favour of the mere prospect of a better income. In exceptional circumstance however, the Court will uphold the alienation of a part of the joint family property by a karta for the acquisition of new property, as for example where all the adult mem-

2. Jan Mohammad v. Bikoo Mahto, (1929) 16 A I R Pat 180 = 116 I C 88 = 7 Pat 798 = 10 P L T 811.

3. Baljnath Prasad v. Bindu Prasad Singh, (1939) 26 A I R Pat 97 = 180 I C 147 = 17 Pat 549 = 19 P L T 919.

1. Ram Bilas Singh v. Ramyad Singh, (1920) 7 A I R Pat 441 = 58 I C 803 = 5 Pat L J 622 = 1 P L T 585.

bers of the joint family with the knowledge available to them and possessing all the necessary information about the means and requirement of the family are convinced that the proposed purchase of the new property is for the benefit of the estate.

These authorities make it abundantly clear that this Court does not confine legal necessity to transactions of a purely defensive nature. If transactions are entered into which benefit the family and the estate and are such as a reasonably prudent man would enter into, such can be said to be supported by legal necessity. The view taken by this Court has been consistently held of late by the Allahabad High Court—see the Full Bench decisions in 50 All 969⁴ and 55 All 1.⁵ These two cases were later considered in the Full Bench case in 57 All 605⁶ in which it was especially laid down that the expression "for the sake of the family" occurring in the text of the *Mitakshara* or the expression "benefit of the estate" has a wider meaning than mere compelling necessity, and is not limited to transactions of a purely defensive nature. The Full Bench further held that the authority of the case in 50 All 969⁴ had not been overruled or shaken by the Privy Council decision in 54 All 564.⁷ In this latter case their Lordships of the Privy Council held that a mortgage securing a loan to finance a business which was not ancestral was not binding on the minor members of the joint family and Mukerji J. in his judgment in 55 All 1⁵ at p. 5 was of opinion that this decision of their Lordships overruled the earlier Allahabad case, 50 All 969.⁴ Sulaiman C. J. and King J. took a contrary view and this latter view was accepted in the most recent Full Bench case, 57 All 605.⁶

A contrary view appears to have been taken by Wort J. in 17 Pat 168.⁸ He held that although no precise definition of what is a benefit to the joint family estate can

be given, it is well established that jeopardizing a property, which is already the property of the joint Hindu family, for the purpose of purchasing another property can never, under any circumstance, be considered a benefit to the estate. Rowland J. who was also a member of the Bench, did not agree with the proposition laid down by Wort J. In that particular case the transaction was such as no reasonably prudent man would have entered into, and Rowland J. held upon that ground that the transaction was not supported by legal necessity. In my judgment the observations of Wort J. are not in accordance with the authorities of this Court supported as they are by the decisions of the Allahabad High Court to which I have referred, which have laid down that an alienation of family property may be supported by legal necessity if the transaction was at the time when it was entered into for the benefit of the family and was such as a reasonably prudent man would enter into at that time. In the present case, as I have stated, all the adult members joined in this transaction. The property purchased was in the village in which the family already owned property, and from the evidence of the plaintiff coupled with the fact that this property has been retained, it is clear that the purchase was from the financial point of view a profitable transaction. It was a transaction for the benefit of the estate and family and eminently one which a reasonably prudent manager would enter into. In these circumstances, the adult members of the defendants' family were entitled to raise money and to charge the family property with the repayment of that money. That being so, the learned Judge was right in holding that legal necessity had been established for this item.

I have some doubt whether the plaintiffs were bound to prove legal necessity with regard to the item which I have discussed. The adult members of the family negotiated with Pareyag Kapri for the purchase of his property, and on 18th February 1921 had made a contract with him and paid a certain sum as earnest money. The sale deed was executed on 20th February 1921, and on that day the family owed Pareyag Kapri a sum of Rs. 1425. On the following day this money was borrowed from the plaintiffs and the mortgage executed. It may be argued that this mortgage was entered into in order to obtain money to pay an antecedent debt, and if that be

4. Jagat Narain v. Mathura Das, (1928) 15 A I R All 454=116 I O 484=50 All 969=26 A L J 841 (F B).

5. Amrej Singh v. Shambu Singh, (1932) 19 A I R All 632=140 I O 509=55 All 1=1932 A L J 895 (F B).

6. Ram Nath v. Chiranjil Lal, (1935) 22 A I R All 221=155 I O 186=57 All 605=1935 A L J 177 (F B).

7. Benares Bank, Ltd. v. Hari Narain, (1932) 19 A I R P O 182=187 I O 781=54 All 564=59 I A 800 (P C).

8. Ramkaran Thakur v. Baldeo Thakur, (1938) 25 A I R Pat 44=173 I O 292=17 Pat 168.

the true view of the transaction no question of family necessity arises. On behalf of the appellants however, it could be contended that the borrowing was in fact a part of the transaction of purchasing this property. This aspect of the case however was not pressed before us. The matter is not of great importance, because, however the borrowing is regarded, the mortgage, in my view, was a valid one which was binding on the property. If the money was borrowed to pay an antecedent debt, clearly the mortgage bound the property. On the other hand, if the borrowing was part of the transaction of purchasing the property, then the mortgage is a valid one for legal necessity by reason of the fact that the transaction was one which was beneficial to the estate and the family and was one which a prudent manager would have entered into. No argument has been addressed to us upon the evidence as to the other item which goes to make up the total sum of money advanced. The learned Judge held that legal necessity was established for this item and with that view I agree. The interest given in the decree exceeds the principal sum by Rs. 402. It has been contended by the appellants that Ss. 9, 10 and 11, Bihar Money-lenders Act, apply to this case; but this Bench is bound by the Full Bench decision in 20 P L T 1.⁹ This point involves a construction of various Sections of the Government of India Act, and that being so, it appears to me to be a fit case in which a certificate should be granted under S. 205 of that Act.

Manohar Lall J. — I agree. The very nature of the question, which requires to be answered in the present case, namely whether the mortgage of the ancestral property of the defendants in order to pay the purchase price of Pareyag Kapri's land was a speculative and risky transaction, indicates to my mind that this is eminently a question of fact and must be answered on the findings of facts and circumstances of this particular case. This view is in accord with the quotations from several judgments of this Court given by my Lord the Chief Justice in the judgment just delivered. But the learned advocate for the appellants relied strongly on the observations of Wort J. in 17 Pat 168⁸ where the learned Judge states at p. 172:

I have no hesitation in going so far as to say that jeopardizing a property, which is already the property of the joint Hindu family, for the purpose of purchasing another property can never under any circumstances be considered a benefit to the estate.

The facts found in that case were that the money was taken by a joint family on the security of a mortgage bond in order to obtain a usufructuary mortgage of certain property. The final Court of fact had found that the income of the property which the ancestors of the defendants took in usufructuary mortgage from the plaintiffs was Rs. 60 per annum only out of which Rs. 9 was payable as Government revenue with the result that the profit was only Rs. 51 a year excluding the collection charges: but the interest payable to the mortgagees was about Rs. 75 a year calculating at a simple rate although interest in arrears was agreed to be compounded. The learned Subordinate Judge put the question to be answered in this form: "the question is whether on these facts the transaction was for the benefit of the joint family." He after a review of the entire evidence in the case came to the conclusion that the transaction appeared on the face of it to be of a speculative character and disadvantageous to the interest of the joint family. I am of opinion, therefore, that it was not necessary for Wort J. to lay down the proposition in the broad form which is enunciated in the quotation referred to, because the finding of fact was quite sufficient to dispose of the appeal. But as the observation in quotation is couched in a general form I, with great respect, give my reasons why I do not agree with it. In the very decision of the Judicial Committee referred to by the learned Judge at p. 171 of 44 I A 147¹⁰ it is stated that in their Lordships' view it is impossible to give a precise definition of it (benefit to the estate) applicable to all cases. In the case of 5 P L J 622¹ also referred to by Wort J., the learned Chief Justice at p. 627 states:

It is not desirable to lay down any general proposition which would limit and define the various cases which might be classed under the term beneficial as above used. It is clear however that all transactions of a purely speculative nature would properly be excluded.

In my opinion these two authorities amply justify the view that it is impossible to lay down any hard and fast rule as to what should be and what should not be

9. *Sadanand Jha v. Aman Khan*, (1939) 26 A I R Pat 55=179 I C 379=18 Pat 13=20 P L T 1 (F B).

10. *Palaniappa Chetty v. Devasikamony Pandarasannadhi*, (1917) 4 A I R P O 88=89 I C 722=44 I A 147=40 Mad 709 (P O).

regarded as a purely speculative transaction in a particular case. In every case the Court of fact will consider prominently and accurately whether the transaction which is sought to be enforced in a particular case was for the benefit of the estate and this must be decided not from any *a priori* arguments but upon the facts of each case. I agree with the doubting opinion expressed by Rowland J., that it is impossible to endorse the proposition that it can never be beneficial to an estate to acquire a fresh property by hypothecating ancestral property for the purpose. It is to be noticed that Rowland J. was able to dispose of the case upon the clear findings of facts in the case which were that the transactions in question were not such as a prudent manager would or should have entered into on behalf of the family estate.

N.S./R.K.

Order accordingly.

* A. I. R. 1939 Patna 375

MOHAMAD NOOR AND CHATTERJI JJ.

Dulhin Kamlapati Devi — Plaintiff —
Appellant.

v.

Jageshwar Dayal and others —
Defendants — Respondents.

Appeal No. 56 of 1936, Decided on 16th November 1938, from original decree of Sub-Judge, Shahabad, D/-16th August 1935.

(a) *Res judicata* — Subsequent suit is not barred by *res judicata* if Court which tried previous suit is incompetent to try subsequent suit.

For the bar of *res judicata* under Sec. 11, Civil P. C., to apply one of the essential conditions is that the Court which decided the former suit must be competent to try the subsequent suit. Consequently the subsequent suit cannot be barred by *res judicata* by reason of the decision in the previous suit if the Court which tried it is not competent to try the subsequent suit. [P 377 O 1]

(b) *Transfer of Property Act* (1882), S. 74 — Subsequent mortgagee advancing money to mortgagor to pay off decree of prior mortgagee — He is entitled to subrogation against intermediate mortgagee.

Even under the old law though S. 74 was by its terms limited to any second or other subsequent mortgagee paying off the next prior mortgagee, the right of subrogation could be claimed by persons and under conditions other than those mentioned in S. 74. The subsequent mortgagee who advanced money to the mortgagor with which a decree of prior mortgagee was paid off is entitled to subrogation against an intermediate mortgagee: 10 Cal 1035 (P O); 21 Cal 70 (P O) and 27 All 325 (P O), Ref.

[P 377 O 2]

(c) *Transfer of Property Act* (1882), S. 92 as amended in 1929—S. 92 whether retrospective (*Quære*).

Whether S. 92 is retrospective in its operation.
[P 377 O 2]

* (d) *Mortgage — Subrogation—Subsequent mortgagee advancing money to mortgagor to pay off decree of prior mortgagee — Intermediate mortgagee made party to decree—Remedy to enforce right of subrogation would be by way of suit and not by execution after substitution in place of original decree-holder — Cause of action for such suit arises from date when mortgage decree was paid off.*

Subrogation means substitution, for the person redeeming is substituted for the incumbrancer whom he has paid off. The incumbrance that is paid off is treated as assigned to the subrogee who is regarded as an assignee in equity. The supposed assignment however does not necessarily carry with it all the consequences that would flow from a legal assignment. The subrogee, no doubt, acquires the rights and power of the incumbrancer whom he has paid off. He cannot acquire any higher rights. But it does not follow that the remedies for enforcing those rights are the same as those that were available to the prior incumbrancer. In other words, the remedies of a subrogee are not co-extensive with those of the original creditor. The remedies for enforcing the right of subrogation will depend on the equities of each particular case. [P 377 O 1, 2]

Where the subsequent mortgagee has advanced money whereby the decree of the prior mortgagee is paid off and the intermediate mortgagee was party to the decree, the remedy of the subsequent mortgagee to enforce the right of subrogation would be by way of suit and not by execution after substitution in the place of the original decree-holder. The cause of action for such suit arises not from the date when the right to sue on the original mortgage accrued but from the date when the mortgage decree was paid off: A I R 1936 All 33, Rel. on; 39 Cal 527 (P C); A I R 1922 Pat 499 and A I R 1927 Mad 631, Expl.

[P 378 O 1, 2]

(e) *Mortgage — Subrogation — Case of subsequent mortgagee paying off prior mortgage out of his own pocket and case where mortgagee advances money to mortgagor for purpose of paying off prior mortgage—Difference between explained.*

There is some distinction between the case where a person interested in a mortgaged property, either as subsequent mortgagee or otherwise, pays off a prior mortgage out of his own pocket in order to protect his own interest and the case where under a new contract of mortgage a person who thereby becomes a mortgagee advances money to the mortgagor for the express purpose of paying off a prior mortgage. In the former class of cases subrogation arises by operation of law whereas in the latter class it arises under a contract. When there is a contract there is no reason why it should not be deemed to give rise to a new cause of action.

[P 379 O 2]

* (f) *Mortgage — Subrogation—Prior mortgage paid in full by number of persons—They are entitled to claim subrogation in proportion to amounts they have respectively paid.*

Though a right of subrogation cannot be claimed unless the prior mortgage has been redeemed in full, it does not mean that the redemption must be effected entirely by the particular person who claims subrogation. All that is necessary is that the mortgage dues must have been fully satisfied. For instance, if three persons, A, B and C advance money with which a prior mortgage is redeemed in full, they are entitled to claim subrogation in proportion to the amounts they have respectively paid : *A I R 1937 All 588, Rel. on.* [P 380 C 1]

Khursaid Husnain, D. N. Varma and Kanhaiyaji — *for Appellant.*

Mahabir Prashad, M. N. Pal, Harians Kumar, Brahmadeva Narayan, A. B. N. Sinha and Harinandan Singh —
for Respondents.

Chatterji J.—This is an appeal by the plaintiff who brought a suit to enforce a simple mortgage dated 12th February 1930 executed by defendants 1 to 5 and 10 for Rs. 5000 carrying compound interest at 1 per cent. per mensem with yearly rests. Defendants 1 to 10 constitute a joint Mitakshara family of which defendant 1 is the karta. The properties covered by the mortgage bond in suit are (1) sixteen annas share of Mouza Sahiara, touzi No. 4690 ; (2) five annas four pies share out of sixteen annas of Mouza Sahiara, touzi No. 9522 and (3) sixteen annas share of Mouza Moap Khurd, touzi No. 11,828. These three together with some other properties had been hypothecated under two earlier simple mortgage bonds dated 25th May 1913 and 18th August 1914 in favour of one Sakhi Chand. He sued on those two mortgage bonds and obtained a preliminary decree for Rs. 9000 on 16th February 1928 which was made final on 27th September 1928. The decree was put to execution and the mortgaged properties were sold. It was to set aside that sale that the loan on the mortgage bond in suit was taken. The mortgagors raised further sums by loan and it is not disputed that those sums with the Rs. 5000 borrowed under the bond in suit were deposited in the execution case of Sakhi Chand with the result that his mortgage decree was satisfied and the execution sale was set aside. In the mortgage suit of Sakhi Chand the present defendant 13 who held a subsequent mortgage dated 1st June 1916 was impleaded as a defendant and he was a party to the mortgage decree and the execution case that followed. His mortgage dated 1st June 1916 comprise two out of the three properties mortgaged under the bond in suit, namely, (1) sixteen annas share in Mouza Sahiara, touzi

No. 4690 and (2) sixteen annas share in Mouza Moap Khurd, touzi No. 11,828.

Defendant 13 brought a suit (No. 6/125 of 1930) in the First Court of Munsif at Arrah to enforce his mortgage, impleading, besides the mortgagors, the present plaintiff as a subsequent transferee. In that suit the plaintiff did not appear and an ex parte preliminary decree was passed on 27th February 1923. The plaintiff made an application under O. 9 R. 13 for setting aside the ex parte decree but it was dismissed and the order of dismissal was upheld on appeal. The final decree was passed on 7th April 1934. The present suit was filed on 6th September 1934. The plaintiff has asked for a mortgage decree, claiming a right of subrogation as against defendant 13 in respect of the prior mortgagee Sakhi Chand's decree of 1928. The plaintiff has further asked for a declaration that the mortgage decree obtained by defendant 13 in his Suit No. 6/125 of 1930 in the Court of First Munsif at Arrah is ultra vires and inoperative.

Defendants 11, 12, 14 and 16 have been impleaded as subsequent transferees. Defendant 15 has been impleaded as he is a benamidar for the mortgagors in respect of some of the mortgaged properties. Defendants 2 to 5 and 10 filed written statements but they did not contest the suit at the final hearing. One of the objections raised by them is that the rate of interest is hard and unconscionable. The suit was contested by defendant 13 only on the grounds inter alia that his decree in Suit No. 6/125 of 1930 operates as res judicata, that the plaintiff's claim for subrogation is not tenable and is also barred by limitation. The learned Subordinate Judge has accepted the plea of res judicata and dismissed the suit as against defendant 13. He has however overruled the other defences raised by that defendant. He has passed a mortgage decree against all the remaining defendants. He has ordered that out of the three properties in suit only one, namely five annas four pies share out of 16 annas of mouza Sahiara, touzi No. 9522, shall be sold free from incumbrance while the remaining two properties shall be sold subject to the prior incumbrance of defendant 13 under his mortgage decree in Suit No. 6/125 of 1930. The plaintiff has preferred this appeal.

The only point raised on behalf of the appellant is that the claim for subrogation is not barred by res judicata. It is pointed

out that the decree of defendant 13 in Suit No. 6/125 of 1930 was passed by the Court of Munsif at Arrah whereas the present suit which is valued at Rs. 8625 was filed in the Subordinate Judge's Court at Arrah. Obviously the Munsif's Court which passed the decree in favour of defendant 13 in Suit No. 6/125 of 1930 was not competent to try the present suit. For the bar of res judicata under S. 11, Civil P. C., to apply one of the essential conditions is that the Court which decided the former suit must be competent to try the subsequent suit. Consequently, the present suit cannot be barred by res judicata by reason of the decision in the previous Suit No. 6/125 of 1930 of the Munsif's Court at Arrah. The learned Subordinate Judge has altogether overlooked this aspect of the case and his decision on the question of res judicata must be set aside. It has been contended on behalf of the respondent that the question of competency of the former Court to try the subsequent suit must be decided with reference to the point of time when the decree in the former suit was passed. Even then the plaintiff's claim for subrogation would exceed Rs. 5000 at the time when the decree in the suit of defendant 13 was passed. This contention, therefore, is of no avail to the respondent.

Mr. Mahabir Prasad, the learned counsel appearing for the respondent, has attempted to support the decree of the learned Subordinate Judge on the ground that the plaintiff's claim for subrogation is barred by limitation. His contention is that by subrogation the plaintiff merely acquired the rights under the prior mortgages dated 25th May 1913 and 18th August 1914 and the suit to enforce the claim for subrogation should have been brought within 12 years from the accrual of the causes of action on those two mortgages and the present suit, having been brought on 6th September 1934 is barred by limitation. In the first place, there are no materials on the record to show when the causes of action on the two prior mortgages in question arose. In the second place, the argument proceeds on a misconception of the rights and powers acquired by subrogation. Subrogation, of course, means substitution, for the person redeeming is substituted for the incumbrancer whom he has paid off. The incumbrance that is paid off is treated as assigned to the subrogee who is regarded as an assignee in equity. The supposed assignment, however, does

not necessarily carry with it all the consequences that would flow from a legal assignment.

In the Transfer of Property Act, as it stood before the Amending Act 20 of 1929, the term "subrogation" was nowhere used but the principle of subrogation was imperfectly expressed in Ss. 74 and 75 of the Act which have been repealed by the Amending Act 20 of 1929. The new S. 92 which has been introduced by the Amending Act 20 of 1929 expressly deals with subrogation. However, even under the old law though S. 74 was by its terms limited to any second or other subsequent mortgagee paying off the next prior mortgagee, it was consistently held that the right of subrogation could be claimed by persons and under conditions other than those mentioned in S. 74. In 10 Cal 1035¹ and 21 Cal 70² their Lordships of the Judicial Committee upheld the rights of subrogation even in favour of purchasers. In 27 All 325³ decided by the Judicial Committee the right of subrogation was allowed in favour of a subsequent incumbrancer paying off a decree on a prior mortgage. Again in 39 Cal 527⁴ their Lordships of the Judicial Committee held that the subsequent mortgagee who advanced money with which a prior mortgage was paid off was entitled to subrogation against an intermediate mortgagee. The law as laid down by these and other judicial decisions has now been enacted and clearly expressed in the new Sec. 92, T. P. Act. In the present case the transactions in question took place before the new S. 92 came into force. There is some controversy as to whether S. 92 is retrospective in its operation. But without going into that controversy, I shall deal with the case as if it is governed by the law as it stood before the new S. 92 came into force. It is not disputed that even under the old law a person in the position of the present plaintiff would acquire a right of subrogation.

Now the question is, how is this right to be enforced? The subrogee, no doubt,

1. Gokaldas Gopaldas v. Purnamal Premshukddas, (1884) 10 Cal 1035 = 11 I A 126 = 4 Sar 543 (P O).
2. Gobind Lal Roy v. Ramjanam Misser, (1894) 21 Cal 70 = 20 I A 165 = 6 Sar 356 (P O).
3. Gopi Narain Khanna v. Bansidhar, (1905) 27 All 325 = 32 I A 128 = 2 A L J 836 = 8 Sar 799 (P O).
4. Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh, (1912) 39 Cal 527 = 14 I O 496 = 39 I A 68 = 15 C L J 411 = 16 C W N 505 (P O).

acquires the rights and power of the incumbrancer whom he has paid off. He cannot acquire any higher rights. But it does not follow that the remedies for enforcing those rights are the same as those that were available to the prior incumbrancer. The decision of the Judicial Committee in 27 All 325³ which I have already referred to furnishes a clear example. In that case a prior mortgage decree was paid off by the subsequent mortgagee who was a party to the decree and by virtue of his right of subrogation thereby acquired he wanted to be substituted in the place of the decree-holder and to continue the proceeding but he was not permitted to do so on the ground that the decree was satisfied and the proceeding came to an end. He then brought a suit to enforce his right of subrogation which was decreed and the decree was upheld by their Lordships. This decision is completely destructive of the idea that the position of a subrogee is exactly that of an assignee of the prior incumbrance. Of course, there the question of limitation did not arise but the effect of the decision is that though the rights acquired by subrogation may be the same as those of the original creditor the remedies for enforcing such rights may be different. In other words, the remedies of a subrogee are not co-extensive with those of the original creditor. The remedies for enforcing the right of subrogation will depend on the equities of each particular case. In the present case, as in 27 All 325,³ the remedy to enforce the right of subrogation would be by way of suit and not by execution after substitution in the place of the original decree-holder. That being so, the question is, when would the cause of action for such suit arise? To hold that the cause of action would arise from the date when the right to sue on the original mortgage accrued would amount to a denial of the very right of subrogation that was unquestionably acquired upon payment of the mortgage decree, because a suit on the original mortgage might have already become barred when the decree was paid off or even when the decree was passed. The result would be that though the original creditor could execute his mortgage decree the subrogee would be in the position of bringing a suit on the original mortgage which had already become barred by lapse of time. Again, when a mortgage has ripened into a decree the mortgagee's rights are determined by the decree and he can

no longer lay any claim on the basis of his original mortgage and consequently the subrogee who has paid off his decree cannot put forward any claim on the basis of the original mortgage; his claim must be limited by the decree. He can only claim to recover the amount of the decree he has paid off with such interest as was allowed by the decree. Thus the position would be quite inconsistent if we were to hold that the remedy of a subrogee who has paid off a mortgage decree is to bring a suit on the original mortgage. His cause of action for a suit to enforce the right of subrogation would arise from the date when the mortgage decree was paid off. To hold otherwise would be, in my opinion, opposed to justice, equity and good conscience. In the present case, defendant 13 was a party to the mortgage decree of Sakhi Chand and was liable to pay the decree. The decree was however satisfied partly out of the money advanced by the plaintiff and partly out of funds raised by the mortgagor himself. So by the plaintiff's payment defendant 13's property has been saved and it would be most inequitable to hold that the plaintiff by his payment acquired no rights at all. I am supported in this view by the Full Bench decision of the Allahabad High Court in 58 All 602.⁵

Mr. Mahabir Prasad has referred to the cases in 39 Cal 527,⁴ 1 Pat 780⁶ and 50 Mad 626.⁷ In the Privy Council case in 39 Cal 527⁴ the facts, briefly stated, were these : There were successive mortgages in respect of certain properties, the earliest being for Rs. 12,000 under a zarpeshgi deed dated 20th November 1874 and the latest being for Rs. 12,000 under a simple mortgage bond dated 17th February 1888. The money under the zarpeshgi deed was repayable at the end of Jeth 1294 Fasli (June 1887; September 1887 in the judgment is a mistake). The zarpeshgi was redeemed on 15th July 1888 with the money borrowed under the last mortgage of 17th February 1888. The assignee of the last mortgage brought a suit to enforce it on 22nd September 1900 claiming priority in respect of the zarpeshgi against certain intermediate

5. Alam Ali v. Beni Charan, (1936) 23 A I R All 33=160 I C 541 = 58 All 602 = 1935 A L J 1294 (F B).

6. Sibanand Misra v. Jagmohan Lal, (1922) 9 A I R Pat 499=68 I C 707 = 1 Pat 780 = 3 P L T 533.

7. Kotappa v. Raghavayya, (1927) 14 A I R Mad 681=102 I C 316 = 50 Mad 626 = 52 M L J 532.

mortgagees who were impleaded in the suit. The intermediate mortgagees themselves had already sued on their respective mortgages and obtained decrees in execution of which the respective mortgaged properties were sold. To all these decrees except one the last mortgagee was a party. Their Lordships held that in the suit on the last mortgage the claim for priority in respect of the *zarpeshgi* was barred by constructive *res judicata* as against those intermediate mortgagees in whose suits the last mortgagee was made a party. As against the remaining intermediate mortgagee who in his suit failed to implead the last mortgagee the latter's claim for priority, though otherwise tenable, was held to be barred by limitation. Their Lordships observed as follows :

But as the Rs. 12,000 were under the *zarpeshgi* deed of 20th November 1874 repayable in *Jeth* 1294 *Fasli* (September 1887), and this suit was not brought until 22nd September 1900 the claim of the plaintiffs to priority is barred by Art. 132, Sch. 2, Limitation Act, 1877.

In the first place, it is to be noticed that the suit was brought after 12 years not only from the date when the money on the *zarpeshgi* deed was repayable but also from the date when it was repaid with the money borrowed on the last mortgage, the latter date being 15th July 1888. It was on this latter date that the right of subrogation accrued. The question whether limitation would run from the date when the money on the *zarpeshgi* deed was repayable or from the date when the right of subrogation accrued upon payment of that money was not raised or decided as it was immaterial, the claim being barred in either case. In the second place, the mortgage under the *zarpeshgi* deed had not ripened into a decree. In cases where subrogation is claimed by reason of payment of a prior mortgage decree to which the intermediate incumbrancers were parties different considerations may arise. On these grounds the said decision of the Privy Council is really of no assistance to the respondents.

In 1 Pat 780⁶ the facts were these : A subsequent mortgagee obtained a decree on his mortgage in execution of which he purchased the mortgaged properties. The judgment-debtors made an application under O. 21, R. 90, Civil P. C., to set aside that sale. Pending that application the decree-holder paid off a decree on a prior mortgage which had in the meantime been put to execution. The proceeding under O. 21,

R. 90 ended in a compromise by which the sale was set aside on the judgment-debtors paying the decretal amount. The subsequent mortgagee then brought a suit against the mortgagors to enforce the earlier mortgage by right of subrogation or, in the alternative, for a personal decree against them. The claim to enforce the earlier mortgage was dismissed as barred by limitation as the suit was brought more than 12 years after the accrual of the cause of action on that mortgage. The suit was however decreed, being treated as a simple action for reimbursement. Das J. who delivered the judgment (Coutts J. concurring) relied on the decision of the Privy Council in 39 Cal 527.⁴ While dealing with the facts of that Privy Council case the learned Judge fell into an obvious error in supposing that the suit was well within time if the right to enforce the earlier security under the *zarpeshgi* deed could be considered to have arisen on the date on which the *zarpeshgi* was redeemed. In fact the suit was beyond 12 years even from that date, the date of institution of the suit being 22nd September 1900 and the date of redemption being 15th July 1888 (not 17th February 1888 as stated by Das J.). There is also some distinction between the case where (as in the Patna case) a person interested in a mortgaged property, either as subsequent mortgagee or otherwise, pays off a prior mortgage out of his own pocket in order to protect his own interest and the case where (as in the present case) under a new contract of mortgage a person who thereby becomes a mortgagee advances money to the mortgagor for the express purpose of paying off a prior mortgage. In the former class of cases subrogation arises by operation of law whereas in the latter class it arises under a contract. When there is a contract there is no reason why it should not be deemed to give rise to a new cause of action.

The case in 50 Mad 626⁷ appears to have been decided on the assumption that the inference deducible from the Privy Council decision in 27 All 325³ is that limitation would run from the accrual of the cause of action on the original mortgage. With all respect I am unable to agree with this view or with the view also expressed therein as to the applicability of the Privy Council decision in 39 Cal 527.⁴ In my opinion the cause of action for the present suit, so far as the claim for subrogation is concerned, arose on 13th February 1930 when the

prior mortgage decree was paid off and therefore no question of limitation can arise.

Another question was raised as to whether the plaintiff who paid only a part of the mortgage decree could claim the right of subrogation. The law on the subject is that a right of subrogation cannot be claimed unless the prior mortgage has been redeemed in full. It does not mean that the redemption must be effected entirely by the particular person who claims subrogation. All that is necessary is that the mortgage dues must have been fully satisfied. For instance if three persons, A, B and C, advance money with which a prior mortgage is redeemed in full, they are entitled to claim subrogation in proportion to the amounts they have respectively paid. In support of this proposition I may refer to the case in I L R (1937) All 880.⁸

The question then arises as to the extent of the amount in respect of which the plaintiff will be entitled to claim priority against defendant 13. As I have already indicated, the plaintiff's claim must be limited by the decree that has been paid off. It has been satisfactorily proved that the entire sum of Rs. 5000 advanced by the plaintiff was utilized for the satisfaction of the decree. She is entitled to recover this sum with interest at the rate allowed by the decree. She has however claimed compound interest at the rate of 12 per cent. per annum according to the stipulation in her own mortgage bond which is not enforceable against defendant 13. A certified copy of the decree has been filed in this Court and we accepted it in evidence as we considered it necessary for the ends of justice. The copy has been marked Ex. 3. It shows that the decretal amount carried interest at Re. 1-2-0 per cent. per mensem, the decree being on compromise. The plaintiff would therefore be entitled by virtue of subrogation to recover Rs. 5000 with interest at Re. 1-2-0 per cent. per mensem thereon from 13th February 1930. But on behalf of the minor respondents 6 to 9 it has been contended that in view of the Bihar Money-lenders Act (Act 3 of 1938) which came into force on 15th July 1938, the plaintiff is not entitled to interest at more than 9 per cent. per annum. It is not necessary to go into the question whether the Bihar Money-lenders Act is applicable

in this case, because the learned advocate on behalf of the plaintiff-appellant has agreed to reduce the interest to 9 per cent. simple. The plaintiff's claim therefore will be reduced accordingly against all the defendants.

In the result the appeal is allowed and the decree of the lower Court will be modified as follows: The suit will be decreed for Rs. 5000 principal with simple interest at 9 per cent. per annum from 13th February 1930 till the expiry of three months from this date together with proportionate costs of the lower Court and full costs of this Court (the appeal being valued at Rs. 2500 only). If the defendants do not pay within three months from this date the amount that will be thus found due the mortgaged properties shall be sold for realization of the same with interest thereon at 6 per cent. per annum from the expiry of the said period of three months till realization.

Mohamad Noor J.—I entirely agree.

D.S./R.K.

Decree modified.

A. I. R. 1939 Patna 380

JAMES AND ROWLAND JJ.

Kamaldhari Lal and others —

Decree-holders — Appellants.

v.

Kamleshwari Sahay—Judgment-debtor — Respondent.

Appeal No. 125 of 1938, Decided on 24th January 1939, from original order of Sub.Judge, Bhagalpur, D/. 20th April 1938.

Civil P. C. (1908), S. 51 and O. 21, R. 21—Scope of—Application for execution by arrest of judgment-debtor—Judgment-debtor cannot object on ground that decree-holder should first proceed against property and be permitted to proceed against person only on failure of his remedy against property.

A decree-holder has the right to decide whether he should execute the decree for money by arrest of the judgment-debtor or by attachment and sale of property or by both. The discretion given to the Court by O. 21, R. 21 to refuse simultaneous execution against the person and the property does not extend to compelling the decree-holder to take either one of these methods: *A I R 1926 Lah 110, Foll.* [P 881 C 2]

Where a judgment-debtor being perfectly capable of paying is unwilling to do so and the decree-holder applies for execution by arrest of the judgment-debtor an objection to the application cannot be taken on the ground that the decree-holder ought in the first instance, to levy execution against the property and only be permitted to levy execution against the person on failure of his remedy against the property: *4 Cal 583; 7 Bom 301 and 9 All 484, Ref.* [P 881 C 2]

8. Hira Singh v. Jai Singh, (1937) 24 A I R All 588 = 171 I C 153 = I L R (1937) All 880 = 1937 A L J 840 (F B).

If it is considered an abnormal thing for a gentleman of wealth and position to be arrested, this should be because it is an abnormal thing for such a gentleman to evade, avoid, delay and obstruct payment of his just debts; and a debtor who is able to pay but does not pay is in the position of a person in contempt of Court. The proper course for such a person is to purge his contempt by fulfilling the order of the Court and paying the decretal amount. [P 382 C 1]

S. N. Bose — *for Appellants.*

D. L. Nandkeolyar — *for Respondent.*

Rowland J.—This is an appeal by the decree-holder who sought to execute a decree for money against one of his judgment-debtors who happened to be in the original transaction not the person primarily liable but a surety. The decree-holder has applied to the executing Court to execute the decree by the arrest of this judgment-debtor and the latter objected, firstly, that he being the surety and not the principal person liable, execution should not be levied against him until all means of execution against the principal judgment-debtors had been exhausted. That first objection was disallowed by the Subordinate Judge and rightly so. The second objection was that the decree-holder if he could proceed against this judgment-debtor, ought, in the first instance, to levy execution against the property and only be permitted to levy execution against the person on failure of his remedy against the property. This objection the Subordinate Judge allowed on the grounds that the objector had sufficient properties against which the decree-holder might proceed in the first instance, and that there was nothing convincing to show that the objector was likely to obstruct or to leave the jurisdiction of the Court or that he had dishonestly transferred, sold or removed any of his property or committed any other act of bad faith.

For the appellant-decree-holder, it is argued that these are not grounds on which a Court should disallow an application for the arrest of a defaulting judgment-debtor, that the decree-holder is given by the Code the option of choosing the manner in which he will ask the Court to execute his decree and that except as specifically provided in the Code, it is not for the Court to impose restrictions on this freedom of choice of the decree-holder. Reference is made to the decision in 6 Lah 548¹ in

1. Hargobind Kishan Chand v. Hakim Singh, (1926) 13 A I R Lah 110=93 I O 54=6 Lah 548.

which it was held that the decree-holder has the right to decide whether he should execute the decree for money by arrest of the judgment-debtor or by attachment and sale of property or by both; and that the discretion given to the Court by Order 21, Rule 21, to refuse simultaneous execution against the person and the property did not extend to compelling the decree-holder to take either one of these methods. The decision was founded on an examination of S. 51, Civil P. C., and of O. 21, Rr. 11 (1), 11 (2) and particularly Clause (j) and R. 17. R. 30 is also referred to. Reliance is placed on observations of the Bombay High Court in 7 Bom 301² to the effect that the creditor has a right to all the assistance which the law can give him. For the respondent we have been referred to the amendment made in Sec. 51 of the Code subsequent to the above admission. The Amendment Act of 1936 inserted a proviso placing some restrictions on the right of the decree-holder to obtain an order for arrest against the judgment-debtor. The Court must be satisfied either (a) that the judgment-debtor has done or is likely to do certain things designed to defeat the decree; or "(b) that the judgment-debtor has or has had since the date of the decree the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or" (c) that the decree was for a liability of a peculiar nature.

Now in dealing with the objection of the judgment-debtor, the Subordinate Judge has referred to the absence of matters referred to in Cl. (a) of the proviso; but he has not paid any attention to Cl. (b) and it is substantially the case of the decree-holder that arrest ought to be ordered on the ground that the judgment-debtor is perfectly capable of paying but is unwilling to do so. The objector took the following as grounds Nos. 10 and 11 of his petition of objection in the lower Court:

(10) That the petitioner is a man who holds high position in society and it is only with a view to lower him in the estimation of the public that such a wrong step is taken;

(11) that the petitioner has got sufficient properties and hence the decree-holders ought not to have prayed for warrant of arrest.

It has been submitted to us that the application for arrest was made with the

2. Chena Pemaji v. Ghelabhai Narandas, (1883) 7 Bom 301.

purpose of humiliating the judgment-debtor. On the other hand the appellant maintains that the sole purpose of applying for arrest was to obtain payment of the judgment-debtor. The objection taken shows, in my opinion, a misconception of the principles which should govern the relations between creditors and debtors. If it is considered an abnormal thing for a gentleman of wealth and position to be arrested, this should be because it is an abnormal thing for such a gentleman to evade, avoid, delay and obstruct payment of his just debts; and a debtor who is able to pay but does not pay is in the position of a person in contempt of Court. The proper course for such a person is to purge his contempt by fulfilling the order of the Court and pay the decretal amount. The petitioner before the Subordinate Judge took an objection that he was not liable; but this was asking the Court to go behind the decree and a party against whom a decree has been passed is not entitled to be judge in his own cause and to choose whether it should or not be executed against him. He is not entitled to resist execution merely because he is dissatisfied with the decision in the suit. On the legal point, I entirely agree with the decision in 6 Lah 548¹ which seems to be in accordance with the current of authority in earlier decisions under the old Code in the Calcutta and Allahabad High Courts, 4 Cal 583³ and 9 All 484.⁴ The Lahore decision, which I have cited, shows that the view of the Bombay High Court is on similar lines.

I would allow the appeal and set aside the order of the Subordinate Judge. I would disallow the objection of the judgment-debtor and direct that the execution case be restored and do proceed according to law. Mr. Bose for the appellant has assured us that in order to give the respondent an opportunity of satisfying the decree and avoiding arrest, his client will not take steps for the arrest of the respondent within two months. The appellant will get his costs of this appeal and of the objection in the Court below.

James J. — I agree.

N.S./R.K.

Appeal allowed.

3. Raja Chunder Roy v. Shama Soondari Debi, (1879) 4 Cal 583.

4. Johari Mal v. Sant Lal, (1887) 9 All 484 = 1887 A W N 101.

A. I. R. 1939 Patna 382

HARRIES C. J. AND AGARWALA J.

Fekua Mahto and others — Plaintiffs —
Appellants.

v.

Babu Lal Sahu and others —

Defendants — Respondents.

Appeal No. 155 of 1937, Decided on 17th November 1938, from appellate decree of Judicial Commissioner, Chota Nagpur, D/30th September 1936.

Mortgage—Redemption—Mortgage with possession by tenant — Owing to default of mortgagee in possession to pay rent holding sold in execution of rent decree and purchased by landlord — Mortgagor's right of redemption is extinguished and does not revive when holding is later on purchased by mortgagee.

Where a tenant has mortgaged his property with possession and the mortgagee in possession who is bound to pay rent has made default in payment of rent in consequence of which the holding is brought to sale by the landlord in execution of the rent decree and purchased upon such sale by the landlord himself but later the property comes into the hands of the original mortgagee, the mortgagor has no right for redemption when the rent sale is not proved to be fraudulent. Because the equity of redemption is forever extinguished by the sale in execution of the rent decrees and does not revive when the mortgagee eventually obtains the property : *A I R 1936 Pat 434, Foll.; 10 M I A 540 (P O); A I R 1916 P C 227 and A I R 1927 All 747, Expl. and Disting.* [P 383 C 2; P 384 C 1, 2]

B. C. De and K. K. Banarji —

for Appellants.

Ray Guru Saran Prasad, N. K. Prasad II,
L. K. Chaudhury and Ray Paras Nath

— for Respondents.

Harries C. J. — This is a plaintiffs' second appeal against a decree of the lower Appellate Court dismissing their suit for redemption. The facts which gave rise to this litigation are somewhat complicated and it is necessary to set them out in some detail. In the year 1886 the ancestors of plaintiffs 1 and 3 and defendants 8 to 10 mortgaged their tenure in village Haratu to one Mt. Sundar Kuar. In 1892 the mortgagors sold their rights to Braj Lal who paid up the money due on the mortgage and thus redeemed it. Later Braj Lal mortgaged the property to Nawal Kishore.

In the year 1898 the ancestors of plaintiffs 1 and 3 and defendants 8 to 10 again mortgaged the same village to defendants 1 to 7 and by the terms of this mortgage the latter who were given possession were bound to pay the rent due in respect of the tenure and were made liable in damages for any loss occasioned by their default. After this mortgage litigation ensued

between Nawal Kishore, who was the mortgagee under Braj Lal's mortgage and defendants 1 to 7 and others and eventually Nawal Kishore actually obtained a decree for possession of this village. However he never executed the decree and never obtained possession of the village. Defendants 1 to 7 appear to have been heavily engaged in this litigation and fell in arrear with their rent. On 18th July 1904, an eight annas share in this village was sold to Ramsewak Sahu in execution of a rent decree which the owners of the village had obtained. On 12th November 1904 the remaining eight annas share in this village was sold to A. T. Peppee in execution of another rent decree obtained by other owners. Therefore by the end of 1904 the whole of this village had been sold in execution of rent decrees to Ramsewak Sahu and A. T. Peppee. These two purchasers entered into possession of the property and remained in such possession until the year 1919. On 22nd May 1919, defendants 1 to 3 purchased the eight annas share held by Ramsewak Sahu and on 10th August 1919 they purchased the other eight annas share held by A. T. Peppee. By the end of 1919 therefore defendants 1 to 3 who were the mortgagees under the mortgage executed in the year 1898 had become the owners of the sixteen annas in this village. On 9th February 1933 the original mortgagors, namely plaintiffs 1 to 3 and defendants 8 to 10, sold twelve annas of their alleged mortgagor rights to plaintiffs 4 and 5. The plaintiffs contended that they still held the equity of redemption in this mortgage and brought the present suit claiming redemption.

The principal defence was that the equity of redemption had been extinguished in the year 1904 when the whole of this village had been sold in execution of the two rent decrees. It was argued that once the equity of redemption had been extinguished it could not be revived thereafter by reason of any purchase of the property by the original mortgagees. The trial Court held that the mortgagors' rights had not been extinguished and accordingly decreed the suit, but on appeal the learned District Judge held that the mortgagors' rights were extinguished by the sale in execution of the rent decrees in 1904 and therefore the plaintiffs had no right whatsoever to redeem the property.

There can be no question that the defendants who were the mortgagees under the

mortgage created in 1898, were bound to pay the rent due in respect of the tenure. This they failed to do and accordingly rent decrees were obtained and the whole village was sold under these two decrees. The trial Court appears to have held that the failure to pay rent was deliberate and intentional, and I am far from clear as to what the learned Subordinate Judge meant by the use of those words. The plaintiffs had attempted to show that the mortgagees had deliberately refrained from paying rent in order that the property should be sold in execution of rent decrees and purchased by their benamidars. It was hotly contended that one of the purchasers in these sales namely Sahu, was a benamidar for the mortgagee defendants, but the trial Court held as a fact that Sahu's purchase was a bona fide one. It was not suggested that A. T. Peppee's purchase was as benamidar for the defendants. Though the trial Court found that the purchases were not made by benamidars, yet it came to the conclusion that these sales were fraudulent and accordingly held that the mortgagors' interest was not extinguished by them. The learned District Judge on appeal came to the conclusion that it had been established that the defendants were guilty of any fraud. All that was established was that the mortgagees had failed to pay the rent and that the village had in consequence been put up for sale in execution of rent decrees obtained by the owners. All therefore that can be alleged against the mortgagees is that they failed to pay the rent due in respect of the tenure, and there is no finding whatsoever that such failure was due to collusion or fraud or anything of that nature.

It is conceded that where a sale takes place in execution of a rent decree a mortgagor's interest is in ordinary cases extinguished and the property is sold and purchased free from all encumbrances. It is however contended on behalf of the appellants that where a property is sold in execution of a rent decree and at some period later purchased by the mortgagees whose failure led to the rent decrees, such purchase by the mortgagees revives the equity of redemption and thereafter the mortgagors have a right to redeem. Reliance is placed on two decisions of their Lordships of the Privy Council. The first case relied upon is 10 M I A 540.¹ That was a case of

1. *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan*, (1868-66) 10 M I A 540 = 5 W R 88 = 1 Suther 635 = 2 Sar 198 (P O).

gross and deliberate fraud. An arrangement had been arrived at between the mortgagees and third persons that the mortgagees should allow the interest to fall into arrears so that rent decrees should be obtained and the property be put up for sale. It was further arranged that the property should be purchased and that it should come back to the mortgagees. Their Lordships of the Privy Council point out that the mortgagees in that case were guilty of a gross fraud and to allow them to hold the property free from the equity of redemption would be to allow them to gain an advantage from their own fraud. The whole decision proceeds upon the basis that mortgagees cannot gain an advantage from their own fraud and therefore where mortgagees on such cases have allowed rent to fall into arrears and the property to be sold in execution of rent decrees, such sale will not extinguish the equity of redemption as against the mortgagee if he subsequently acquires the property. In short, their Lordships of the Privy Council held that where fraud, such as I have indicated, exists, the sale must be treated as a private sale and not a public sale. In other words, a sale under a rent decree brought about by the fraud of the mortgagees cannot be held to defeat the rights of the mortgagors as against the mortgagees.

A later case is 44 Cal 573.² In that case the mortgagee allowed rent to fall into arrear and a sale had taken place in execution of a rent decree. The property eventually came into the hands of the mortgagee, and their Lordships of the Privy Council hold that the mortgagors had a right to redeem. In that case their Lordships came to the conclusion that the mortgagee concerned, who was a minor, was not himself guilty of fraud, but on the other hand, they held that his agents had engineered the whole transaction to enable the minor mortgagee to obtain the whole interest in the property. In short, it was found that the agents of the mortgagee were guilty of fraud and that being so, the mortgagee himself could not benefit by the fraud of his agents. The only substantial difference between this case and the earlier case in 10 M I A 540¹ is that in this later case the mortgagee himself was not guilty of fraud but only his agents. In my view the basis for the decision of both these cases

is the fraud practised by the mortgagees or their agents. Their Lordships of the Privy Council were simply applying the well known principle that no person should be permitted to benefit from his own fraud. These cases have no application whatsoever to cases where fraud on the part of the mortgagee has not been established.

A more recent case relied upon by the appellants is the case in 50 All 36.³ In that case a mortgagee of a fixed rate holding, who was under a covenant to pay the rent of the holding to the zamindar, made default in such payment, in consequence of which the holding was sold, and it was purchased by the mortgagee himself. It was held that the mortgagee could not by his own wrongful act deprive the mortgagor of his rights, and the mortgagor's equity of redemption still subsisted. It has been argued that no fraud was established in this case and it is contended that this case is an authority for the proposition that a mere breach of contract will have the same result as fraud. It is to be observed that the learned Judges who decided the Allahabad case purported to follow the case in 10 M I A 540¹ to which I have already referred. That, as I have pointed out, was a case of fraud. Further, it is clear that the learned Judges regarded the particular case before them as a case of fraud. It was a case where the mortgagee had failed to pay the rent and had then bought the property when it was put up for sale in execution of a rent decree. At p. 40 the learned Judges after discussing various cases observed:

It seems to us that these cases lay down a sound principle of law which prevents a fraud being practised on innocent parties. If property is sold owing to the wrongful act and default of the mortgagee himself, he cannot be allowed to claim it on the ground of his own wrong, for no cause of action can arise out of the wrong.

It appears to me that the learned Judges held in that case that the facts disclosed fraud on the part of the mortgagee and accordingly they held that the mortgagor's rights as against the mortgagee had not been extinguished by the execution sale.

The point before us has been considered by a Bench of this Court in A I R 1936 Pat 434.⁴ In that case a tenant mortgaged his property with possession. The mortgagee in possession, made default in

3. Jaikaran Singh v. Sheo Kumar Singh, (1927) 14 A I R All 747=103 I C 370=50 All 36=25 A L J 658.

4. Gauri Shanker v. Sheotahal Gir, (1936) 23 A I R Pat 484=164 I C 218=17 P L T 531.

2. Deo Nandan Prasad v. Janki Singh, (1916) 8 A I R P C 227=89 I C 346=44 Cal 573=44 I A 80 (P O).

payment of rent in consequence of which the holding was brought to sale by the landlord in execution of the rent decree and purchased upon such sale by the landlord himself. Later the property came into the hands of the original mortgagee. Thereupon the mortgagor instituted a suit for redemption claiming that his right to redeem the property had revived when the property came into the hands of the original mortgagees. A Bench of this Court, however, held that the rent sale which had not been set aside had extinguished the mortgagor's equity of redemption as the rent sale had not been proved to be fraudulent. In this case the learned Judges discussed the case in 10 M I A 540¹ and stressed the point that in that case fraud was practised and accordingly distinguished that case from the case before them. In the case before the Court nothing had been proved beyond the fact that the mortgagees had defaulted in the payment of the rent and the learned Judges refused to hold that the mortgagee was guilty of fraud merely on the ground that he had failed to pay his rent. As no fraud had been proved, the Bench held that the equity of redemption was for ever extinguished by the sale in execution of the rent decrees and did not revive when the mortgagee eventually obtained the property. If the equity of redemption is extinguished, I cannot see how it can possibly revive. If there is a fraudulent sale, the most that can be said is that the mortgagor's rights are suspended and revive when the property comes into the hands of the fraudulent mortgagees. In my view the facts of the present case cannot be distinguished by the facts of the case in A I R 1936 Pat 434,⁴ and that case must be followed. The result therefore is that the plaintiff-mortgagors have failed to show that they have a right to redeem and accordingly I would dismiss this appeal with costs. The costs will be payable to the defendants first party.

Agarwala J. — I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 385

COURTNEY-TERRELL C. J. AND

AGARWALA J.

Mahanth Jaikishun Dass — Petitioner.

v.

Ram Narain Das — Opposite Party.

Misc. Judicial Case No. 71 of 1936,
Decided on 16th November 1937.

1939 P/49 & 50

Civil P. C. (1908), O. 33, R. 5—Application to sue or to appeal in forma pauperis backed by champertors acting behind scenes—Application cannot be granted.

Rule 5 merely states a series of circumstances any one of which if proved compels the Court to reject the application and it is by no means exhaustive, and one of the circumstances which should prevent the Court from granting the permission is the fact if brought to the notice of the Court, that the suit has been throughout and will, if the application be rejected, be financed by a person who is behind the scenes. The machinery of leave to sue or to appeal in forma pauperis is not given for the purpose of promoting the interest of champertors but only for the purpose of protecting and giving assistance to people who are genuinely paupers and have no one to help them out of their difficulties. [P 386 C 1]

S. N. Ray — *for Petitioner.*

Rai Gurusaran Prasad —

for Opposite Party.

Courtney-Terrell C. J. — This is an application for leave to pursue a first appeal in forma pauperis. The appeal has already been admitted. The dispute between the parties is as to the right to the mahantship of a certain math the plaintiff alleging that he is the chela of the late mahant. The dispute in the first Court lasted some time and has provoked a very lengthy judgment by which the plaintiff's suit is dismissed, and in the course of that judgment the learned Judge has made it very clear that his finding is that the suit has really been promoted by certain persons who are using the plaintiff as a mere tool. It is admitted by everybody that the plaintiff being a chela in a math has got no property whatever and that he might properly be considered as a pauper, but the machinery of leave to sue or to appeal in forma pauperis is not given for the purpose of promoting the interest of champertors but only for the purpose of protecting and giving assistance to people who are genuinely paupers and have no one to help them out of their difficulties. The facts found by the learned Judge certainly lead to the inference that the plaintiff has entered into some arrangement with his backers and if the suit is one with himself as the nominal plaintiff they will derive substantial advantages.

It has been contended by the learned advocate on behalf of the applicant that pursuant to the provisions of O. 33, R. 5, Para. (e) it is incumbent upon the respondent to the appeal or the defendant to the suit, to prove that in fact a legal and valid agreement has been entered into, legally enforceable with respect to the subject.

matter of the proposed suit and to prove that somebody else has obtained an interest in such subject-matter, but R. 5 merely states a series of circumstances any one of which if proved compels the Court to reject the application and it is by no means exhaustive, and one of the circumstances which should prevent the Court from granting the permission is the fact if brought to the notice of the Court, that the suit has been throughout and will, if the application be rejected, be financed by a person who is behind the scenes. That fact is very amply demonstrated in this case, and for this reason it is necessary to refuse the application for these provisions are not intended for the benefit of such persons as really are working behind the applicant. The application, in my opinion, should be refused with costs, which we assess at two gold mohurs.

Agarwala J. — I agree.

D.S./R.K. *Application refused.*

A. I. R. 1939 Patna 386

WORT J.

Nripendra Nath Chatterji — Plaintiff
— Appellant.

v.

Jugal Prasad Mandal and others —
Defendants — Respondents.

Appeal No. 48 of 1938, Decided on 23rd December 1938, from appellate decree of Addl. Sub-Judge, Bhagalpur, D/- 8th November 1937.

(a) **Second Appeal—Finding that lands were totally unfit for cultivation—High Court has no jurisdiction to interfere.**

The question whether the lands were totally unfit for cultivation for the years in suit is a matter for the Court below and where the lower Appellate Court has accepted the finding of trial Court that the entire land has been diluviated and no area was cultivable in the years in suit, the High Court has no jurisdiction to interfere. [P 386 C 2]

(b) **Bihar Tenancy Act (8 of 1934), Ss. 52 and 180—S. 52 is wider than S. 180—Under S. 52 tenure-holders are entitled to abatement.**

Section 52 is a much wider Section than S. 180, inasmuch as it deals with every class of tenants. S. 52 undoubtedly gives right of abatement to tenure-holders. [P 387 C 1]

Subal Chandra Mazumdar —
for Appellant.

S. C. Misra — *for Respondents.*

Judgment.—This appeal arises out of an action for rent in which the defendants claimed abatement and in the result appears to have claimed total abatement on

the ground that the lands in suit were covered with water of the Ganges for the years for which rent was claimed. It is contended by Mr. Mazumdar appearing on behalf of the plaintiff-appellant that the learned Judge is in error both in law and on the facts of the case, inasmuch as in the first instance the claim by the defendants was merely for an abatement in the sense that the lands were less fit for cultivation than they would have been but for the fact that the lands had become diluviated and when they reappeared sand was deposited on them. I must say that it looks very much as if it had been the defendants' original case, because an application was made for the appointment of a commissioner for the purpose of ascertaining these facts; but that appears to have been abandoned and ultimately the Judge refused to appoint a commissioner. In the result the Judge came to the conclusion that the lands were totally unfit for cultivation for the years in suit. Whether this was so or not was a matter for the Court below and I cannot see how this Court can interfere, although I must say, if I had to try this case in the first instance, that I should have very grave doubts whether the defendants' case in this regard was made out. Not only is the evidence vague but it appears to be somewhat contrary to the case that was made out at first. But this much is to be said for the defendants that in para. 5 of the written statement defendant 1 does state that "the rent claimed land was entirely washed away by the Ganges" in two years. This appears to have entitled the landlord to rent at least for some of the years in suit. The Appellate Court accepted the finding of the trial Court which was to this effect :

On this point the evidence is *ex parte* and unchallenged. Defendant has pledged his oath and has examined a boundary man to say that the entire land has been diluviated and no area was cultivable in the year in suit.

Strictly speaking I suppose he should have amended the defence before being allowed to make a case of that kind. But it has been accepted, as I have said by the trial Court and the Appellate Court, and I have no jurisdiction to interfere as much as I feel inclined to. As regards the point of law the matter seems to be perfectly clear. Mr. Mazumdar relies upon S. 180, Bihar Tenancy Act, which amongst other things provides as follows :

A raiyat . . . until he acquires a right of occupancy in the land, shall be liable to pay such rent

for his holding as may be agreed upon between him and his landlord.

Mr. Mazumdar contends that that Section applies and not S. 52. Now, S. 52 is a much wider Section than S. 180, inasmuch as it deals with every class of tenants. The words of the Section are "Every tenant shall" and we know from the definition of tenant in S. 4 of the Act that a "raiya" is simply one class of tenant. Sec. 52 undoubtedly gives right of abatement, and as these defendants are not raiyas but tenure-holders, as has been held by the Judge in the Court below, it seems to me on the question of law that the learned Judge was right in holding that, if the facts were established, the tenants would be entitled to abatement. In the paragraph of the written statement to which I have referred the defendant agrees to pay one anna per bigha for the purpose of fixing his rights in the land when it should reappear from water. Ordinarily stated the Judge would have given judgment for the plaintiff for this amount; but he points out that he is unable to assess that as the area has not been shown. If it had been a matter of any great value to the landlord I might incidentally say in parenthesis that it is of greater value to the defendants, I might have remanded the case for this question to be determined. But as it is of no particular value to the plaintiff-landlord, I do not propose to adopt that course. With these observations I hold that the appeal fails and must be dismissed with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 387

AGARWALA J.

*Ramnarin Singh and others —
Defendants — Petitioners.*

v.

*Atal Behari Singh and others —
Plaintiffs — Opposite Party.*

Civil Revn. No. 560 of 1938, Decided on 31st January 1939, against order of Munsif, Hajipur, D/- 27th July 1938.

Civil P. C. (1908), O. 32, R. 7—No particular form need be used by Court in granting permission — Application on behalf of minors for leave — Order of Court directing matter to be referred to arbitration held amounted to recording permission.

The language of O. 32, R. 7 does not indicate any particular formula to be used by the Court in granting leave and so long as an application is made to the Court for leave and the Court is aware that the application is on behalf of minors and

exercises its judicial discretion to permit the guardian to enter into a compromise on behalf of the minors, the compromise is binding even though there is no record expressly granting the Court's leave : *A I R 1923 Pat 375, Rel. on; A I R 1928 All 534 and A I R 1916 Pat 223, Disting.*

[P 388 C 1]

An application to refer to arbitration was signed by the guardians of the minor plaintiffs and the defendants and an application was filed by the guardian of the minor defendants seeking permission to refer the matter to arbitration. Court passed an order on these petitions directing that the matter should be referred to arbitration :

Held that the circumstances indicated that the Court had applied its mind to the application of the guardian of the minors for permission to agree to the reference and hence the order directing reference to be made amounted to the recording of its permission.

[P 389 C 1, 2]

S. K. Mitra — *for Petitioners.*

Ganesh Sharma and Satish Chandra Misra — *for Opposite Party.*

Order.—The opposite party instituted a suit for the recovery of 15 dhurs of land alleging that the petitioners had encroached upon the land of the plaintiffs. Two of the plaintiffs and two of the defendants were minors. These minors were represented in the suit by guardians. An application was filed on behalf of all the parties requesting the Court to refer the matter in dispute to arbitration. The application was signed by the adult plaintiffs and defendants and by the guardians of the minor plaintiffs and defendants. There was also an application made by the guardian of the minor defendants for permission to enter into the agreement to refer to arbitration but no such application was made by the guardian of the minor plaintiffs. The Court considered the application to refer the matter to arbitration and referred it to arbitration. When the arbitrators submitted their award, objection was taken on behalf of the minor defendants. This objection was overruled. An application was then made on behalf of the minor defendants for review on the ground that the Court had not recorded express permission to the guardians of the minor plaintiffs and defendants to agree to refer the suit to arbitration. The application for review having been disallowed, this petition in revision has been presented on behalf of the defendants.

In course of the argument reference was made to the decision of this Court in 35 I C 675¹ where it was held that the next friend or guardian of a minor cannot

1. *Hanuman Rai v. Jagdish Rai*, (1916) 3 A I R Pat 223=35 I C 675.

compromise on behalf of the minor without the leave of the Court expressly recorded in the proceedings. It is noticeable that in that case the guardian sought to withdraw from the compromise before the Court recorded its permission for her to enter into the compromise and it was observed by the learned Chief Justice :

It appears to me that it would not be right to hold that the Court was entitled to force the compromise on Mt. Raj Rani (the guardian) after she had withdrawn her petition praying for the leave of the Court to enter into the compromise.

The next case referred to was 111 I C 156.² That was a suit for ejectment against two co-tenants, one of whom was an adult and the other a minor under the guardianship of the adult defendant. The suit was compromised without the sanction of the Court and without the leave of the Court having been sought for the guardian to enter into the compromise on behalf of the minor defendant. The present case approximates nearer to the decision of this Court in 2 Pat 538,³ where it was held that when it is shown that an application for leave to compromise a suit on behalf of the minor was made by the guardian and noted by the Court, a decree passed on the compromise entered into by the guardian is binding on the minor. The view which the learned Judges took of the language of O. 32, R. 7, requiring the leave of the Court to be expressly recorded in the proceedings, was that this did not indicate any particular formula to be used by the Court in granting leave and that so long as an application is made to the Court for leave and the Court is aware that the application is on behalf of the minors and exercises its judicial discretion to permit the guardian to enter into a compromise on behalf of the minors, the compromise is binding even though there is no record expressly granting the Court's leave.

Now as I have already stated, the present application in revision arises out of an application for review. On the application for review the question the Court was asked to investigate was whether there had been a granting of leave to the guardian to refer the matter to arbitration. The Court held that in view of the application to refer to arbitration being signed by the guardians of the minor plaintiffs and the defendants

and in view of the application filed by the guardian of the minor defendants seeking permission to refer the matter to arbitration and in view of the order of the Court on these petitions directing that the matter should be referred to arbitration that the provisions of O. 32, R. 7 had been sufficiently complied with. In view of the observations in 2 Pat 538³ it was certainly open to the Court to find that the circumstances mentioned above, indicated that the Court had applied its mind to the application of the guardian of the minors for permission to agree to the reference and that the order directing reference to be made was the recording of its permission. In these circumstances, there is no ground made out for interfering in revision with the decision of the Court below, more particularly as it is not alleged that there was any fraud or misconduct on the part of the guardian of the minors or on the part of the arbitrators. I will therefore dismiss this application with costs; hearing fee one gold mohur.

N.S./R.K.

Application dismissed.

A. I. R. 1939 Patna 388

AGARWALA J.

Ragho Prasad — Petitioner

v.

Emperor.

Criminal Revn. No. 38 of 1939, Decided on 13th February 1939, against order of Magistrate, Patna, D/- 15th November 1938.

Penal Code (1860), Ss. 279 and 338—Rash and negligent driving resulting in grievous hurt being caused to another—Accused should be convicted under S. 338 only and not both under Ss. 279 and 338.

Section 279 makes rash driving or riding on a public road punishable if such rash driving or riding endangers human life or is likely to cause hurt or injury to any other person. Where the rash or negligent driving actually results in grievous hurt being caused to any person, an offence under S. 338 is committed and accused can be convicted under S. 338 but not both under Ss. 279 and 338 : *A I R 1928 Pat 326, Rel. on.* [P 389 C 1]

Mahabir Prasad and K. Deyal —

for Petitioner.

Order.—The petitioner has been convicted under Ss. 279 and 338, I. P. C., and sentenced to a fine of Rs. 50 on each of the charges or in default to undergo rigorous imprisonment for 15 days. The fine, if realized, to be paid as compensation to the complainant. The facts were that on the night of 1st January 1938 he was driving a

2. *Har Sarup v. Tohfa Singh*, (1928) 15 A I R All 534=111 I C 156.

3. *Ishan Chandra Kundu v. Nilratan Adhikari*, (1928) 10 A I R Pat 375=72 I C 1049=2 Pat 538=4 P L T 311.

motor car in a reckless manner along a road in this town and drove into the hackney carriage in charge of the complainant with the result that the complainant and his passengers were hurt. The only question is whether in these circumstances he should have been sentenced under both Ss. 279 and 338. The former Section makes rash driving or riding on a public road punishable if such rash driving or riding endangers human life or is likely to cause hurt or injury to any other person. Where the rash or negligent driving actually results in grievous hurt being caused to any person, an offence under S. 338 is committed. In A I R 1928 Pat 326¹ a Division Bench of this Court held that the imposition of separate sentences was not justified where the acts constituting two different offences form part of the same transaction against the same accused. That observation appears to apply to the facts of this case and I would therefore set aside the sentence under Sec. 279, I. P. C. The conviction and sentence under S. 338 will remain.

D.S./R.K.

Order accordingly.

1. Mt. Champa Pasin v. Emperor, (1928) 15 A I R Pat 326=108 I C 81=29 Cr L J 325.

*** A. I. R. 1939 Patna 389**

HARRIES C. J. AND MANOHAR LALL J.

Santa Prasad Singh — Plaintiff

— Appellant.

v.

Thakur Harkishore Prasad Singh —

Defendant — Respondent.

Appeal No. 38 of 1937, Decided on 20th January 1939, from decision of Sub-Judge, Santal Parganas, Deoghar, D/- 23rd December 1936.

* Limitation Act (1908), S. 20 (as amended in 1927)—Words "paid as such" are redundant after amendment — Payment made by debtor to creditor without specification but appearing in handwriting of person making it — Creditor appropriating it towards interest — Payment is deemed to be of interest as such within Section 20 (1).

Previous to the amendment of S. 20 the fact of payment of interest needed no acknowledgment in writing by the person making the payment, whereas a payment towards principal required such an acknowledgment to extend limitation. After the amending Act payments towards interest or principal required acknowledgments of the payments in the handwriting of the person paying in order to be effective in extending the time. The words "paid as such" may have been necessary in the Section before it was amended; but after the amendment no effect can be given to them, and hence they are redundant. [P 390 C 1; P 391 C 1]

Where therefore a debtor makes payment to the creditor within the period of limitation and the fact of payment appears in the handwriting of the person making it but the debtor does not specify whether the payment is towards interest or principal or towards both, then if the creditor appropriates the payment towards interest, it is a payment of interest as such by the debtor and saves limitation by reason of Sec. 20 (1): A I R 1936 Pat 183, Foll.; A I R 1937 Pat 410, Rel. on; *Minority view in A I R 1935 All 946, Approved.*

[P 389 C 2]

Sir Sultan Ahmed and S. N. Bose

— *for Appellant.*

G. P. Das, D. C. Varma and Sambhu Brahmeswar Prasad—*for Respondent.*

Harries C. J. — This is a plaintiff's appeal from a decree of the learned Subordinate Judge of Deoghar dismissing his claim for moneys due as principal and interest under a promissory note. On 10th February 1929 the defendant executed a promissory note for Rs. 9200 and by the terms of the said note he agreed to pay interest thereon at the rate of one per cent. per mensem. It appears that from time to time the defendant made payments to the plaintiff and these payments were all endorsed by the defendant in his own hand on the back of the promissory note. At the date of this suit a sum of Rs. 15,652-12-0 was due and owing as principal and interest upon the said note. A number of defences were raised; but it is only necessary to consider one of them, namely limitation. The learned Judge found that the note had been duly executed and that the sum claimed was due for principal and interest. He however found that the claim was barred by limitation and accordingly dismissed the suit. The plaintiff contended that certain admitted payments made by the defendant extended the time of limitation and that the suit was within time. The two payments relied upon were a payment of Rs. 400 on 21st April 1933, and a payment of Rs. 722-4-0 on 7th January 1934. These payments were within limitation, but according to the defendant's contention, they were not such payments as would extend the time in favour of the plaintiff. The payments are set out in para. 3 of the plaint, and it is to be observed that nowhere is it stated whether these payments were made towards interest or towards principal or both. All that is pleaded is :

That thereafter on 8th February 1932 the defendant repaid Rs. 70 and on 17th March 1932 repaid Rs. 60 and on 21st April 1933 repaid Rs. 400 and on 7th January 1934 repaid Rs. 722-4-0 towards the dues for the said loan and endorsed all the

aforesaid repayments in his own hand on the back of the said promissory note.

It is further clear from the next paragraph in the plaint that these payments were appropriated by the plaintiff towards interest, because he states that on 3rd February 1936, that is when the plaint was filed, the sum of Rs. 9200 was due as principal, that is the original sum advanced and Rs. 6452.12.0 as interest. It is clear, therefore, that the plaintiff must have appropriated all the payments made towards interest. It is to be observed that the defendant does not deny this in his written statement. He says that the allegations contained in paras. 3 and 4 of the plaint, which relate to payments and appropriation, are partially correct, though he says that the plaintiff had not given credit for all the amounts paid by the defendant. Further, it is clear that the defendant had made endorsements on the back of the promissory note in respect of each of these payments. Though the learned Judge was satisfied that two payments had been made within the period of limitation, yet he felt constrained to hold that the suit was barred by reason of certain decisions of other Courts upon the construction to be given to S. 20, Limitation Act. He accordingly dismissed the suit. The only point for consideration is whether time was extended by these payments by reason of Sec. 20 (1), Limitation Act, as amended by Act 1 of 1927. S. 20 (1), Limitation Act, as amended, is in these terms :

Where interest on debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made :

Provided that, save in the case of payment of interest made before 1st day of January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

It is to be observed that before the Amending Act of 1927 a written acknowledgment of the payment was only necessary in the case of a part payment of the principal sum due. Further before and after the amendment the words "paid as such" appear in connexion with sums paid as interest. It has been argued before us by Sir Sultan Ahmed on behalf of the appellant that this case is concluded by authority of this Court, and in my view this

contention is well founded. The precise point which arises in this case was decided by a Division Bench of this Court in 16 Pat 294.¹ In that case a payment was made by the debtor to the creditor within the period of limitation, though the debtor did not specify whether the payment was towards interest or principal. The creditor appropriated the payment towards interest and a Bench of this Court held that the payment was a payment of interest as such and as the fact of payment appeared in the handwriting of the person making the same, a new period of limitation commenced from the date of such payment by reason of S. 20 (1), Limitation Act. In that case it was argued, as it has been argued before us, that a payment by a debtor to a creditor without any specification cannot be a payment of interest as such even though the creditor exercising his option has appropriated the payment towards the interest. The Bench of this Court expressly held that where such a payment is made and is appropriated by the creditor towards interest, it is a payment of interest as such by the debtor and saves limitation by reason of S. 20 (1), Limitation Act. This point was also argued in an earlier case of this Court, namely 16 Pat 27.² In that case a Bench were inclined to hold that a payment made without specification and appropriated by the creditor to interest was a payment by the debtor which prevented the bar of limitation.

A contrary view has been taken by a majority of three Judges in the Full Bench case in 58 All 261.³ In that case S. 20 (1), Limitation Act, was fully considered. The majority held that where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it wholly towards interest due, there is neither payment of interest as such nor a part payment of the principal within the meaning of S. 20, Limitation Act. A contrary view was taken by two Judges. I am inclined to agree with the view of the minority in this Full Bench

1. *Bankanidhi v. Godipatna Co-operative Society*, (1938) 25 A I R Pat 183=174 I C 1005=16 Pat 294=18 P L T 563.

2. *Bagha Co-operative Society v. Debi Mangal Prasad Sinha*, (1937) 24 A I R Pat 410=170 I C 130=16 Pat 27=18 P L T 809.

3. *Udaypal Singh v. Lakhmi Chand*, (1935) 22 A I R All 946=159 I C 387=1935 A L J 1029=58 All 261 (F B).

case. It was pointed out by Thom J. that the words "as such" in the Section appear to be redundant. In his view a payment of interest is a payment of interest, and it is no more a payment of interest if the words "as such" are added. Any other interpretation would lead to the absurd result that though the payment made without specification must either be towards interest or towards principal or partly towards both, it will not give a fresh start to limitation. Thom J. was of opinion that according to the rules of interpretation of statutes, it is permissible to ignore or reject words which are redundant or which lead to an absurd result.

In my judgment, these words are now redundant since the amendment of this Section of the Limitation Act by the Amending Act of 1927. Previous to the amendment, the fact of payment of interest needed no acknowledgment in writing by the person making the payment, whereas a payment towards principal required such an acknowledgment to extend limitation. After the Amending Act, payments towards interest or principal require acknowledgments of the payments in the handwriting of the person paying in order to be effective in extending the time. The words "paid as such" may have been necessary in the Section before it was amended; but, after the amendment, I cannot see what effect can be given to them, and in my view they are redundant. If they are not redundant, then in my view a payment made to a creditor which can be appropriated by the creditor at his option either towards principal or interest, is a payment of interest as such the moment the creditor appropriates the payment towards interest. If a debtor, for example, in terms said to the creditor that he was sending him Rs. 100 so that the latter could apply it either towards principal or interest as he desired, then in my view the payment would be a payment as such towards either principal or interest the moment the creditor had appropriated it to one or other. Unless some such view is taken, a payment by a debtor to a creditor without any appropriation becomes no payment at all so far as S. 20 is concerned if the creditor appropriates it towards interest. If he appropriates it towards principal, it would extend the time provided there was the necessary written acknowledgment. Even if there is such an acknowledgment, it will have no effect at all on limitation if the money is appropriated towards interest.

Such, to my mind, is a result which the Legislature could never have intended. In my view the minority view of the Allahabad Full Bench is to be preferred to the majority view. In any event this Bench must follow the previous decisions of this Court and accordingly I hold that the suit is not barred by limitation. There is no dispute as to the amount due under the note, and I would therefore allow this appeal, set aside the decree of the Court below and decree the plaintiff's claim for the amount claimed together with pendente lite interest at the rate of six per cent. and interest from the date of this decree onwards at the same rate. The appellant is entitled to the costs in this Court and in the Court below.

Manohar Lall J.—Having listened to the argument of the learned advocate for the respondent, I am not in the least convinced that the decision of this Court in 16 Pat 294¹ is erroneous. That decision follows the minority decision of the Allahabad Full Bench case in 58 All 261³ which, in my opinion, is correct, if I may say so respectfully. The payments in this case are said to be Rs. 400 in April 1933 and Rs. 722.4.0 in January 1934. The question is whether these payments are payments towards principal or towards interest or partly towards principal and in part towards interest. This can be decided either by the writings themselves or by some other evidence or by the operation of law. The defendant gives no evidence that he made these payments towards interest or towards principal. The plaintiff, on the other hand, states in his plaint in para. 4 that he appropriated these towards interest. The law allows him to do so. On the dates of these payments interest due was more than the amounts paid in. The result therefore is that on the evidence, as it stands upon the pleadings, it must be held in law that these payments were made towards interest.

It was then argued that the payments have never been made expressly towards interest 'as such'. I do not understand the meaning of the words 'as such' in S. 20 (1), Limitation Act, even as it stood before the amendment. If that Section is read, all it means is that where interest is paid on a debt before the expiration of the prescribed period by the person liable to pay the debt, certain consequences will follow. The words 'as such' appear to me to be redundant in that Section and are merely put in as *ex cautela*. The words are not "where money

is paid by the debtor" but where interest is paid. The amendment to the Section by the Act of 1927 contemplates these very meanings as pointed out by Sir Courtney-Terrell, late Chief Justice, in 16 Pat 294.¹ The Legislature now as a result of experience has directed that all acknowledgments of payments should be in the handwriting, of, or in a writing signed by the person making the payment as a safeguard against the reckless allegations that used to be advanced on behalf of the creditors that the debtor had made certain payments towards interest. The result is that if there is an acknowledgment in writing as in the present case, it can easily be seen from the accounts whether the payment is intended to be made towards interest or principal or both. In case of doubt it will be decided by the appropriation made by the creditor. In any case the debt has been acknowledged and this saves limitation. If the argument of the learned advocate for the respondent was sound, no evidence other than the writing was admissible to prove the nature of the payment. But that is not the meaning of the Proviso as added by the Legislature. I therefore agree that the appeal should be allowed with costs.

N.S./R.K.

Appeal allowed.

*** A. I. R. 1939 Patna 392**

FAZL ALI AND MANOHAR LALL JJ.

Satnarain Prasad Choudhury and others — Appellants.

v.

Mahabir Prasad Choudhury and others — Respondents.

Appeal No. 252 and Civil Revn. No. 582 of 1938, Decided on 15th February 1939, from decision of Dist. Judge, Muzaffarpur, D/- 29th June 1938.

(a) Civil P. C. (1908), S. 73—S. 73 covers also money voluntarily paid into Court by judgment-debtor to satisfy decree under execution.

By the use of words where assets are held by a Court in S. 73 the Legislature has considerably enlarged the scope of the Section and it is no longer permissible to hold that rateable distribution must be confined only to those cases where assets are realized by sale or by some other process of execution. The words of the new Section are wide enough to cover not only the money which a judgment-debtor is compelled to pay, but also money voluntarily paid into Court by him to satisfy a decree under execution. The words "assets held by a Court" obviously mean any fund in possession of a Court or at its disposal which may be applied by it for the payment of a judgment-debtor's debt. [P 393 C 2]

* (b) Civil P. C. (1908), S. 73—S. 73 is imperative—Sum paid in Court by judgment-debtor to satisfy decree of attaching creditor is asset available for rateable distribution among other creditors.

Section 73 is imperative. The assets are so distributable by the operation of law and there is nothing in this Section or any other provision of the Code to show that the Court must deal with them in accordance with the wishes of the judgment-debtor. When there are several decrees outstanding against a judgment-debtor, and all the requirements of S. 73 are complied with, the judgment-debtor cannot prevent rateable distribution by merely earmarking his payments for the benefit of one of the decree-holders. Hence a sum of money paid in Court by a judgment-debtor to satisfy the decree of certain creditors at whose instance his property has been attached is an asset available for rateable distribution among his other creditors under S. 73 : *A I R 1933 Pat 303, Foll.; Case law discussed.* [P 393 C 1, 2 ; P 394 C 1]

* (c) Civil P. C. (1908), O. 21, R. 55 and S. 73—Mere deposit does not satisfy decree—Sum paid into Court by judgment-debtor to satisfy decree of attaching creditor rateably distributed among other creditors — Entire decree of attaching creditor is not satisfied and attachment therefore continues (Per *Manohar Lall J.*).

The Legislature has never stated that a mere deposit will satisfy the decree. Ordinarily a decree will be satisfied if the deposit is made of the amount of the decree and there is no obstacle whatsoever in the decree-holder receiving it. In cases where the law intervenes and directs that although the full amount was intended to be paid to the decree-holder, but it has to be diverted by reason of S. 73 or some other provisions of the Code, obviously the decree has not been satisfied in full even though there had been a deposit of the full decretal amount. Cl. (a) of R. 55 ought to be read in such a way so that the provisions of S. 73 and O. 21, R. 55 do not conflict with each other. Hence where sum paid into Court by judgment-debtor to satisfy decree of attaching creditor is made available for rateable distribution among other creditors, the entire decree of attaching creditor is not satisfied and the attachment therefore continues. [P 396 C 1]

(d) Interpretation of Statutes—Each part of statute should be so construed as to avoid conflict with other part (Per *Manohar Lall J.*).

It is a well-known rule of construction that each part of a statute should be endeavoured to be construed in such a way that there may be no conflict with any part if it can be done without doing any violence to the plain meaning of the language adopted by the Legislature. [P 396 C 1]

(e) Civil P. C. (1908), O. 21, R. 89 and S. 73—Five per centum of compensation paid to auction-purchaser cannot be treated as asset of judgment-debtor available for distribution to all decree-holders (*Obiter per Manohar Lall J.*).

The five per centum of compensation which is paid to the auction-purchaser is not in payment of a debt due to the auction-purchaser. It is a statutory payment in order to ensure the setting aside of the sale. The auction-purchaser is never executing any decree and nothing is due to him from the judgment-debtor, the amount which is being paid by the judgment-debtor as a part of the

statutory requirement is not being paid by him to his creditor and therefore it cannot be called an asset available for distribution. [P 396 C 2]

S. K. Mitter — *for Appellants.*

A. K. Mitter — *for Respondents.*

Fazl Ali J.—The question to be decided in this appeal is whether a certain sum of money paid in Court by a judgment-debtor to satisfy the decree of certain creditors at whose instance his property has been attached is an asset available for rateable distribution among his other creditors under S. 73, Civil P. C. This question arises upon the following undisputed facts: The appellants being judgment-debtors under several decrees for money, one of the decree-holders, namely Mahabir Choudhry, proceeded to attach some of their properties in execution of his decree. The appellants in order to pay up the decree deposited in Court on various dates several sums of money aggregating to Rs. 2472-12-0 which if there had been no other dues outstanding against them, would have fully satisfied this particular decree. All these deposits however were made after two other creditors of the appellants, who had also obtained decrees against them, had applied for rateable distribution under Sec. 73, Civil P. C. The learned Munsif rateably distributed the amount deposited by the appellants among their three creditors and overruled their contention that as their payments had been ear-marked for the purpose of satisfying the dues of Mahabir Choudhry, their property had to be automatically released under O. 21, R. 55. This rule provides among other things that where the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court the attachment shall be deemed to be withdrawn. The learned Munsif held that the entire decree of Mahabir Choudhry had not been satisfied and so the attachment must continue. The appellants after unsuccessfully appealing against the decision of the Munsif to the District Judge have now preferred this second appeal.

Now, if the case had to be decided under the Code of Civil Procedure as it stood before it was amended in 1908, there would not have been much difficulty in upholding the contention of the appellants. Indeed it appears that the precise point which has been raised in this case by the appellants was raised in 8 All 67¹ and upon the view

of the law which then prevailed it was held that the amount paid by the judgment-debtor for the satisfaction of a particular decree was not available for rateable distribution to the other decree-holders. It is to be noticed, that the language of S. 295 of the old Code to which S. 73 of the new Code corresponds, was somewhat different from that of S. 73. Under the old Code the Court could rateably distribute such assets only as were "realized by sale or otherwise in execution of the decree." In 6 Bom 588² Sir Charles Sargeant C. J. expressed the view that these words must be read as if the words "from the property of the judgment-debtor" were inserted after the word "realized." That case was followed in a number of other cases and though its correctness was doubted by Sir Lawrence Jenkins in 28 Bom 264,³ the view which prevailed in all the High Courts was that S. 295 applied only to sale proceeds of property sold in execution of a decree and money realized in one of the modes expressly prescribed by the various Sections of the Code. In 1908 the Section being amended the words "whenever assets are realized by sale or otherwise in execution of a decree" have been replaced by the words "where assets are held by a Court." It is obvious that by the use of these words the Legislature has considerably enlarged the scope of the Section and it is no longer permissible to hold that rateable distribution must be confined only to those cases where assets are realized by sale or by some other process of execution. The words of the new Section are wide enough to cover not only the money which a judgment-debtor is compelled to pay, but also money voluntarily paid into Court by him to satisfy a decree under execution. The words "assets held by a Court" obviously mean any fund in possession of a Court or at its disposal which may be applied by it for the payment of a judgment-debtor's debt. It is difficult to hold that the payments made by the appellants in this case fall outside this definition.

Now S. 73 being imperative, it is obligatory upon a Court to distribute rateably the assets held by it (irrespective of how they came into its hands) among all the creditors who are entitled to the benefit of this Section. The assets are so distributable

1. Gopal Dai v. Chunnilal, (1886) 8 All 67=1886 A W N 1.

2. Purshotamdass Tribhovandass v. Surajbharthi Haribharthi, (1881) 6 Bom 588.

3. Manilal v. Nanabhai, (1904) 28 Bom 264 = 6 Bom L R 11.

by the operation of law and there is nothing in this Section or any other provision of the Code to show that the Court must deal with them in accordance with the wishes of the judgment-debtor. When therefore there are several decrees outstanding against a judgment-debtor, and all the requirements of S. 73 are complied with, the judgment-debtor cannot prevent rateable distribution by merely earmarking his payments for the benefit of one of the decree-holders. Thus in the present case though the payments made by the appellants were made for the satisfaction of the decretal dues of Mahabir Choudhury alone, the Munsif had to dispose of the money paid by them in the manner provided in S. 73 with the result that the entire decree of Mahabir Choudhury has not been satisfied. O. 21, R. 55, must be read subject to S. 73 and if it is so read, the case before us will present no difficulty whatsoever.

The view which I have expressed is supported by the decision of a Division Bench of this Court in 12 Pat 772⁴ and by a number of decisions of the High Courts of Calcutta, Madras and Allahabad : see 47 Cal 515,⁵ 70 IC 539,⁶ 70 IC 541,⁷ 42 CWN 840,⁸ 41 Mad 616⁹ and 54 All 516.¹⁰ For the purpose of the present discussion it will be sufficient to refer to the first mentioned case only which has been relied on in a number of other cases. In that case on an application by a judgment-creditor for execution of a decree, money was paid by the judgment-debtor to the Sheriff who paid it into Court. Two other creditors, who had previously applied for execution, had part of their claim and the costs of execution respectively unpaid and asked for rateable distribution of the assets. A question then arose as to whether the money lying in the Court was available for rate-

able distribution, and while answering it in the affirmative Rankin J. observed as follows :

The money paid with whatever motive if paid to the Court is paid upon terms of the Code whatever they may be. These terms, as I read S. 73, have been laid down so that distinction in the form in which execution has been had, in the precise extent to which execution has been allowed to run in the exact source or genesis of the fund in Court, are now no part of the definition of the assets that are subject to distribution rateably. The object of the new Code in using larger language can only be to avoid anomaly. To introduce a distinction on the strength of the voluntariness of the payment or the purpose of the debtor, is, I think, to cut down the language and intention of the Code upon a principle which is inapplicable to the subject-matter and which if applicable is very difficult to imply.

It has been pointed out to us that a contrary view has been expressed by Scott C. J. in 36 Bom 156¹¹ who has commented upon S. 73 in these words :

In the reference to "the costs of realization" we have an indication that the Legislature contemplated that the assets referred to should be assets held in the process of execution. If we were to hold that money paid into Court under O. 21, R. 55, was assets held by the Court within the meaning of Sec. 73, we should be only nullifying the provisions of R. 55; for, there would be no inducement to any judgment-debtor to procure a payment into Court of the amount of the claim of his attaching creditor if the money could at once be absorbed by rateable distribution amongst a number of other creditors.

The soundness of this view was doubted by a learned Judge of the Bombay High Court in 21 Bom L R 975.¹² In that case the learned Judge referring to the grounds on which the remarks of Scott C. J. were based observed as follows :

The first ground follows the cases decided on the words "sale or otherwise, which are held to mean sale or other process of execution provided for in the Civil Procedure Code . . . But these cases all followed *Purshotamdas' case*² in restricting the process to one of sale or conversion of the property and I venture to doubt whether this is not too restrictive a construction under the amended Section in which the words "sale or otherwise" have been dropped and in which there is merely an implication that the assets should have been realized or obtained in execution proceedings. I also venture to doubt the correctness of the second reason. O. 21, R. 55, operates effectively where there is one decree-holder. If there are a number of decree-holders, there is no scope for the rule for the judgment-debtor has no motive for paying off one judgment creditor when the same property is liable to be reattached by the others. To allow one decree-holder to be paid off in full when the property is insufficient to discharge other judgment-debtors might possibly be undue preference and defeat the object of the Section which is equal

11. *Sorabji Cooverji v. Kala Raghunath*, (1912) 36 Bom 156=12 IC 911=13 Bom L R 1193.

12. *Nathmal v. Maniram*, (1919) 6 A I R Bom 152=53 IC 599=21 Bom L R 975.

4. *Bhattoo Singh v. Raghunandan Prasad Singh*, (1933) 20 A I R Pat 303=145 IC 390=12 Pat 772=14 P L T 357.

5. *Noor Mahomed v. Bilasiram*, (1920) 7 A I R Cal 785=59 IC 458=47 Cal 515.

6. *Ghisulal Agarwala v. Todermall Agarwala*, (1922) 9 A I R Cal 19=70 IC 539=26 CWN 169.

7. *Hari Charan Roy v. Birendra Nath*, (1921) 8 A I R Cal 749=70 IC 541=35 C L J 327.

8. *Chittagong Urban Co-operative Bank Ltd. v. Indo Burma Trades Bank Ltd.*, (1938) 25 A I R Cal 521=176 IC 607=42 CWN 840.

9. *Thiraviyam Pillai v. Lakshmana Pillai*, (1919) 6 A I R Mad 647=47 IC 538=41 Mad 616=35 M L J 150.

10. *Sidhnath v. Tegh Bahadur*, (1932) 19 A I R All 411=188 IC 106=54 All 516=1932 A L J 359.

distribution of all the moneys received in execution. Again why should a judgment creditor, whose attachment has been removed under O. 21, R. 55, be in a better position than a judgment creditor who has taken the trouble of bringing the property to sale. Lastly, if the money paid under O. 21, R. 55, to remove an attachment is not available for rateable distribution then a fortiori money paid to stop a sale under O. 21, Rule 83, would also not be so available So that the interpretation put upon the Section in 36 Bom 156¹¹ makes the new Section more restrictive than the old one, and this is not what the Legislature intended.

Again in 28 Bom L R 237¹³ another learned Judge of the Bombay High Court refused to follow the opinion of Scott C. J. on the ground that the observations made by him were in the nature of obiter dicta. We are informed that the opinion expressed by Scott C. J. has been followed in A I R 1925 Nag 157¹⁴ and has also been quoted with approval in 5 Rang 573¹⁵ but it appears to me that the balance of authority is against that view and for the reasons I have already stated I have no hesitation in following the view already expressed in 12 Pat 722.⁴ In my opinion therefore the decisions of the Courts below are correct and I would accordingly dismiss this appeal with costs. Civil Revision No. 582 of 1938 is dismissed without costs.

Manohar Lall J.—On 30th March 1938 the appellant deposited a sum of Rupees 2479.12.0 towards the full satisfaction of the decretal amount and costs due from him to the respondents who were executing their money decree by attaching a property of the appellants in Execution Case No. 44 of 1937. Prior to that date two other decree-holders, who are also respondents before us, had applied on 27th September 1937 and on 21st March 1938 respectively for a share in the rateable distribution of the assets if and when realized from the sale of the property of the judgment-debtor under attachment. The learned Munsif distributed the amount deposited on 30th March 1938 rateably among the three decree-holders. The appellant being aggrieved by the order which has resulted in the continuation of the attachment of the property due to the partial satisfaction of the decree under execution in Case No. 44

of 1937 has appealed to this Court against the appellate order of the learned Subordinate Judge affirming the decision of the Munsif ordering a rateable distribution. The question upon these facts which arises is whether the Courts below had any jurisdiction to distribute the amount which had been deposited by the judgment-debtor appellant. The argument before us took the form that the provisions of O. 21, R. 55, Cl. (a) specifically provide that

where the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, the attachment shall be deemed to be withdrawn, and therefore it was argued that when on 30th March 1938 the amount of the decree in Execution Case No. 44 of 1937 together with costs had been deposited, the Court had no jurisdiction except to withdraw the attachment and erred in law in distributing the proceeds rateably. It appears to me that this argument is unsound. The provisions of S. 73 are imperative. It leaves no option in the Court and directs the Court that where assets are held by the executing Court, the assets after deducting the cost of realization shall be rateably distributed among the persons entitled to share rateably in the distribution as provided in the Section. The assets become available for payment in the hands of the Court on the date when the assets are paid in or realized by the Court. The direction under S. 73 seizes the assets as soon as they are paid in and the subsequent diversion of the assets is then regulated not by the wishes of the person who has deposited the assets but by the operation of law. It is immaterial with what object and desire the judgment-debtor deposited the amount in Court because as observed by Rankin J. in 47 Cal 515⁵ the deposit in Court must be taken to be on the terms provided by the Code of Civil Procedure and not upon the supposed wishes or desires of the judgment-debtor. If the judgment-debtor so desired, it was open to him to pay the money outside the Court, but when he chooses to deposit the money within the Court, the terms of the Civil Procedure Code begin to operate and the law as provided in the Code must take effect. The apparent difficulty which has been felt by Wort J. in 13 Pat 446¹⁶ does not appear to me to be any difficulty at all. O. 21, Rule 55 is so worded as to ensure that the attachment

13. *Indaji Majaji v. Coovarji Nowroji*, (1926) 18 A I R Bom 242=93 I C 852=28 Bom L R 287.

14. *Firm Umrao Sharif v. Rodba*, (1925) 12 A I R Nag 157=81 I C 7.

15. *Administrator-General of Burma v. M. E. Moola*, (1928) 15 A I R Rang 19=105 I C 592=5 Rang 573.

16. *Radha Mohan v. Mt. Wahidan*, (1934) 21 A I R Pat 685=155 I C 918=13 Pat 446.

shall be deemed to be withdrawn when the decree has been satisfied. It will be a strange result if the decree is not satisfied and yet the attachment is deemed to be withdrawn by a mere deposit. The Legislature could not have meant to reach such an inequitable result. The decree may be satisfied either by deposit under Cl. (a) or otherwise as stated in Cl. (b). But the Legislature has never stated that a mere deposit will satisfy the decree.

Ordinarily a decree will be satisfied if the deposit is made of the amount of the decree and there is no obstacle whatsoever in the decree-holder receiving it. In cases where the law intervenes and directs that although the full amount was intended to be paid to the decree-holder, but it has to be diverted by reason of S. 73 or some other provisions of the Code, obviously the decree has not been satisfied in full even though there had been a deposit of the full decretal amount. Cl. (a) of R. 55 ought to be read in such a way so that the provisions of S. 73 and O. 21, R. 55 do not conflict with each other. It is a well-known rule of construction that each part of a statute should be endeavoured to be construed in such a way that there may be no conflict with any part if it can be done without doing any violence to the plain meaning of the language adopted by the Legislature. If R. 55 (a) is so read along with S. 73, it seems to me clear that the decree can only be satisfied if the amount is available to the decree-holder in full satisfaction of his decree. It has been held in a number of cases that a deposit which is made by the judgment-debtor under O. 21, R. 83, Civil P. C., is an asset available for rateable distribution. I do not see similarly how it can be argued that the deposit in the present case was not an asset within the meaning of the word "asset" used by my learned brother at p. 465 of 13 Pat 446¹⁶ which in my view gives the key to the solution of the present problem. The word "assets" must be taken to mean any fund in the hands of a Court which may be applied by the Court for the payment of the debt of a judgment-debtor. If the debtor has only a single debt, the Court is bound to apply the deposit or fund to the payment of that debt, but if the judgment-debtor has a number of decree debts, the executing Court, if satisfied that the conditions of S. 73 of the Code are fulfilled, is bound to apply it rateably to reduce the decree debts of the number of decree-holders

who are so entitled to share in the rateable distribution of the assets. In other words, the moment the deposit is made by a judgment-debtor to the executing Court or the money is realized involuntarily or voluntarily in the course of execution by the executing Court, the assets are held by the Court and they will be applied in the manner provided by the Code.

An argument was advanced in some cases depending upon the construction of O. 21, R. 89, Civil P. C. It was argued that where Rule 89, Cl. (a) directs payment of five per centum of the amount of sale price as compensation to the auction-purchaser, then logically this five per centum ought to be treated as part of the assets of the judgment-debtor and therefore it should be available for distribution to all the decree-holders and should not be paid to the auction-purchaser. The answer to this argument is very simple. The five per centum of compensation which is paid to the auction purchaser is not in payment of a debt due to the auction-purchaser. It is a statutory payment in order to ensure the setting aside of the sale. The auction-purchaser is never executing any decree and nothing is due to him from the judgment-debtor the amount which is being paid by the judgment-debtor as a part of the statutory requirement is not being paid by him to his creditor and therefore it cannot be called an asset available for distribution. For these reasons I think that the decision of this Court in 12 Pat 772⁴ was correct and with great respect, the doubt expressed by Wort J. in 13 Pat 446¹⁶ was not justified. The remarks of the learned Judge are expressly obiter because he says: "I think it is unnecessary to decide the question in the present case." He then goes on to observe:

To hold that the payment under O. 21, R. 55 was an asset distributable amongst decree-holders would raise difficulties which from one point of view are unsurmountable ;

and proceeds to point out that the terms of R. 55 definitely require that the attachment should cease the moment the amount is deposited irrespective of the claims against that deposit. I have already pointed out that I do not agree with this view. But even if this view is taken to be correct, I do not see how the fact, that an attachment is to be deemed to be raised the very instant the deposit is made, can have any bearing at all upon the subsequent diversion of the deposit by the operation of S. 73. The distribution of the assets is

one thing and the raising of the attachment is another. A recent case of the Calcutta High Court in 42 C W N 840^s expressly follows the decision of this Court in 12 Pat 772.⁴

My learned brother in the judgment just delivered has traced the history of the legislation by which a radical change has been effected in the corresponding Section under the Code of 1882 shewing that the present S. 73 is now much wider and in effect adopts the view expressed by Sir Lawrence Jenkins in the earlier Bombay case. I agree with those observations entirely and have nothing to add. For these reasons I agree that the appeal fails and must be dismissed with costs. The civil revision also fails, but there will be no costs.

D.S./R.K. *Appeal and Revision dismissed.*

A. I. R. 1939 Patna 397

VARMA AND ROWLAND JJ.

Radhaballabh Prasad Narain Singh —
Plaintiff — Appellant.
v.

Raghunath Lal and others —
Defendants — Respondents.

Appeal No. 261 of 1937, Decided on 12th January 1939, from appellate decree of Dist. Judge, Muzaffarpur, D/- 13th January 1937.

Civil P. C. (1908), O. 1, R. 10—Transposition of parties—Object of—Power is discretionary and its use depends upon facts of each case.

The Court, including the High Court in second appeal, has power at any stage under O. 1, R. 10 to permit a transposition of parties. The power is discretionary and its use will depend upon the circumstances of the particular case. The purpose of it is to enable the Court to be in a position to determine the real questions in controversy between the parties and to avoid allowing a mere technical objection successfully to defeat a just claim : *A I R 1931 P C 162; A I R 1931 P C 149 and A I R 1932 Pat 346, Rel. on.* [P 398 C 1]

S. M. Mullick, S. N. Roy, G. P. Singh
and R. P. Jaruhar — *for Appellant.*

B. N. Mitter and P. N. Gour —
for Respondents.

Judgment. — This is an appeal by the plaintiff in a rent suit. He is the proprietor of a share in village Masahi. Four annas share in that village was given by him on lease to the defendants first party on 6th May 1929, on an annual rent of Rs. 275-8-0 for a period of five years, viz., 1337 to 1341 Fasli. The kabuliyat was

executed by defendant 1; but it is the plaintiff's case that both defendant 1 and defendant 2, his brother, are joint and were jointly interested in the thica. On 11th May 1929 the plaintiff on taking a loan from defendant second party of Rs. 4000 gave the same share to him in zarpeshgi together with certain ziraitis which had been excluded from the thica lease in favour of defendants first party. In lieu of interest the zarpeshgi deed authorized the defendant second party to receive the rent due from time to time from the thicadar in respect of the thica lease and also to enjoy the usufruct of the zirait. No payments were made on account of rent by the thicadar either to the plaintiff or to defendant second party. The latter demanded from the plaintiff redemption of his principal money as the arrangement for satisfaction of the interest on it had not been successful. The plaintiff on 10th May 1935, paid off the zarpeshgi of defendant second party thereby redeeming the four annas share. On 29th August 1925 he instituted this suit impleading defendants first party, the thicadar and defendant second party, the zarpeshgidar, claiming thica rent for five years 1337 to 1341 Fasli. The defendant second party in substance supported the claim of the plaintiff, while denying any personal responsibility by himself to the plaintiff for the claim and asking for his costs. The defendants first party took several objections to the claim. They pleaded that the plaintiff was not the right person to sue for the money, as the redemption—the fact of which they questioned—did not convey to him the arrear rents accrued in the absence of a separate written assignment of those dues. Secondly, they resisted the claim on the ground of limitation. Thirdly, they denied to have been permitted to enjoy possession of the property, the subject of the lease; and finally, it was alleged that defendant 1 only had taken the thica and defendant 2 had no concern with it and was not liable.

The Munsif decided all the issues, except No. 2, in favour of the plaintiff. As regards No. 2, he held that the three year period of limitation applied under Art. 2 of Sch. 3, Ben. Ten. Act, and therefore the plaintiff's claim for 1337 and 1338 was barred, and the remainder of the claim was alive. On the remaining points his findings were in favour of the plaintiff and he gave a proportionate decree. On appeal the District Judge reversed the finding of the Munsif

on point No. 1, holding that the actionable claim for arrears of rent could only be transferred by an assignment in writing and not by mere redemption of the zar-peshgi. He did not decide the other issues.

In second appeal, Mr. Mullick for the plaintiff first contended that the plaintiff being the registered proprietor, the defendant could not resist him on the plea that he was not the person entitled to rent. Unfortunately, it appears to have been in the Courts below neither proved nor even pleaded that the plaintiff is the registered proprietor, and there is no foundation for applying S. 60, Ben. Ten. Act, and S. 78, Land Registration Act, in this case. On the other point, assuming the question of title to be open, Mr. Mullick could not contest the finding that the proper person to sue for the arrears of rent was the defendant second party. To meet this objection he informed us that the defendant second party (respondents 3 to 5 in this appeal) have presented a petition praying that they be transposed from the category of defendants to that of plaintiffs and from the category of respondents to that of appellants. The rest of the hearing centred round the question whether this application should be allowed. Mr. Mitter for the respondents opposed it on the ground that it would change the character of the suit, and that it would defeat the salutary provisions of the Limitation Act of which the defendants ought to get the benefit.

A number of decisions were cited from which it appears that undoubtedly the Court, including the High Court in second appeal, has power at any stage under O. 1, R. 10, Civil P. C., to permit such a transposition as is here applied for. The power is discretionary and its use will, of course, depend upon the circumstances of the particular case. The purpose of it, like that of the provision in O. 6, R. 17 for amendment of pleadings, is to enable the Court to be in a position to determine the real questions in controversy between the parties and to avoid allowing a mere technical objection successfully to defeat a just claim. In 59 Cal 80,¹ where the defendants objected to the maintainability of a suit by the plaintiff, on the ground that the property was not his alone but was the joint property of himself and certain defendants, and where the pro forma defendants had asked

that a decree should be passed in favour of the appellants, their Lordships thought it unnecessary to determine the question of fact, observing that all the members of the family were parties to the suit and were at least jointly entitled to the whole, and that, if there was a technical objection to the Court passing a decree in favour of the plaintiff,

the Court clearly had power at any stage of the proceedings to remedy the defect under O. 1, R. 10, Civil P. C., by adding the pro forma defendants as co-plaintiffs with the appellant. Such a course should, in their Lordships' opinion, always be adopted where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings.

We may refer also to another case which came before their Lordships. In 10 Pat 654² the propriety of a transposition under O. 1, Rule 10 was not directly before their Lordships but such a transposition had been made. The suit was a suit for redemption brought by plaintiffs, who were transferees of the equity of redemption from the mortgagors by two permanent leases. In the suit, as originally framed, the mortgagors were joined as co-defendants. The mortgagee defendants resisted the suit denying the validity of the plaintiff's leases and consequently their right to redeem. Thereupon the mortgagor-defendants applied to be made co-plaintiffs. Their Lordships referred to this application as "an application which it was obvious must succeed." Transposition was allowed in this Court even in a civil revision in 11 Pat 616,³ Khaja Muhammad Noor J. observing that to disallow transposition on the ground that this would result in the claim becoming time-barred would be defeating the very object which the Legislature had in view.

In the circumstances of this case, we think that permission should be allowed to transpose the defendant second party from the category of respondents to that of appellants, and also from the category of defendants to that of co-plaintiffs. The result of this will be that the first objection taken by defendants first party, that the plaintiff was not the right person to sue for the money, becomes groundless and unsustainable. The second objection, on the ground of limitation, was decided by the Munsif on the question of the statute appli-

2. Parsotim Thakur v. Lal Mohar Thakur, (1931) 18 A I R P C 143=132 I C 721=58 I A 254=10 Pat 654 (P C).

3. Surajman Prasad v. Sadanand Misra, (1932) 19 A I R Pat 346=140 I C 572=11 Pat 616.

1. Bhupendra Narayan v. Rajeshwar Prasad, (1931) 18 A I R P C 162=132 I C 610=58 I A 228=59 Cal 80 (P C).

cable, and his decision in that respect is correct in point of law. The third objection, viz. denial by the defendants first party that they had enjoyed the property, was left open by the District Judge and a finding on this issue will be necessary. The same applies to the fourth objection, that defendant 1 only had taken the thica, that defendant 2 was separate from him and had no concern with the thica, and was not liable. On this also findings of the lower Appellate Court are necessary. We would in this case utilize O. 41, R. 25, Civil P. C., and refer those two issues for decision to the Court of the District Judge who will decide them on the evidence already on record. The District Judge shall return his findings to this Court within two months from the date of receipt by him of the record.

N.S./R.K.

*Order accordingly.***A. I. R. 1939 Patna 399**

VARMA J.

Kaladhari Singh — Appellant.

v.

Jibachh Mishra and others —

Respondents.

Appeal No. 949 of 1936, Decided on 4th November 1938, from decree of Dist. Judge, Darbhanga, D/- 18th July 1936.

Adverse Possession — Nature of rights exercised—Small piece of land convenient to neighbour used by him by doing acts of possession of flimsy and temporary character for over 12 years—Such user cannot establish title of neighbour by adverse possession.

In deciding question of adverse possession the nature of the rights exercised by the parties and the relationship between them will have to be looked into in order to see whether the acts were permissible or so trivial as not to be noticed. In a case where the land is adjoining the house of the defendants and the plaintiff is not a resident of that locality where the land is situated, little acts of possession cannot be effectively taken notice of at once by the plaintiff against whose interest they were exercised. If therefore a small piece of land of no present use to the owner but convenient in many other ways to the neighbour is made use of by the latter by doing on it acts of possession all however of a flimsy and temporary character such as stocking straw and logs of wood, building sheds and removing earth therefrom without objection for more than 12 years, such a user excites no particular attention. It is neither meant to denote, nor understood as denoting on the side of the other a claim to the ownership of the land. Where such and no more is the case, it would be altogether wrong to hold that a claim to title by adverse possession has been made out : 16 *Bom 838, Foll.*; *A I R 1927 Sind 114* and *A I R 1929 Lah 71, Rel. on.*

[P 401 C 1, 2]

P. C. Manuk, L. K. Jha, P. Jha and J. Jha — *for Appellant.*

B. C. De and S. K. Mitra —

for Respondents.

Judgment.—This is an appeal on behalf of the plaintiff. The defendants-respondents are the three sons of Manohar Misra of Barhampur where the subject-matter of the dispute is situated. The disputed property is 1 katha 19 dhurs of land included in plot No. 496 with an area of 3 kathas 4 dhurs. The suit was for a declaration of the plaintiff's title to and for confirmation or, in the alternative, recovery of possession over the disputed land. The Courts below have dismissed the suit of the plaintiff on the ground that the defendants' title to the land had matured by adverse possession. The plaintiff has come up in second appeal. Mr. Manuk, appearing on behalf of the appellant, has urged chiefly that on the findings of the Courts below, no case of adverse possession can be made out, and secondly, that they have acted illegally in relying on a piece of evidence which is not admissible. The litigation with regard to this piece of land has a long history and it redounds to the credit of the litigious zeal of the parties that for such a small strip of land they have been engaged in it for nearly 30 years having moved about half a dozen Courts presided over by about a dozen different Judges.

In order to understand the point raised by Mr. Manuk, it is necessary to give a short statement of the litigation in the past with respect to this land. In the year 1908 three mortgage suits were filed by Brajnandan Singh, the father of the present plaintiff, against Kallar Jha and his brothers, based on three bonds executed in the year 1902. These suits were decreed and the plaintiff's father purchased, amongst others, this land in dispute in execution of one of the decrees, the delivery of possession including the entire plot No. 496. It appears that one Nathu Shah, a bataidar of the plaintiff's father, was compelled to file a petition against the defendant's father and defendant 1 under S. 144, Criminal P. C., because they had committed certain acts of aggression with respect to this land. The proceeding was converted into one under S. 145 and ultimately ended against the defendant's father and defendant 1 on 10th September 1910. It is significant that no suit was filed within the period of limitation against this decision of the Criminal

Court, and a great deal turns upon this aspect of the whole case.

It appears that aggression was again started near about the year 1916 on account of which the plaintiff's father had to file a suit against defendants 1 and 2 with regard to the land included in plot No. 496, the disputed portion covering an area of 25 dhurs situated partly towards the north and partly towards the west. The nature of the encroachment complained against was that the defendants had put heaps of cow-dung upon the land. In that suit the defendants contested on the strength of an unregistered kobala of 1901 alleged to have been executed prior to the mortgage deed executed in favour of the plaintiff's father. The suit was dismissed by the trial Court which, in coming to its conclusions, relied upon the results of a local inspection held by the Court itself on 5th August 1917. We have no note of that local inspection on the records of the present case, although the Courts below have relied upon the facts as mentioned in the judgment in the suit of 1916. That judgment is dated 19th February 1918, and the facts taken therefrom are that there was a mud wall house on the north, a heap of cow-dung almost like a small hill was stacked towards the south-west of plot No. 496, that the mud had been taken from the middle of the plot (the area is not given but the depth is said to be 1 cubit) and that there was a well in the plot. Of these facts the first two were included in the subject-matter of that dispute while the other two facts were not involved therein.

On 13th January 1919, the Appellate Court set aside the judgment of the trial Court, holding that the kobala relied upon by the defendants was not genuine and that no suit having been filed against the decision in the 145 proceedings, the title of the defendants was extinguished with regard to the hut built upon the disputed plot. The delivery of possession was thus given to the plaintiff's father with regard to two-thirds share of the defendants (I have already mentioned that the land is not subdivided into sub plots). Then there was some further trouble, it appears, on behalf of one of the brothers who was not impleaded in the previous suit. The plaintiff filed a suit, No. 23 of 1921, and took the precaution of impleading all the three brothers as defendants. This suit was decreed on 8th March 1931, and ultimately delivery of possession was effected with regard

to the remaining one-third of the plot in 1931. Fresh troubles seem to have arisen in the beginning of the year 1932 and it appears that on 12th January 1932 proceedings under S. 144, Criminal P. C., were initiated with regard to the entire plot No. 496. The present defendants were made the defendants first party and the plaintiff was the second party. That order was made absolute against the first party on 19th February 1932. The matter did not end there and, it appears, that on account of some further troubles the plaintiff initiated proceedings under S. 107, Criminal P. C., but those proceedings were dropped, as a result of which the present suit, out of which this second appeal has arisen, was instituted on 20th December 1932.

Now, the lower Appellate Court has come to the following findings in the present case: After accepting the case of the defendants that they had been in continuous possession of the entire plot No. 496 since their kobala of 1901 and had exercised acts of possession by planting trees, stacking straw and logs of wood and by removing earth therefrom, the lower Appellate Court came to the following finding:

It is by no means improbable that the defendants have been storing their straw, cow-dung and other materials on the disputed land for a number of years, as alleged by them;

and that

they had, apart from the pucca well, at least a heap of cow-dung, straw and piles of brickbats on the present disputed land in the year 1931.

On these findings the learned Judge says:

I am satisfied from the evidence that the defendants have proved their actual possession over the land in dispute for a continuous period of more than 12 years.

In coming to this conclusion it is clear that the lower Appellate Court has relied mainly upon the results of the local inspection held in the suit of 1916; and to this, as at present advised, Mr. Manuk rightly takes exception. Even the learned advocate appearing on behalf of the respondents, could not justify the inclusion of the results of the local inspection in 1916 in the present case; and he had tried to support the judgment of the Court below by referring to the evidence of Mr. Biswas (P. W. 3); but that witness was obviously speaking with regard to the state of affairs existing in the year 1931. The evidence of Mr. Biswas could not go to support the results of the local inspection in 1916, which has wrongly been included in the present case. Mr. Manuk urges that, although he cannot question the findings of fact arrived at by

the Courts below, the question is whether the inference drawn by them is correct; and relying upon the decision in 16 Bom 338¹ he contends that on the findings of the particular acts of possession, it could not be held that the defendants had acquired any right by adverse possession. In that case a small piece of land being of no present use to its owner and being convenient in many ways to his neighbour was made use of by the latter in various ways without objection for more than 12 years. A privy and sheds for cows, goats, fowls, etc., and a hut for a ghariwallah—all however structures of flimsy and purely temporary character—were said to have been constructed and maintained for many years on the said piece of land; and it was contended that such user by the neighbour of the owner of the land, amounted to adverse possession against the owner. But it was held by their Lordships that such user as this was insufficient to give a title to the land by adverse possession. If I may say so with great respect, their Lordships rightly observed as follows:

In this country such a user excites no particular attention. It is neither meant to denote, nor understood as denoting — on the side or the other — a claim to the ownership of the land. Where such and no more is the case, it would be altogether wrong to hold that a claim to title by adverse possession has been made out. These cases are even more frequent in the mofussil than in Bombay itself, and there such acts of user are never construed as founding a claim to the land by adverse possession.

To the same effect are the decisions in 98 I C 888² and 109 I C 657,³ relied upon by Mr. Manuk. Mr. B. C. De, appearing on behalf of the respondents, urges that merely because the acts of possession relied upon by the Courts below can be regarded as of flimsy nature, it would not amount to a proposition of law. The finding of adverse possession in favour of his clients should not be disturbed. He contends that the nature of the rights exercised by the parties and the relationship between them will have to be looked into in order to see whether the acts were permissive or so trivial as not to be noticed. This is so; but one has to remember that in a case of this nature where the land is adjoining the house of the defendants and the plaintiff is

not a resident of that locality where the land situates, these little acts of possession could not be effectively taken notice of at once by the plaintiff against whose interest they were exercised. The present case is on all fours with the case reported in 16 Bom 338.¹

In the acts of possession found by the Courts below, which I have already stated there is only one item on which the lower Appellate Court has laid stress, viz. the existence of a well in the plot. A well is certainly more permanent than a hut; but with regard to this other considerations arise, i. e. was the construction of the well an act of possession or, when was it built? From the facts mentioned above, it is clear that in 1910 the Criminal Court found that the plaintiffs' father was in possession of plot No. 496; and whatever rights the defendants might have were extinguished in the year 1913 they not having filed any suit against that decision within the period of limitation. Therefore, if the well was constructed before 1910 then by reason of that decision it became the property of the plaintiff. The lower Appellate Court has not gone into this matter from this point of view. The defendants' case in the written statement was that the well was constructed soon after the unregistered kobala in their favour in the year 1901; and the lower Appellate Court says:

As for the pacca well, the defendants' statement that it was constructed by them soon after their kobala has not been disproved in any way.

The presence of this well could not therefore be said to be an act of adverse possession after 1913. That being the position with regard to the well, there is nothing to distinguish this case from the case reported in 16 Bom 338.¹ Mr. De then contends that the plaintiff omitted this part of his claim in the previous suit and therefore the present suit was barred under the provisions of O. 2, R. 2, Civil P. C.; but a fresh cause of action has accrued to the plaintiff since then and there is nothing to indicate that the previous suit was filed when the plaintiff was dispossessed in respect of the entire plot No. 496. I would therefore set aside the judgment and decree of the Court below and decree the suit with costs throughout. Mr. B. C. De asks for leave to appeal under the Letters Patent; but as I have already said, the subject-matter of dispute is rather very insignificant and the litigation has gone on for nearly 30 years, and it is neither a case of

1. *Framji Cursetji v. Goculdas Madhowji*, (1892) 16 Bom 338.

2. *Osman Saleh Mohammad v. Khanoomal Saramdass*, (1927) 14 A I R Sind 114 = 98 I C 888.

3. *Muhammad Amin Khan v. Balanda*, (1929) 16 A I R Lah 71 = 109 I C 657.
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public importance nor does it raise any complicated question of law. I do not feel justified in granting leave to appeal in this case. Leave to appeal is refused.

N.S./R.K.

Decree set aside.

A. I. R. 1939 Patna 402

HARRIES C. J. AND ROWLAND J.

Mahant Sidhakamal Ramanuj Das —
Plaintiff — Appellant.
v.

Batakrishna Mahapatra — Defendant
— Respondent.

Appeal No. 4 of 1936, Decided on 6th December 1938, from appellate decree of Dist. Judge, Cuttack, D/- 23rd September 1935.

(a) Second Appeal—Question of law—Question whether entry of rent in settlement rent roll is conclusive and whether party can prove it to be incorrect is question of law—It can be raised in second appeal.

When an obvious point of law has arisen the practice of attempting to shut out a second appeal by the use of language designed to clothe a decision on a question of law with the appearance of a finding of fact is deprecated. The question whether an entry of rent in the settlement rent roll is conclusive or whether a party can prove by evidence that it is incorrect, is undoubtedly a point of law, and a party is perfectly competent to raise this question in second appeal. [P 403 C 1]

(b) Orissa Tenancy Act (2 of 1913), Ss. 127 and 141 — Declaration that tenancy is for different class from that shown in Record of Rights does not displace presumption of correctness of rent entered in rent roll.

A declaratory suit (such as is contemplated by the Proviso to S. 141), can no doubt be entertained and a declaration can be had that the tenancy is of a different class from that shown in the Record of Rights but such a declaration does not displace the irrebuttable presumption of correctness of the rent entered in the rent roll: *11 I C 262, Rel. on; A I R 1922 Cal 101, Ref.* [P 403 C 1, 2]

(c) Orissa Tenancy Act (2 of 1913), Ss. 126, 127 and 141—Entry of rent can be challenged only on ground of want of jurisdiction—Settlement Officer within jurisdiction to record rent recording it erroneously—Procedure for correcting mistake not utilized by party — He must fail.

The only ground on which an entry of rent can be challenged is that of want of jurisdiction. The Judge is entitled to enquire whether it was within the jurisdiction of the Settlement Officer to record a rent in respect of the tenancy, but if that question is answered affirmatively, the Settlement Officer was within his jurisdiction whether he recorded it correctly or erroneously, and if erroneously, the statute has provided one procedure and one procedure only for correcting the mistake. If that procedure is not utilized the party must fail.

[P 403 C 2]

(d) Orissa Tenancy Act (2 of 1913), Sec. 3 (23) and S. 118—Holder of tanki bahal land is tenant and revenue officer can settle rent of his holding.

The distinctive characteristics of tenancy are that a person should hold land under another person and be liable to pay rent for it to him. Sub-proprietor means a person holding land under another proprietor, just as an under-tenure holder holds land under a tenure-holder and an under-raiyat holds under a raiyat. What the sub-proprietor pays kist by kist to the proprietor is rent. A tanki bahaldar is sub-proprietor and pays rent and is therefore tenant. It follows that the revenue officer has jurisdiction to settle and record the rent of his holding. [P 404 C 1, 2]

B. N. Das—for Appellant.

B. Mahapatra—for Respondent.

Rowland J. — This is an appeal by the plaintiff who sued as proprietor for the rent of the period second kist of 1337 to first kist of 1341 in respect of a tenure described in the current Record of Rights as a tanki bajyasti tenure and entered as bearing a rent of Rs. 7.3.0. The claim was laid in accordance with the settlement rent roll. The defendant resisted it, contending that the land was tanki bahal and not tanki bajyasti and that its rent was Rs. 3.5.3. The Rent Deputy Collector considered himself precluded from giving effect to this plea of the defendant by S. 127, Orissa Tenancy Act, the settlement rent roll having been prepared in the course of a settlement of land revenue in the local area under part 1 of Chap. 11 of the Act. Under this part a settlement rent roll is prepared which, after sanction by the confirming authority, is finally framed and incorporated in the Record of Rights. Any person aggrieved by entries in the Record of Rights can prefer within two months an appeal under S. 125 or within six months a suit under S. 126, such suit being limited to the grounds specified in Cl. (3) of the latter Section. No such appeal or suit was preferred. The Rent Deputy Collector considered himself therefore bound by S. 127, which enacts that subject to the provisions of S. 126, all rents settled under the preceding Sections shall be deemed to have been correctly settled and to be fair and equitable rents. He passed a decree for the rent as claimed. He held that the operation of S. 127 was not affected by the result of a suit brought by the defendant in 1929 more than a year after the final publication of the rent roll, in which he obtained a declaration that the land was tanki bahal and not tanki bajyasti.

From this decision an appeal was preferred to the District Judge in which two contentions were raised. First, that rent was recoverable only for the period subse-

quent to 4th May 1932, and secondly, that the status of the defendant being that of a tanki bahal tenant, the rent which in earlier settlement records had been recorded as Rs. 3.5.3 could not be enhanced and should have been held notwithstanding the entry in the settlement rent roll to be still only Rs. 3.5.3. The District Judge accepted both these contentions and allowed the appeal. In second appeal the finding that rent is recoverable only for the period after 4th May 1932 is not challenged. We are concerned only with the question whether the annual rent payable is Rs. 7.3.0 or Rupees 3.5.3.

The learned District Judge has said in his judgment "I find it as a fact that the rent payable by the defendant is only Rs. 3.5.3." When an obvious point of law has arisen, I deprecate the practice which has been observed in the judgments of some of the lower Appellate Courts of attempting to shut out a second appeal by the use of language designed to clothe a decision on a question of law with the appearance of a finding of fact. The question whether an entry of rent in the settlement rent roll is conclusive or whether a party can prove by evidence that it is incorrect, is undoubtedly a point of law, and the plaintiff is perfectly competent to raise this question in second appeal. In fact, no attempt has been made by the respondent to contend that the finding of the District Judge as to the rent binds us as a finding of fact. The appeal first came before a Single Judge of this Court, who considering that a question of some general importance was involved, has referred it to a Division Bench, indicating at the same time his own view that the Courts are bound to give effect to the entries of rent incorporated in the rent roll. The particular point does not appear to have been decided under the Orissa Tenancy Act, but in the decisions under the corresponding provisions of the Bengal Tenancy Act, there is ample authority that failing a suit under S. 104-H of that Act (corresponding to S. 126, Orissa Tenancy Act) the entry as to the rent is conclusive. A declaratory suit (such as is contemplated by the Proviso to Sec. 141, Orissa Tenancy Act) can no doubt be entertained and a declaration can be had that the tenancy is of a different class from that shown in the Record-of-Rights, 15 O W N 896,¹ but such a declaration does

not displace the irrebuttable presumption of correctness of the rent entered in the rent roll. In 49 Cal 1026² even where it appeared that the entry of rent in the Record-of-Rights had been made by mistake and the actual rent was much higher and where the certificate procedure for recovery of the higher rent had been resorted to by the landlord and the Secretary of State, it was held on a suit by the tenant that the revenue authorities, not having taken the procedure contemplated by the statute, could not reopen the question in defence to a suit to set aside the certificate. The only ground on which an entry of rent can be challenged is that of want of jurisdiction. The District Judge thought that a tanki bahal tenant being a tenant at fixed rent there was no jurisdiction to settle higher rent to enhance his rent. There is some confusion here. The decisions relied on by the District Judge do not support him. The District Judge was entitled to enquire whether it was within the jurisdiction of the Settlement Officer to record a rent in respect of the tenancy, but if that question is answered affirmatively, the Settlement Officer was within his jurisdiction whether he recorded it correctly or erroneously, and if erroneously the statute has provided one procedure and one procedure only for correcting the mistake. That procedure the respondent did not utilize. When he did sue to correct the entry regarding his status (as to which the record has a presumptive but not a conclusive value) he no doubt advisedly abstained from asking for any declaration as to the quantum of rent, advisedly because had he asked for such a relief it must have been refused. The District Judge says "unfortunately" and proceeds as if the decision operated to give him the very relief which the Civil Court could not have given him.

When it appeared in the course of the hearing that the decision of the District Judge could not possibly be supported on the ground on which it was based, the learned advocate for the respondent raised a novel contention that the holder of tanki bahal land being a sub-proprietor is not a tenant at all but a proprietor and the duty of the revenue officer to settle rents "for all classes of tenants" did not include the settling of rents for tanki bahal holders, a class who are not tenants at all. No doubt

1. *Promoda Nath Roy v. Asiruddin Mandal* (1911) 15 O W N 896=11 I O 262.

2. *Pratap Chandra v. Secy. of State*, (1922) 9 A I R Cal 101=67 I O 375=49 Cal 1026=85 O L J 304.

the holder of a tanki bahal land is a sub-proprietor within the meaning of S. 3, Cl. 21 of the Act, and we are asked to hold that a sub-proprietor is a proprietor within the meaning of S. 3, Cl. 14 which defines "proprietor" as including also the sub-proprietary interest referred to in S. 3, Cl. 2. That clause however defines bajyastidars but contains no reference to tanki bahaldars. We must look further therefore to see whether a tanki bahaldar is a tenant. S. 15 (1) (a) speaks of sub-proprietors other than sarbarakars as one of the classes of tenure-holders, and S. 6, Cl. 3 enacts that for the purposes of certain Sections every sub-proprietor shall be deemed to be a tenure-holder, and for the purposes of S. 74 shall be deemed to be a permanent tenure-holder. With the other Sections we are not particularly concerned here, but S. 74 is the Section imposing liability on a tenant to have his tenure or holding sold in execution of a decree for the rent thereof and declaring that the rent shall be a first charge thereon. It is difficult in face of these provisions to hold that what the sub-proprietor is to pay to the proprietor is not rent, and it does not seem to have been suggested in the Courts below that the defendant was not a tenant under the plaintiff. The distinctive characteristics of tenancy are that a person should hold land under another person and be liable to pay rent for it to him. "Sub" is Latin for "under" and by its derivation the expression "sub-proprietor" would seem to mean a person holding land under another proprietor just as an under-tenure holder holds land under a tenure-holder and an under-raiyat holds under a raiyat. A tanki bahaldar pays a fixed tanki and the word "tanki" is explained in the glossary to Mr. Maddox's Settlement Report thus: "Tanki (rent)=quit rent."

Tanki lands are referred to as tenures in para. 317 at p. 215 of Mr. Maddox's Settlement Report. Again in para. 512 at p. 347 is a list of classes of tenancy and in this list appears tanki bahal. Tanki bahaldars are again referred to as a class of tenants in para. 515 at p. 349 of the report. At the time of Mr. Maddox's Settlement the Orissa Tenancy Act had not been passed and corresponding provisions of the Bengal Tenancy Act were in force. There was no such status as "sub-proprietor" recognized at that time. I may refer then to the final report of the current settlement operations, Mr. Dalziel's Report. In para. 50, p. 19 he

refers to sub-proprietors as tenure-holders whose position approximates to that of proprietors of estates. In para. 447 at page 157 he says that

Section 15 recognizes their right to transfer their tenures without the consent of their landlords. But in other respects their position is practically that of an ordinary permanent tenure-holder, with fixity of rent.

In the form of kabuliat for sub-proprietors annexed to the same report col. 3 is for the "date on which rent falls due." I have no doubt that what the sub-proprietor pays kist by kist to the proprietor is for our present purposes rent and he is for those purposes a tenant. It follows that the Revenue Officer had jurisdiction to settle and record the rent of the respondent.

The result is that the entry in the rent roll of annual rent, Rupees 7-3-0, must be deemed to be correct. I would allow the appeal and give the plaintiff a decree for rent at this rate for the period in respect of which he has been held entitled to it with costs of the appeal and proportionate costs in the Courts below.

Harries C. J. — I agree.

D.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 404

JAMES AND ROWLAND JJ.

Iswar Krishna Chandimajee Thakur—
Appellant.

v.

Brijbehari Das — Respondent.

Appeal No. 714 of 1936, Decided on 19th January 1939, from appellate decree of Dist. Judge, Purnea, D/- 14th April 1936.

Bihar Tenancy Act (8 of 1934), Ss. 7 and 167 — Permanent tenure held at variable rate of rent — Tenure holder creating under tenure at fixed rate of rent — Tenure brought to sale and purchased by proprietor — Fixed rate of rent is not binding on proprietor — Rent of under tenure is liable to enhancement.

The purchaser who does not annul incumbrances under Sec. 167 is bound to recognize such incumbrances as the tenant had power to create, but where the tenant had purported to create in his under tenant a status higher than his own, the landlord is not bound to recognize such a status in the under tenant. The utmost that he can create is a tenure to be held on as favourable terms as his own. Hence where a holder of permanent tenure at variable rate of rent creates an under-tenure at fixed rate of rent and the proprietor brings the tenure to sale and purchases it he is not bound by the fixed rate of rent created by the tenure-holder. The under-tenure holder holds a permanent tenure but at a rent liable to enhancement: S. A. No. 754 of 1929 and S. A. No. 1185 of 1931, *Foll.*; A I R 1932 Cal 165, *Dissent.*
[P 405 C 1, 2]

S. C. Mazumdar, K. Dayal and Ram-nugrah Narain Singh—for Appellant.

S. M. Mullick and Phulan Prasad Varma
— for Respondent.

James J. — The appellant is the proprietor of an estate in Purnea District who brought to sale and purchased an *istimarari* tenure within his own estate which was held at a variable rate of rent *istimarari lekin mokarrari nehi*. This tenure-holder's predecessor had in 1870 created an under-tenure which purported to be an *istimarari mokarrari* tenure, a permanent tenure at a fixed rate of rent. The proprietor instituted the suit out of which this appeal arises for enhancement of rent of the under-tenure claiming that his tenure-holder could not, when granting an under-tenure, create a status higher than that which he himself enjoyed. The Munsif found that the entry of status in the Record of Rights was incorrect and allowed enhancement of rent under S. 7 of the Tenancy Act. His decision was reversed on appeal by the District Judge who accepted the entry in the Record of Rights and held on the authority in 59 Cal 26¹ that the tenure-holder whose own rent was variable, had the power to create a permanent tenure at a fixed rate.

Attention is drawn on behalf of the appellant to two decisions of this Court (Second Appeal No. 754 of 1929² and Second Appeal No. 1185 of 1931³). Mr. S. M. Mullick on behalf of the respondent argues that when the proprietor purchased in execution of a rent decree the intermediate tenure, he was obliged to annul incumbrances under S. 167 of the Tenancy Act, if he was not to be bound by all the contracts into which the late tenure-holder might have entered regarding his tenure. This was the view taken in 59 Cal 26¹ which was expressly not followed by the Division Bench of this Court in Second Appeal No. 1185 of 1931.³ We may say that it appears to us that the purchaser who does not annul incumbrances under S. 167 is bound to recognize such incumbrances as the tenant had power to create; but where the tenant has purported to create in his under tenant a status higher

than his own, the landlord is not bound to recognize such a status in the under-tenant. In fact the under-tenant could not create such a status. The utmost that he could create was a tenure to be held on as favourable terms as his own, and if he entered into a contract with the under-tenure holder that his rent should not be enhanced, he did not thereby confer upon him the status of permanent tenure-holder at a fixed rate so far as the proprietor of the estate was concerned. This was the view taken in the decisions of the Division Benches of this Court, which I have quoted, by which we are bound. It must be held that the under-tenure holder holds a permanent tenure, but at a rent liable to enhancement. No other point has been argued in this Court. The result is that I would set aside the decree of the District Judge and restore the decree of the Munsif. The plaintiff is entitled to his costs throughout.

Rowland J. — In Finucane and Ameer Ali's Bengal Tenancy Act at p. 739 there is the following commentary on the legal position. If the holder of a permanent tenure, which is not held at rates fixed in perpetuity, were to grant a lease creating an under-tenure in a permanently settled estate at a rate fixed in perpetuity and if the tenure-holder were ejected, and the tenure were resumed by the proprietor the fixed rate agreed upon with the under-tenure-holder would not be binding on the proprietor, for the tenure-holder could not confer a right which he did not himself possess; but the fixed rate would be binding on the tenure-holder himself, his heirs, assigns and successors. It is not necessary to express any opinion as to the validity of the fixed rate of rent as against a transferee or a stranger auction-purchaser in execution of a decree; and I think we should limit our decision to the case actually before us where the landlord is himself the auction-purchaser, and as pointed out by Khaja Noor J. in Second Appeal No. 754 of 1929² there has been a merger tantamount to extinction of intermediate tenure. Whatever view might have been taken, had the matter been *res integra*, I agree that we are bound to follow the decisions of this Court in Second Appeal No. 754 of 1929² and in that of Second Appeal No. 1185 of 1931.³ I concur in the order passed.

D.S./R.K.

Decree set aside.

1. *Tayefa Khatun v. Surendrakumar Sen*, (1932) 19 A I R Cal 165=188 I O 99=59 Cal 26=58 O L J 512=85 O W N 806.

2. *Chandra Mohan Manjhi v. Midnapur Zamindari Co., Ltd.*, Second Appeal No. 754 of 1929.

3. *Bholanath Marwari v. Midnapur Zamindari Co.*, Second Appeal No. 1185 of 1931.

A. I. R. 1939 Patna 406

VARMA J.

Jagdish Narain Singh — Appellant.

v.

Bande Ali Mian and others —

Respondents.

Appeal No. 361 of 1938, Decided on 16th February 1939, from appellate decree of Sub.Judge, Second Court, Muzaffarpur, D/- 6th April 1938.

Mahomedan Law — Limited estate — When created by contract is not repugnant to Mahomedan law.

In case of gift limited estate is repugnant to Mahomedan law but in case of an estate, created by contract as a sort of family arrangement, and transferred to a lady, limited ownership is permissible even under Mahomedan law : 21 M L J 958 and 33 All 421, *Rel. on*; 11 Cal 597 (P C), *Ref.*

[P 408 C 1]

L. K. Jha, R. Chowdhry and M. N. Pal
— *for Appellant.*

Syed Ali Khan and K. P. Upadhaya —
for Respondents.

Judgment. — In this second appeal the defendants first party are the appellants. The plaintiff filed a suit for recovery of possession of a house situated on 3 kathas and 10 dhurs of land in the town of Muzaffarpur. One Roza was the father of the plaintiff. Roza had a wife called Bashiran, a daughter named Zohra and another son named Mehdi Hussain. In 1901 Roza executed a bai mokasa deed conveying the disputed house with zamindari properties in favour of Bashiran. Bashiran applied in the Land Registration Department for registration of her name with regard to the milkiat property which stood recorded in the name of the plaintiff. The plaintiff objected and the application of Bashiran was rejected. In 1904 Bashiran brought a suit with regard to the milkiat property in which the plaintiff, Mehdi, and Roza were the defendants. The daughter was not a party and the house was not the subject-matter of the suit. On 18th January 1904 a compromise was arrived at between the parties and in the compromise petition this house was also included. By that compromise Bashiran was to remain in possession as malik for life and after her the house was to go to Roza for life. Bashiran had no power to alienate except for necessity. After Roza the property was to go to the plaintiff and his brother. Zohra was not a party to the compromise, although by the compromise petition she was given 4 bighas of land. In December 1916 Bashiran sold the

house to Zohra and Roza was an attesting witness of the deed. In June 1923 Zohra executed a bharna deed in favour of one Ram Charitar, the ancestor of the defendant second party. In September 1923 Bashiran executed a deed of surrender in favour of the plaintiff with regard to all the properties included in the bai mokasa deed. In January 1930 Zohra executed a deed of conditional sale in favour of Nokh Lal and in August 1930 a deed of sale in favour of defendant 1 was executed, the consideration being the bharna and the conditional sale deeds. On 15th January 1934 Bashiran died and the present suit out of which this appeal arises was instituted on 31st October 1935. The trial Court decreed the suit in favour of the plaintiff by declaring his title and right to recover possession of the same; the lower Appellate Court has confirmed the decision of the trial Court.

Mr. L. K. Jha appearing on behalf of the defendants first party who are the purchasers of the property by the deed of sale in 1930 has raised four points in this second appeal: (1) whether the son would get any title to the house which was not the subject-matter of the suit although it was included in the compromise petition; (2) even if there was title created with regard to the house by the compromise decree whether Bashiran got an absolute estate specially when any curtailment of her right would be repugnant to Mahomedan law; (3) when Bashiran got possession admittedly under the bai mokasa deed whether her title can be challenged by virtue of the title in the compromise decree, and (4) the question of limitation. Now, with regard to the first point Mr. L. K. Jha urges that the bai mokasa deed could not be modified by the compromise which included property that was not the subject-matter of the suit and which compromise was not registered. He has strongly relied upon the case reported in 47 Cal 485¹ and relying upon this case he urges that even if registration is not required the compromise decree is only evidence of the agreement but it does not pass any title. He also refers to the case in 17 P L T 164.² In 47 Cal 485¹ the decree recited the claims in the suit, and the peti-

1. Hemanta Kumari Debi v. Midnapur Zamindari Co., (1919) 6 A I R P O 79=53 I C 534=46 I A 240=47 Cal 485 (P O).

2. Kallar Chaudhury v. Mt. Kamod Choudharain, (1936) 23 A I R Pat 300 = 162 I C 787=17 P L T 164.

tion for compromise, and granted a decree in the terms of the compromise which were then set out in full. It was held:

The compromise was not an 'agreement to lease,' within the meaning of S. 17, Registration Act (16 of 1903), and was therefore admissible in evidence under S. 49 of that Act though not registered. The phrase 'agreement to lease' in that Section relates to some document that creates a present and immediate interest in the land, and not a document like that in the present case from which it was impossible to say whether there would be a lease or not.

It was further held that if the agreement were regarded as being 'decree' it is exempted from registration by S. 17, sub-s. (2) (vi) and on the true construction of S. 375, Civil P. C., 1882, is nonetheless a decree under S. 17, sub-s. (2) (vi) because though the whole of the agreement or compromise is recorded in it, the operation of the decree is limited only to so much of the subject-matter of the suit as is dealt with by the agreement. As a decree it may be incapable of being executed outside the land of the suit compromised, but can still be received in evidence of its contents, though unregistered.

It may be noted that this was a case in which the suit was for specific performance of a contract which the defendants had made with a firm and the respondents were claiming the benefit of the contract as assignees and the question before their Lordships of the Judicial Committee was whether the agreement with regard to matters outside the scope of the suit which was included in the compromise decree had to be registered before it could be used as evidence and their Lordships held that the decree was sufficient evidence of the compromise or the agreement. Mr. L. K. Jha relies upon the distinction that has been drawn between a compromise decree being evidence of the agreement and its effect on the question of title with regard to the property which was outside the scope of the suit. On this point my attention has been drawn by Mr. S. A. Khan to two cases. The first one is reported in 1 Pat L J 208,³ where Mullik J., after referring to certain decisions, held that so far as it relates to properties within the scope of the suit a compromise decree operates as *res judicata*, but so far as it relates to properties outside the scope of the suit, such a decree, if the terms of the compromise are embodied with the decree, is of an agreement to transfer an interest in the property. It is not necessary in such a case to register the compromise petition.

Later on, while summarizing his decision on this point, the learned Judge has stated:

As the compromise decree has just been found to be operative and to be evidence of title in favour

of Bisseswar the Court must consider it in arriving at a decision in Suit No. 935.

But the difficulty is that this case was decided before the amendment of 1929. The second case relied on by Mr. S. A. Khan is the case in 3 Pat L J 43⁴ which also decided that

a decree dealing with properties not included in the suit, although not registered, is evidence of an agreement between the parties under which certain lands have been allotted to each.

Mr. S. A. Khan relies further on 13 Pat 17⁵ where it was held that "an executing Court has no power to discuss the validity of the terms of the decree which he is directed to execute" although the terms of the compromise include properties outside the scope of the suit. This case is not directly in point on the subject. He also relies on 49 M L J 490=A I R 1925 Mad 1101⁶ which is more in point and which says that

a decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions. If the terms of the compromise decree which do not relate to the suit appear either directly or indirectly as considerations on which the settlement of the plaintiff claim was based, then such terms may be considered as part of the decree executable with it,

and their Lordships of the Madras High Court also questioned the power of an executing Court to discuss the validity of a compromise decree on the ground of some portion of it dealing with properties beyond the scope of the suit. But the real distinction between the present case and the cases cited by Mr. L. K. Jha lies in the fact that here was a case for possession on the basis of the compromise whereas the cases cited by Mr. L. K. Jha were dealing with cases in which there was a suit for specific performance. The agreement was more or less in the nature of an executory agreement. I may refer to some of the cases cited by Mr. S. A. Khan in support of the present judgment. The first case is 43 Mad 688⁷ which is a Full Bench decision of the Madras High Court where the question that was discussed was whether at the execution stage a compromise arrived at between the parties with regard to some immovable

4. Karu Mian v. Tejo Mian, (1918) 5 A I R Pat 139=43 I O 282=3 Pat L J 43.

5. Muhammad Ismail v. Bibi Shaima, (1934) 21 A I R Pat 203=151 I O 968=13 Pat 17.

6. Ramaswami Naidu v. Subbaraya Tevar, (1925) 12 A I R Mad 1101=88 I O 648=49 M L J 490.

7. Poovvanayi Aylssa v. Purayil Kundron Chokru, (1920) 7 A I R Mad 242=58 I O 554=43 Mad 688=39 M L J 77 (F B).

3. Bisseswar Ram v. Mahadeo Pahan, (1917) 4 A I R Pat 9=36 I O 290=1 Pat L J 208.

property of the value of over Rs. 100 should not be exempted from registration and it was answered by the Full Bench that it did not require registration. The case that is directly in point in favour of Mr. Khan is the case reported in 31 I C 260.⁸ This is also a decision from the Madras High Court—a Full Bench decision—where his Lordship (Tyabji J. who delivered the judgment of the Court) said :

I feel therefore no hesitation in arriving at the conclusion that the lower Appellate Court was right in the conclusion at which it arrived, that Ex. 2 can be adduced in evidence and can be read as part of the decree (Ex. 5) so as to affect the immovable property compromised therein notwithstanding that it has not been registered,

and I should also refer to the observation of Ayling J. in the same case where he said that he agreed with his brother Judge in holding that

the razinamah, Ex. 2, does not require registration to render it admissible in evidence or operative as a transfer of the suit property to Minakshi.

There was another case cited and that is the case in 94 I C 210,⁹ but that is not very much in point. So respectfully agreeing with decision in 31 I C 260⁸ I am of opinion that the first point urged by Mr. L. K. Jha, on which he mainly relied in questioning the correctness of the decision of the Courts below fails.

Now the next point is as to what was the nature of the title created by the compromise decree which included property outside the scope of the suit. Mr. L. K. Jha says that a limited ownership is unknown to Mahomedan law and that Mt. Bashiran could not be held to be holding only a life estate; but evidently this proposition has to be considerably modified in view of the fact that this was an estate created by contract. If it were a case of gift, certainly a limited estate would be repugnant to Mahomedan law as was held in 11 Cal 597.¹⁰ Moreover, one cannot lose sight of the fact that the Courts below have dealt with this agreement as a sort of family arrangement and on that point authorities are not wanting in which it has been held that in an estate created by contract as a sort of family arrangement transferred to a lady limited ownership is permissible even in Mahomedan law. If

any authority is required on that point I may refer to the case of 21 M L J 958.¹¹ The decision is to the effect that a transfer of property to a Mahomedan lady for a term (here for her life) by the husband in consideration of dower must be regarded as a sale and not as a gift of a life estate and such a transaction is unimpeachable under the Mahomedan law.

The case in 33 All 421¹² is on the same point where the question was as to the nature of the title that was transferred under certain conditions. That was a case in which a Mahomedan made over to his wife, to whom a dower of Rs. 1,25,000 was due, certain property. In the deed of transfer it was stipulated (1) that the wife was to take possession of the property in lieu of her dower and enjoy the usufruct; (2) that the property was to revert to the husband if the wife predeceased him, the dower debt being deemed to have been discharged; (3) that if the husband predeceased the wife the property was to become hers absolutely. It was held that the transaction was neither a mortgage by conditional sale nor a mahabat, but the wife obtained a right to enjoy the usufruct during her husband's lifetime with the possibility of the interest developing into full ownership if the husband predeceased her.

I need not refer to several other cases that were referred to but this much is clear, taking into consideration the circumstances under which the compromise was arrived at, that it was a sort of contract between the parties which the Courts below have determined to be a family arrangement by which certain rights of the property were allowed to Mt. Bashiran by the other members of the family and there were certain restrictions also placed upon her power to alienate. In view of the various authorities that have been discussed above I do not think there was anything repugnant to Mahomedan law in this family arrangement and therefore the interest which Mt. Bashiran had was a life-interest in the property. These are the main points upon which Mr. L. K. Jha relied, the question of limitation being not seriously pressed; and as all these points have failed I am afraid the appeal must be dismissed with costs. Leave to appeal under the Letters Patent is refused.

S.G./R.K.

Appeal dismissed.

8. Sankaravelu Pillai v. Muthusami Pillai, (1916) 3 A I R Mad 536=31 I C 260=29 M L J 779.

9. Sital Prasad Singh v. Janki, (1926) 13 A I R All 563=94 I C 210.

10. Abdul Wahid Khan v. Mt. Nuran Bibi, (1885) 11 Cal 597=12 I A 91=4 Sar 627 (P O).

11. Khamrunnisa v. Hazarath Sahib, (1911) 21 M L J 958=12 I C 457.

12. Mubarakunnissa v. Mansab Hasan Khan, (1911) 33 All 421=10 I C 727=8 A L J 206.

A. I. R. 1939 Patna 409

AGARWALA J.

Mian Ahir and others — Appellants.

v.

Paramhans Pathak — Respondent.

Appeal No. 779 of 1937, Decided on 7th February 1939, from appellate decree of Addl. Dist. Judge, Arrah, D/- 5th May 1937.

Bihar Tenancy Act (8 of 1934), S. 49—Holding consisting of agricultural and homestead land settled on agricultural raiyat—Raiyat to provide milk, curds, ghee to holder in consideration of settlement of homestead land and assist holder in cultivation—Notice served on raiyat not complying with provisions of S. 49—Suit for ejectment of raiyat from homestead land only claiming amount for milk, ghee, etc. which raiyat failed to supply—Raiyat held was under-raiyat—Claim for ejectment held could not succeed.

Where the lands included in the holding of an agricultural raiyat consist partly of agricultural and partly of homestead lands and the homestead portion is let out for use as homestead, the person to whom it is so let is an under-raiyat within the meaning of the Tenancy Act, and accordingly such person is not liable to ejectment, unless a notice has been served in accordance with the provisions of S. 49 : 8 C W N 454 and A I R 1925 Cal 202, Rel. on. [P 409 O 2]

An occupancy holding which was settled upon an agricultural raiyat consisted partly of agricultural land and partly of homestead land. The latter was settled on condition that the raiyat should provide milk, curds and ghee to the holder on ceremonial occasions and also assist him in the cultivation. The holder served the raiyat with a notice which was sufficient to terminate the tenancy under the Transfer of Property Act but did not however comply with the provisions of S. 49, Bihar Tenancy Act. Thereafter the holder filed a suit for ejectment of the raiyat from the homestead land and also claimed a certain sum in respect of milk, curds and ghee which the raiyat was alleged to have failed to supply in pursuance of the agreement, but nothing was claimed for the non-rendition of services in cultivation :

Held that the tenancy was a produce tenancy and the raiyat was an under-raiyat. Therefore the claim for ejectment failed by reason of the fact that the notice served did not comply with the provisions of S. 49, Bihar Tenancy Act : A I R 1934 P O 5, Disting. [P 409 O 1, 2 ; P 410 O 1 ; P 411 O 1]

Tarkeshwar Nath — for Appellants.

Barhamdeo Narain — for Respondent.

Judgment.—This second appeal by the defendants arises out of a suit in ejectment. The plaintiff is the holder of an occupancy holding consisting of 17.94 acres of agricultural land and some homestead land. The suit was to eject the defendants-appellants from two plots of homestead land Nos. 50 and 51. With regard to the latter plot, it has been found as a fact by the Court below that the plaintiff was wrongfully

evicted from this plot by the defendants in 1340. The decree in plaintiff's favour with regard to this plot therefore is not open to challenge in second appeal. With regard to plot No. 50 the case of the plaintiff was that it was settled with the defendants on condition that they provided milk, curds and ghee to the plaintiff at certain prices on ceremonial occasions and assisted him in his cultivation. The question is whether the defendants are under-raiyats or not. If they are under-raiyats, the plaintiff's claim to eject them from plot No. 50 must fail by reason of the fact that the plaintiff has not caused a notice to be served on them in the manner required by S. 49, Tenancy Act. If on the other hand, defendants are not under-raiyats, it is not disputed that the notice that was served on them by the plaintiff is sufficient to terminate the tenancy.

The learned advocate for the defendants-appellants relies on a decision of the Calcutta High Court in 8 C W N 454¹ in which it was held that where the lands included in the holding of an agricultural raiyat consist partly of agricultural and partly of homestead lands and the homestead portion is let out for use as homestead the person to whom it is so let is an under-raiyat within the meaning of the Tenancy Act, and accordingly that such person is not liable to ejectment, unless a notice has been served in accordance with the provisions of S. 49. The contention in that case as in this, was that it was sufficient to serve a notice under the Transfer of Property Act. In the course of the judgment their Lordships said :

The Transfer of Property Act is not applicable to lands used for agricultural purposes, and in considering whether the one Act or the other would apply, we have to look to the nature of the original tenancy, and not the nature of the tenancy with reference to a particular piece of land within the landlord's holding.

That case was referred to in a later case in the same High Court, 40 C L J 307,² which first came before Newbould J. and then before a Bench in Letters Patent Appeal which confirmed the decision of that learned Judge. There the holder of 10 kathas of land which was used for horticultural purposes sub.let a portion of it to the defendant who occupied it as homestead. The plaintiff sued to eject the tenant alleg-

1. Babu Ram Roy v. Mahendra Nath, (1904) 8 O W N 454.

2. Rampado Sarkar v. Atore Dome, (1925) 12 A I R Cal 202=84 I O 743=40 C L J 307.

ing that the tenancy had been terminated by notice to quit under the Transfer of Property Act. The suit was dismissed on the ground that the Tenancy Act, and not the Transfer of Property Act, applied. In the course of the judgment of the learned Judges who heard the appeal it was said :

The position consequently is that when the sub-tenancy in favour of the defendant was created, although the grant included only the homestead portion of the land comprised in the tenancy, still the tenancy taken as a whole included agricultural and horticultural lands. These facts make applicable the principle enunciated in 8 C W N 454.¹ That principle is that, in the absence of a local custom or usage, the homestead portion of an agricultural holding is governed by the provisions of the Bengal Tenancy Act, precisely in the same manner as the portion under actual cultivation. From this it follows that the answer to the question, whether a case of this description is governed by the Bengal Tenancy Act or by the Transfer of Property Act, depends upon the nature of the original tenancy and not on the character of the parcels included in the sub-tenancy.

On behalf of the respondents it is contended that these decisions have no application to the facts of the present case, and the learned advocate relied upon Sec. 181, Tenancy Act, which provides as follows :

Nothing in this Act shall affect any incident of a *gatwali* or either service-tenure, or, in particular, shall confer a right to transfer or bequeath a service-tenure which, before the passing of this Act, was not capable of being transferred or bequeathed.

The learned advocate contends that the term "service-tenure" in this Section includes a tenancy such as we have in the present case and that the meaning of the Section is that the incident of resumability which attaches to a service-tenure is not affected by anything in the Act. The learned advocate referred to a number of decisions which support his proposition, but they are all cases in which the proprietor of the land had made a grant for service purposes, and not cases in which the raiyat of an agricultural holding had parted with a part of his holding in return for services or rent in kind. In particular, the learned advocate referred to a passage in the judgment of their Lordships of the Privy Council in 13 Pat 254.³ In that case the High Court had held that the term "service-tenure" in S. 181, Tenancy Act, was not confined to tenures properly so-called and that a right of occupancy could not be acquired in a service grant of a police character, especially when they are in the nature of raiyati

holdings. The passage in the judgment of the Privy Council which was relied upon was :

In their Lordships' opinion there is a great distinction between the grant of lands on service-tenure, revenue or rent-free to a raiyat to cultivate himself in lieu of wages and a grant to a tenure-holder of rents from tenants holding under him as raiyats. In the former case the raiyat's grant may well be said to be inconsistent with the acquisition of full occupancy rights because the lands are only granted to him so long as he holds the office.

This is said to be an authority for the proposition that a person to whom a portion of an agricultural holding has been let by the raiyat in return for a promise of service is exempted from the provisions of the Tenancy Act. That was not the question which was considered either in the High Court or in the Privy Council. There was no question there of the tenant being an under-raiyat although it appears that an attempt had been made by the plaintiff to establish that fact. The precise conditions on which plot No. 50 was let to the defendants-appellants in the present case are not very clear on the finding of the Appellate Court. The learned Additional District Judge who heard the appeal below observed :

I would accordingly believe the evidence adduced by him (that is, the plaintiff) and hold that defendant 1 and Jhojhari were inducted into plaintiff's house on plot No. 50 as tenants-at-will or licensees on condition of rendering some sort of service.

Now in view of the pleadings of the parties, it is not at all clear what the learned Additional District Judge meant by "service" in this connexion. It is true the plaintiff had alleged that the defendants had undertaken to assist him in cultivation, but the principal obligation which the defendants undertook would appear to have been the supply of milk, curds and ghee on ceremonial occasions, and that this is the proper view to take of the agreement between the parties is evidenced by the claim in the plaintiff's plaint. There he claims a certain sum in respect of milk, curds and ghee which he alleges the defendants had not supplied in violation of the agreement, and nothing for non-rendition of services. It therefore appears to me that plot No. 50 was let to the defendants on condition of their supplying milk, curds and ghee on stated occasions, that is to say, it was an agreement to let the land in return for certain articles of produce, in other words, a produce tenancy. In any view of the matter, I can find no distinction

3. Anup Mahto v. Mita Dusadh, (1934) 21 A I R P C 5=147 I C 977=13 Pat 254=61 I A 93 (P C).

between this case and the two Calcutta cases which have already been referred to, and applying those decisions to the facts of this case, I must hold that the defendants were under-raiyats under the plaintiff with respect to plot No. 50 and that the plaintiff's suit to eject them from this plot must fail for non-compliance with the provisions of Sec. 49, Tenancy Act. The defendants' appeal succeeds therefore with regard to plot No. 50 and it fails with regard to plot No. 51. In these circumstances the parties will bear their own costs throughout. Leave to appeal is refused.

N.S./R.K. *Appeal partly allowed.*

A. I. R. 1939 Patna 411

JAMES AND ROWLAND JJ.

Ranbahadur Singh Thakur and others
— Appellants.

v.

Awadhbehari Prasad Singh, Applicant
and others — Respondents.

Appeal No. 225 of 1938, Decided on 30th January 1939, from Appellate order of Dist. Judge, Monghyr, D/- 14th May 1938.

(a) Evidence Act (1872), S. 92—Conveyance reciting that property is transferred by judgment-debtor for certain consideration (satisfaction of mortgage decree) — Oral agreement that vendee would proceed no further in prosecution of claim for certain money debts not specified in the deed can be proved.

Where conveyance recites that the property is transferred by the judgment-debtor for consideration of certain amount which is met by satisfaction of the mortgage decree, the parties would not be prevented from proving the existence of a separate oral agreement to the effect that the vendee would proceed no further in the prosecution of his claim for certain money debts not specified in the deed.

[P 411 O 2; P 412 O 1]

(b) Execution — Judgment-debtor cannot assert that real decree-holder is someone else than named in decree.

In execution proceedings it is not open to the judgment-debtor to assert that the real holder of the decree is any person other than the person named as decree-holder in the decree, unless there has been a valid assignment or devolution by process of law.

[P 412 O 2]

(c) Civil P. C. (1908), O. 21, R. 2—Entry of satisfaction of decree can be claimed only if payment is made to decree-holder or to his agent.

Under O. 21, R. 2 judgment-debtor can only claim entry of satisfaction of the decree where payment has been made either to the decree-holder or to some other person definitely held out by the decree-holder as his agent for the purpose of payment.

[P 412 O 2]

(d) Adjustment—Decree-holder not party — Adjustment cannot be recognized (*Per Rowland J.*).

An adjustment to which the decree-holder is not a party cannot be recognized by the executing Court. [P 413 O 1]

S. N. Bose and D. C. Varma —

for Appellants.

S. K. Mitter — *for Respondents.*

James J. — Ramsarup held a mortgage decree the dues under which including costs amounted to nearly Rs. 12,000 against Awadhbehari Prasad Singh. A maternal uncle of Ramsarup named Ramkhelawan held two money decrees against Awadhbehari, one in Begusarai and the other in Monghyr. Ramsarup and Awadhbehari agreed between themselves that the question of how Awadhbehari should settle these decrees should be referred to arbitration. This was apparently done on the assumption that Ramsarup was the real creditor in respect of the debts for which the money decrees had been obtained; but Ramkhelawan was not party to the reference to arbitration. The arbitrators decided that all three decrees should be settled by the payment of Rs. 17,500, which meant practically that one of the decrees standing in the name of Ramkhelawan would be abandoned. This was to be effected by the conveyance of Awadhbehari's share in certain zamindari property to the value of Rs. 17,500. Certain property was conveyed to Ramsarup by a deed which stated the consideration to be Rs. 12,000 which was met by writing off the dues under the mortgage decree. After this conveyance had been executed, Ramkhelawan certified satisfaction of his decree at Begusarai. Awadhbehari applied under O. 21, R. 2 that satisfaction should be recorded of Ramkhelawan's decree in Monghyr, which after contest on the part of Rambahadur, Ramkhelawan's son, was allowed by the Subordinate Judge; and an appeal from that order was dismissed by the District Judge. The decree-holder has come in second appeal from that decision.

Mr. S. N. Bose on behalf of the appellant argues that since he was no party to the agreement to refer his decree to arbitration, he cannot be treated as bound by the proceedings of the arbitrators and by those of Ramsarup and the judgment-debtor between themselves. The conveyance recites that the property is transferred for consideration of Rs. 12,000 which is met by satisfaction of the mortgage decree. Mr. Bose argues that the provisions of S. 92, Evidence Act, prohibit us from taking evidence of any oral agreement which

would vary the terms set out in the document. I do not know that Proviso 2 to S. 92 would not apply in this case. The parties would not be prevented from proving the existence of a separate oral agreement to the effect that the vendee would proceed no further in the prosecution of his claim for certain money debts not specified in the deed; and I do not consider that the judgment-debtor can be prevented from attempting to prove that there was such an agreement. Mr. Bose is apparently on stronger ground when he argues that the decree-holder must be held entitled to execute his decree unless it is proved that he has himself received payment or that some other person definitely held out by him as his agent for the satisfaction of the decree has received payment from the judgment-debtor. The Courts below have come to the conclusion that Ramsarup was the real decree-holder and that Ramkhelawan was merely a benamidar. The judgment of the learned District Judge suggests that he bases his decision that Ramsarup was the real holder of the three decrees on the evidence of the arbitrators Ramcharitar Singh and Baleshwar Prasad. These men merely asserted that Ramsarup said that he was the decree-holder, a statement which would be inadmissible in evidence as proof of the fact that Ramsarup was the real owner. Awadhbehari said that Ramkhelawan was a farzidar; so he or his son Rambahadur took no step in the matter of the arbitration.

Mr. Bose argues that even if Ramkhelawan was a benamidar, it would be necessary before he could be prevented from executing his decree to show that he had either assigned the decree to somebody else or that he had been satisfied by somebody whom he held out as his agent. Mr. Mitter on behalf of Awadhbehari relies on the decision in 55 C L J 82¹ for his contention that the question of whether the person seeking execution is the true owner of the decree or not could be decided in execution proceedings under S. 47, Civil P. C. This is contrary to the view which was taken in 18 Cal 639² and in earlier cases in the Calcutta High Court, wherein it was held that the person appearing on the face of the decree as the decree-holder is entitled to execution, unless some other person can

show that he has taken the decree-holder's place by an assignment of the decree or by operation of law, that is, by death or succession or in some similar manner. In 48 Mad 553³ it was held that where a decree had been transferred by an instrument in writing, no person other than the transferee named in the document could claim the benefit on the ground that the transferee was a mere benamidar. It must be held that in execution proceedings it is not open to the judgment-debtor to assert that the real holder of the decree is any person other than the person named as decree-holder in the decree, unless there has been a valid assignment or devolution by process of law; and that under O. 21, R. 2, he can only claim entry of satisfaction of the decree where payment has been made either to the decree-holder or to some other person definitely held out by the decree-holder as his agent for the purpose of payment.

The decree-holder in the present case said that he accepted the arbitration to this extent that he accepted the decision that the dues under the three decrees—under the decree held by his uncle and the two held by him—should be limited to Rupees 17,500; but he did not admit that the arbitration was made at his instance or that he took any part in the reference; and there is no evidence to that effect on the record of these proceedings. The decree-holder did not accept the award so far as it decided that the conveyance of this property valued at Rs. 12,000 should be treated as a payment to him of his share of Rs. 17,500 represented by the two decrees. He had entered satisfaction of his decree at Begusarai and the learned District Judge inferred from this that he had been a party to the proceedings in arbitration; but the decree-holder said that he had done this on Ramsarup's telling him that Awadhbehari would pay up his decree which he held in Monghyr. There is no evidence to show that he authorized Ramsarup to treat satisfaction of the mortgage decree as satisfaction of his own decree in Monghyr, or that he held out Ramsarup to be the decree-holder or as his agent with general powers for adjustment of his dues under the two decrees. I consider that in the circumstances it must be held that there was no evidence on which the Courts below could hold that Rambahadur's decree in Monghyr had been

1. Nil Kanta v. Ram Chand, (1928) 15 A I R Cal 885=114 I C 495=55 C L J 82.

2. Jasoda Deye v. Kirtibash Das, (1891) 18 Cal 639.

3. Palaniappa Chetti v. Subramania Chettiar, (1925) 12 A I R Mad 701 = 88 I C 409 = 48 Mad 553=48 M L J 419.

satisfied, and that the petition of Awadhbehari under O. 21, R. 2, ought to have been dismissed. I would accordingly allow this appeal with costs, set aside the orders of the Courts below and dismiss the petition of Awadhbehari Prasad Singh under O. 21, R. 2. The appellant is entitled to his costs throughout.

Rowland J.—I agree. An adjustment to which the decree-holder is not a party cannot be recognized by the executing Court. The contrary position seems inconsistent with the provisions of the Code. S. 2, Cl. (3) defines "decree-holder" as the person in whose favour a decree has been passed or order capable of execution has been made by a Court and this must mean the person named in the decree. Then we have O. 21, R. 1, directing that all money payable under a decree is to be paid either into the Court or out of Court to the decree-holder or otherwise as the Court may direct. Then O. 21, R. 2, refers to payment out of Court or adjustment of the decree "to the satisfaction of the decree-holder" and does not recognize any payment or adjustment to the satisfaction of some third party. And R. 2, Cl. (3) lays down that a payment or adjustment which has not been certified or recorded as aforesaid shall not be recognized by any Court executing the decree. The facts put in issue in this case were matters between the judgment-debtor and Ramsarup, a stranger to the suit, rather than between the judgment-debtor and the decree-holder named in the decree. The proper place for the disputes between the judgment-debtor and Ramsarup to be settled is not in the executing Court but in separate and appropriate proceedings. I also agree with the reasoning of my learned brother and I concur in the order proposed to be passed.

D.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 413

AGARWALA J.

Mukhan Singh and others—Defendants
— *Appellants.*

v.

Chandrika Prasad Singh and others —
Plaintiffs — Respondents.

Second Appeal No. 1 of 1938, Decided on 13th January 1939, from appellate decree of Addl. District Judge, Shahabad, D/. 12th August 1937.

(a) Bihar Tenancy Act (8 of 1934), Ss. 179 and 155—Parties to permanent mukarrari ex-

pressly agreeing that on default of payment of rent on certain date of any year lessor should be entitled to re-enter — On default lessor is entitled to decree for ejectment without conforming to provisions of S. 155.

The opening words of S. 179 of the Act are : "Nothing in this Act" (that is to say, either in S. 155, S. 178 or any other Section of the Act) shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent mukarrari lease on any terms agreed on between him and his tenant. [P 414 C 2]

Where parties to a permanent mukarrari expressly agree that on default of payment of rent on certain date of any year, the lessor should be entitled to re-enter, the provision should be given effect to. On default the lessor is entitled to a decree for ejectment without conforming to the provisions of S. 155 : *A I R 1919 Cal 722, Disting.; A I R 1935 Pat 508, Expl.; A I R 1934 Pat 153, Rel. on.* [P 414 C 2]

(b) Bihar Tenancy Act (8 of 1934), S. 155 — Right of ejectment which is unqualified so far as contract is concerned is qualified by S. 155 if it is applicable.

The right of ejectment which is unqualified so far as the contract is concerned, is qualified by the provisions of S. 155 if they are applicable. They are qualified in two particulars, first, the landlord is required to give a notice in the prescribed form specifying the breach of contract, and, secondly, by the necessity of accepting compensation in lieu of forfeiture in the event of the tenant choosing to pay such compensation. [P 414 C 2]

Phulan Pd. Verma — *for Appellants.*

Baldeo Sahay and Harinandan Singh —
for Respondents.

Judgment. — This second appeal is by defendants 1 to 3. The plaintiffs' predecessor granted a permanent mukarrari to defendant 4 at an annual rent of Rs. 19. The lease contains a proviso entitling the lessor to re-enter on default of payment of rent on 30th Jeth of any year. In 1934 the lessee transferred his interest to defendants 1 to 3. He had not paid the rent for 1341 and defendants 1 to 3 defaulted in payment of the rent for 1342. The plaintiffs instituted the present suit to eject the defendants and to recover compensation for breach of the condition for payment of rent. The first Court directed defendants 1 to 3 to pay the plaintiffs Rs. 21-9-6, the amount claimed for 1342, within 15 days, and ordered that in the event of payment within that period defendants should continue to hold the property, but in the event of default in payment within that period, the plaintiffs were to be given possession. Against that decision the plaintiffs appealed and obtained an unconditional decree for ejectment. The question raised in this appeal by defendants 1 to 3 is whether S. 155, Bihar Tenancy

Act, applies. The relevant words of that Section are:

A suit for ejectment of a tenant, on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment, shall not be entertained unless the landlord has served, in the prescribed manner, a notice on the tenant specifying the particular misuse or breach complained of; and where the misuse or breach is capable of remedy, requiring the tenant to remedy same, and, in any case, to pay reasonable compensation for the misuse or breach, and the tenant has failed to comply within a reasonable time with the request.

On behalf of the respondents, on the other hand, it is contended that the application of the provisions of S. 155 is excluded by S. 179 where the conditions entailing forfeiture are provided by a contract between the parties to a permanent lease. S. 179 enacts that:

Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent mukarrari lease on any terms agreed on between him and his tenant.

Reference was also made in the course of the argument to S. 178. The relevant portion of that Section is:

Nothing in any contract, between a landlord and a tenant made before or after the passing of this Act shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of this Act.

The learned advocate contends that by reason of the provisions of S. 178, S. 155 applies even in the case of a permanent lease made after the passing of the Act. Reference was made to the decision in 29 C L J 40.¹ That however was a case of a lease made prior to the passing of the Bengal Tenancy Act. A similar case was in 16 P L T 633.² where also the question of the application of S. 155 to a case of lease executed after the enactment of S. 179 was considered. Delivering the judgment of the Court, Dhavle J. said at p. 644:

Holders of permanent mukarrari tenures were thus governed by the provisions of their leases as regards liability to ejectment for non-payment of rent among other grounds, but were nevertheless entitled, if the matter came into Court, to have 15 days' grace for payment (that is to say, under Ss. 78 and 52 of the Act of 1859 and 1869, respectively). The Bengal Tenancy Act seems to have left them in substantially the same position, while specially providing in S. 179 for future permanent mukarrari leases in permanently settled area that nothing in the Act shall be deemed to prevent such leases being made on any terms that may be agreed upon between the parties;

that is to say, his Lordship specially left open the question whether the words "terms agreed on between the parties" in S. 179 excluded or did not exclude the operation of S. 155. In the Full Bench decision of this Court in 13 Pat 231³ it was held that where a permanent lease is explicit, the general provisions of law do not apply, such as, for instance, the provisions in S. 68 for the awarding of damages where rent has been withheld. The opening words of S. 179 of the Act are: "Nothing in this Act" (that is to say, either in S. 155, S. 178 or any other Section of the Act) shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area, from granting a permanent mukarrari lease on any terms agreed on between him and his tenant. In the present case, the parties expressly agreed that on default of payment of rent on 30th Jeth of any year the lessor should be entitled to re-enter. Prima facie, there is no reason why that provision should not be given effect to. The learned advocate for the appellants however contends that he does not dispute the proposition that the lease was forfeited by the default, but he contends that before the landlord can enforce the remedy given him by the contract, he must conform to the provisions of S. 155. As put by the learned advocate the argument is that S. 155 does not modify the right conferred on the landlord by the contract but merely provides the method by which that right is to be enforced. But when the provisions of S. 155 are examined, it is found that the right of ejectment which is unqualified so far as the contract is concerned, is qualified by the provisions of the Section if they are applicable. They are qualified in two particulars, first, the landlord is required to give a notice in the prescribed form specifying the breach of contract, and secondly, by the necessity of accepting compensation in lieu of forfeiture in the event of the tenant choosing to pay such compensation. The acceptance of that contention means that the parties, despite the provisions of S. 179, are not to be governed by the terms of their contract but by the general provisions of the Tenancy Act relating to ejectment. In the absence of authority I am not constrained to accept that construction of the Act and I do not feel justified in acceding to the argument.

1. *Afladdi v. Satis Chandra*, (1919) 6 A I R Cal 722=34 I O 497=29 C L J 40.

2. *Sri Ramchandra Naick v. Ajodhya Singh*, (1935) 22 A I R Pat 508=158 I O 399=15 Pat 8=16 P L T 633.

3. *Nawabzada Syed Moinuddin Mirza v. Surendra Kumar*, (1934) 21 A I R Pat 158=147 I O 656=13 Pat 231=15 P L T 166 (F B).

The appeal is therefore dismissed with costs. The cross-appeal by the plaintiffs is not pressed and is dismissed without costs. Leave to appeal under the Letters Patent is granted.

D.S./R.K.

Appeal and cross-appeal dismissed.

A. I. R. 1939 Patna 415

HARRIES C. J. AND MANOHAR LALL J.

Dulhin Anupa Kuar — Plaintiff

— Appellant.

v.

Babu Kameshwar Nath Varma and others — Defendants — Respondents.

Appeal No. 46 of 1937, Decided on 12th January 1939, from original decree of Sub-Judge, Chapra, D/. 18th December 1936.

Transfer of Property Act (1882), S. 83 — What is good deposit stated — Usufructuary mortgage — Deposit in names of persons really interested and also person not interested — Interested persons refusing to deliver possession — Suit by depositor for possession — Interested persons cannot be saddled with mesne profits up to the date of decree.

A deposit to be a good deposit must be one which would enable the persons entitled to withdraw the money forthwith. [P 416 O 1]

Where it is found that one of the persons in whose names the deposit is made, is not interested in the mortgage money then the deposit in the names of the persons really interested and such other person cannot be regarded as a valid deposit: *A I R 1928 All 311; 26 All 291 and 23 Mad 510, Rel. on.* [P 416 O 1]

If in such case, the mortgage as to the amount of which the deposit is made is a usufructuary mortgage and the persons interested refuse to deliver possession on the ground that the deposit is not good, and the person making the deposit files a suit for possession, then since the interested persons cannot withdraw the amount without the permission of the uninterested person in whose name also the deposit is made, the interested persons are entitled to retain possession until the matter has been judicially decided and cannot therefore be saddled with mesne profits upto the date of the decree in such suit. [P 416 O 2]

B. P. Sinha and K. K. Singh

— *for Appellant.*

Rajeshwari Prasad, and J. N. Sahai for

A. A. Khan — *for Respondents.*

Harries C. J. — This is a plaintiff's appeal against a decree of the learned Subordinate Judge of Chapra partly decreeing his claim in a redemption suit. The facts of the case can be shortly stated as follows: On 20th September 1909 defendant 5 executed a usufructuary mortgage bond in favour of one Bindhyachal Prasad, a practising pleader. This bond was to secure a

sum of Rs. 6999-15-6. On 4th September 1933 defendant 5 executed another usufructuary mortgage in favour of the plaintiff to secure a sum of Rs. 9000. Out of this sum of Rs. 9000 the plaintiff undertook to pay the sum of Rs. 6999-15-6 due from defendant 5 under the previous mortgage transaction. On 22nd August 1934 the plaintiff deposited this sum in Court in the names of defendants 1 to 4, that is in the names of Babu Bireswar Nath, Babu Dineswar Nath, Babu Sureswar Nath and Musammatt Sanjharo Kuar. These were the brothers, nephews and widow of the original mortgagee. Notices were served on all the defendants on 26th January 1935 but the money deposited in Court was not taken out and possession was not given to the plaintiff. On 25th July 1935 the present suit was instituted. I may add that defendant 1 died and that his two minor sons, Kameshwar Nath and Umeshwar Nath, defendants 1 (a) and 1 (b), were brought on the record in his stead. The defendants pleaded that the money deposited was not sufficient and further that it had been deposited in the names of the wrong persons. It was the case for the defendants that this mortgage in favour of Bindhyachal was really in favour of the joint family and that after Bindhyachal's death the other members of the family became entitled to the money to the complete exclusion of the widow, defendant 4. As I have stated, the money was paid in the names of the brothers and the nephews of the deceased mortgagee and the widow, and it was contended on behalf of the defendants that the persons entitled, namely the brothers and nephews of the mortgagee, could not take this money out by reason of the fact that the widow had also been joined with them as a person entitled to some share in the money.

The learned Subordinate Judge came to the conclusion that the money deposited was the correct sum; but he held that the money belonged to the joint family, namely the survivors after the death of Bindhyachal. In his view the widow had no right whatsoever to the money and that she should not have been joined along with the other defendants in this deposit. Accordingly he held that the deposit was not in accordance with the terms of S. 83, T. P. Act, and that the defendants were not bound to give up possession from the date of the deposit or from the date of the notices served upon them. Having held that the

sum was sufficient, he decreed the plaintiff's claim for possession but refused to give the plaintiff anything by way of mesne profits from the date of the notices, namely 26th January 1935. On behalf of the appellant it has been contended that the learned Judge should have given mesne profits from the date when notices were served upon the defendants, that is 26th January 1935. Counsel has argued that as the mortgage stood in the name of Bindhyachal the plaintiff was entitled to assume that Bindhyachal's brothers, widow and nephews would be entitled to some interest in this mortgage money at Bindhyachal's death. He has not contended before us that the finding that this was joint family property is wrong; but he has urged that the deposit made in their names was a good deposit within S. 83, T. P. Act. Once it is found that the widow had no interest in this mortgage money, then a deposit in the names of the persons really interested and the widow cannot be regarded as a good deposit. A deposit to be a good deposit must be one which would enable the persons entitled to take out the money forthwith. In the present case the persons really entitled, namely the survivors of the joint family, could not withdraw this money without the permission of the widow, though she had no interest whatsoever in it; and in my view as they could not withdraw the money immediately, they cannot be saddled with mesne profits up to the date of the decree. This view has been consistently held by the Allahabad High Court. In 50 All 655¹ it was held that in order that the consequences attached by S. 84, T. P. Act, 1882, to a tender made under S. 83 of the same should ensue, it is necessary that the mortgage money should be deposited to the credit of the real mortgagee, and of him alone. Hence, where the mortgagee was a person in whose family the custom of primogeniture prevailed, and he died leaving him surviving two sons, a deposit of the mortgage money to the credit of both the sons was not a valid deposit within the purview of S. 83. This case followed an earlier case in 26 All 291² and a similar view was expressed by the Madras High Court in 23 Mad 510.³

1. Ganeshi Lal v. Rohni Rukumdhuj Prasad Singh, (1928) 15 A I R All 311=108 I O 570 =50 All 655=26 A L J 394.

2. Debendra Mohan Rai v. Sona Kunwar, (1904) 26 All 291=1901 A W N 21=1 A L J 5.

3. Madhavi Amma v. Kunhi Pathumma, (1900) 23 Mad 510.

The facts of the present case cannot be distinguished from the facts of the cases to which I have referred, and in my view those cases correctly state the law on this matter. In the present case the money having been deposited jointly in the names of persons interested and a person not interested, such could not be withdrawn at the will of the persons solely interested. That being so, the defendants in the present case were entitled to retain possession until the matter had been judicially decided. The Court below has found that the persons interested are defendants 1 (a), 1 (b), 2 and 3 and he has directed that they are entitled to the money deposited. The learned Judge however gives the plaintiff no mesne profits from the date of the decree, and in my view this is clearly wrong. Once it had been determined that defendants 1 (a), 1 (b), 2 and 3 were the persons entitled to the deposit, the latter could have taken the money at once and given up possession. Apparently they did not give up possession at once, and I do not know whether they have given up possession even now. In my view the learned Judge should have granted the plaintiff mesne profits from the date of the decree which is 18th December 1936. The amount of these mesne profits will be ascertained in proper proceedings. For the reasons which I have given, I would therefore allow this appeal in part and vary the decree of the Court below in the manner indicated above. The appellant is entitled to half the costs of this appeal. Defendants 1 (a) and 1 (b) are minors who are represented in this Court through their guardian ad litem. The appellant has not paid anything towards the costs of the guardian, and in my view he must pay a sum of fifty two rupees as guardian's costs.

Manohar Lal J.—I agree.

N.S./R.K. *Appeal allowed in part.*

A. I. R. 1939 Patna 416

ROWLAND AND CHATTERJI JJ.

Narayan Lal Mahtha — Defendant — Appellant.

v.

Bulak Lal Chaudhary and others, Plaintiffs and others, Defendants — Respondents.

Appeal No. 27 of 1935, Decided on 14th November 1938, from original decree of Sub-Judge, Gaya, D/- 17th December 1934.

Hindu Law — Adoption — Custom among Gayawals of Gaya—Gift by sonless Gayawal of his Gadi to another—Latter is called his adopted son — Such adoption is not adoption in its accepted sense under Hindu law and cannot have effect of removing adopted boy from natural family—But adoption in Dattaka form cannot fail even among Gayawals to have its usual consequence of loss of son's rights in natural family.

Among the Gayawals the custom is that when one who is sonless makes a gift of his Gadi to another the latter is usually called his adopted son. The Gayawals are otherwise known as the Pandas of Gaya whose main source of income is the Jatri business. According to traditional notions, Gayawal commands the respect of his pilgrims who worship his feet and make offerings to him. The Jatri books maintained by the Gayawal are considered to be property. In order that the Jatri business may continue, a sonless Gayawal sometimes makes a gift of his Gadi (which really means his family business) to another who acquires thereby the right to the Gadi with all the prestige and privileges of the donor. A donee in such cases is known as the donor's adopted son. Of course such adoption is not adoption in the accepted sense of the term under the Hindu law and it cannot have the effect of removing the adopted boy from his natural family. But among the Gayawals the customary rules regarding adoption are not so relaxed that a man may be regularly adopted into another family and still retain his interest in the estate of his natural father. An adoption in the Dattaka form cannot fail even among the Gayawals to have its usual consequence of loss of the rights of the son in his natural family : 22 Cal 609, *Ref.*

[P 419 C 1, 2; P 420 C 2; P 421 C 1]

S. M. Mullick, Sarjoo Prasad and L. K. Choudhary — *for Appellant.*

Dr. P. K. Sen, Raj Kishore Prasad, Gopal Prasad and Nazamuddin Khan — *for Respondents.*

Chatterji J.—This appeal arises out of a suit for partition between members of a Gayawal family of Gaya governed by the Mitakshara School of Hindu law. Plaintiff 1 Bulak Lal Mahtha who is the father or grandfather of the remaining plaintiffs is the younger uterine brother of defendant 1 Narayan Lal Mahtha who is the father or grandfather of the remaining defendants. The plaintiffs claim half-share in the disputed properties mentioned in Schs. B, C and D of the plaint, which, they say, are the joint family properties of themselves and the defendants. The suit was contested by defendant 1 alone, his defence being that plaintiff 1, though his uterine brother was adopted into another family and that he (defendant 1) has been in adverse possession of the disputed properties. The learned Subordinate Judge, overruling these defences, has decreed the suit. Hence this appeal by defendant 1.

The only question raised in this appeal

is that of adoption. One Damaji Hall had three sons—Ganga Bishun, Radha Kishun and Hira Lal. Radha Kishun was adopted into a Mahtha family and was known as Radha Kishun Mahtha. Narayan Lal (defendant 1) and Bulak Lal (plaintiff 1) are the sons of Radha Kishun Mahtha. Hira Lal is said to have been adopted into a Choudhuri family and was known as Hira Lal Choudhuri, though it appears that he got the properties both of his natural and adoptive families. According to the defence Bulak Lal was adopted by the said Hira Lal Choudhuri some time in 1887 during the lifetime of Radha Kishun who died in 1889. The adoption is said to have been in the usual Dattaka form. Both oral and documentary evidence has been adduced on both sides. But considering the fact that the adoption is said to have taken place about 47 years before the trial of the suit, it will not be safe to act upon the oral evidence. I shall therefore confine myself primarily to the documentary evidence.

The earliest document in support of the adoption is Ex. A, a registered deed of gift dated 30th November 1905, executed by Hira Lal Choudhuri in favour of Bulak Lal. It recites that about 18 years ago the executant Hira Lal having no son asked his brother Radha Kishun to give his second son Bulak Lal in adoption to him and accordingly Radha Kishun and his wife gave Bulak Lal in adoption to him and since then he brought up Bulak Lal as his own son and performed his churakaran (tonsure), janeu (sacred thread) and marriage ceremonies. By this deed, Hira Lal gave away to Bulak Lal the properties mentioned therein including the books relating to his Jatri business. The deed further recites that the said Babu Bulak Lal Mahtha shall get his feet worshipped by all the Jatri of me, the executant, for which I have given him the right under this deed, in place of me, the executant. He should bring into his own use whatever offerings and property he would get from the Jatri.

The recitals in this deed are clear enough and undoubtedly afford prima facie evidence of the adoption. Ex. B is a mortgage bond dated 10th December 1913, executed by Hira Lal in favour of one Sham Lal Mauar for Rs. 1000. Hira Lal died in February 1914 leaving the mortgage debt under Ex. B unsatisfied. On 10th May 1915 plaintiff 1 describing himself as Bulak Lal Choudhuri, son of Babu Radha Kishun Mahtha, deceased, and adopted son of and in possession of the properties left by Hira

Lal Choudhuri, deceased, executed a registered mortgage bond Ex. B (1) in favour of the same Sham Lal Mauar for Rs. 2000, hypothecating some of the properties obtained by him from Hira Lal Choudhuri by the deed of gift. The necessity for borrowing the money on this mortgage, as recited in the deed, was to meet the expenses of his daughter's marriage. To satisfy the dues on this mortgage, as also on Hira Lal's mortgage Ex. B, plaintiff 1 describing himself as Bulak Lal Choudhuri, son of Babu Radha Kishun Mahta, deceased, and adopted son of and in possession of the properties left by Babu Hira Lal Choudhuri *wo* Hal, deceased, executed as a deed Ex. D, dated 3rd November 1915 in favour of the mortgagee Sham Lal Mauar for Rs. 5225 in respect of the mortgaged properties. This deed recites that Hira Lal Choudhuri having no male issue had taken Bulak Lal in adoption and performed his churakaran, janeu and marriage ceremonies. In other words, in this deed there is a clear admission of plaintiff 1 himself that he had been taken in adoption from his natural father Radha Kishun by Hira Lal. Ex. F is an extract from the Demand Register of Gaya Municipality for 1911-20 which shows that plaintiff 1 described as Bulak Lal Choudhuri was assessed in respect of a pucca house. Presumably it refers to the house covered by the deed of gift Ex. A. Exs. H and H (1) are two vakalatnamas, dated 18th November 1932, and 8th May 1931, respectively, filed by Bulak Lal in two previous cases, in which he signed as Bulak Lal Choudhuri. Ex. J is his written statement dated 18th May 1931, in the suit in which he filed the vakalatnama Ex. H (1). Ex. 1 is a petition of objection dated 18th November 1932, filed by him as judgment-debtor in the execution case to which the vakalatnama Ex. H (1) relates. This is all the documentary evidence produced on behalf of the defendant.

On the other side the earliest document in Ex. 8 an entry in Register of Civil Suits relating to a suit instituted on 28th February 1893, by Narayan Lal Mahtha (defendant 1) and Bulak Lal Mahtha (plaintiff 1) minor through guardian Narayan Lal Mahtha against Shashi Mohan Sen in respect of $2\frac{1}{2}$ kathas of land situate in Kalighat, Calcutta. It appears from the evidence that this land had been gifted to Radha Kishun Mahtha, by one Kshemankari Chaudhurani. After Radha Kishun's death

his sons Narayan Lal and Bulak Lal came into possession of that land, but they were subsequently dispossessed by Shashi Mohan Sen, adopted son of the said Kshemankari Chaudhurani. Thereupon they brought the suit to which Ex. 8 relates, in the Munsif's Court at Alipore. The suit was dismissed on compromise on 16th March 1894, as Ex. 8 shows. On that very day Shashi Mohan Sen, the defendant in that suit, executed in favour of Narayan Lal and Bulak Lal a registered deed of exchange Ex. 3 by which some other property in Calcutta was given in exchange to them. In this deed Bulak Lal was described as Bulak Lal Mahtha, son of Radha Kishun Mahtha. The Calcutta property thus acquired by exchange was eventually alienated by Narayan Lal alone by the sale deed, Ex. 1 dated 16th March 1932 to one Srimati Suraj Mohini Debi. The following recital in this sale deed is important :

Since then the said late Radha Krishna Mahatji was in rightful possession of the said gift property and he having died, I and my brother Shreeman Bulki Lal Mahata became entitled to and were in possession of the said property by right of inheritance, according to the Mitakshara. Then after the death of the said Kshemankari Chaudhurani Shashi Mohan Sen, the son taken in adoption according to the will of her husband having dispossessed us from some portion of the said land, we instituted Title Suit No. 271 of 1893 in the Munsif's 2nd Court at Alipur, praying for recovery of possession on declaration of title to the said land, and the said suit was decided on compromise; and Shashi Mohan Sen, the defendant in the said suit, in exchange for the land made a gift of by his said mother gave a plot of land measuring $1\frac{1}{2}$ katha more or less, specified and lying within the boundaries below, included the former holding No. 22 and the present holding No. 331 and on 3rd Chaitra 1300 B. S. corresponding to 18th March 1894 regularly executed a deed of exchange and got it registered and put me in possession thereof. Thereafter my brother the said Bulki Lal Mahata having been adopted as a son by Babu Hira Lal Choudhuri, according to Hindu law and family custom of the Gayawalis prevalent in my part of the country, I am in possession and enjoyment of the said sixteen annas property in absolute right.

This recital shows that Bulak Lal Mahtha's adoption, if any, must have taken place subsequent to the execution of the deed of exchange in March 1894. Radha Kishun Mahtha's family had also some property in District Basti. Ex. 7 is a khewat of village Pakardanah in District Basti of 1319 Fasli (1912) which shows that 10 bighas, 4 kathas and 11 dhurs of land with a rental of Rs. 6 were recorded in the names of Narayan Lal and Bulak Lal, sons of Radha Kishun, with a note that they had equal shares. In respect of

this property, there were some rent suits and ejectment suits which were instituted by both Narayan Lal Mahtha and Bulak Lal Mahtha who were described as sons of Radha Kishun Mahtha. Ex. 4 (b) and Ex. 4 are judgments dated 6th March 1915 and 26th March 1915 respectively, in two such ejectment suits. Ex. 5 is the decree corresponding to the judgment, Ex. 4. Ex. 4 (a) is the judgment dated 3rd July 1917 in one of the rent suits and Ex. 5 (a) is a decree dated 3rd July 1917 in another rent suit. These documents show that Bulak Lal even long after the alleged adoption was regarded as a member of his natural father's family and had interest in the properties of that family.

Bulak Lal's explanation with regard to the documents produced by the defendant is that among the Gayawals the custom is that when one who is sonless makes a gift of his Gadi to another the latter is usually called his adopted son and that it was because Hira Lal Choudhuri made a gift of his Gadi by the deed Ex. A to Bulak Lal that the latter was called his adopted son according to the said prevalent custom. The Gayawals are otherwise known as the Pandas of Gaya whose main source of income is the Jatri business. According to traditional notions, a Gayawal commands the respect of his pilgrims who worship his feet and make offerings to him. The Jatri books maintained by the Gayawal are considered to be property. In order that the Jatri business may continue, a sonless Gayawal sometimes makes a gift of his Gadi (which really means his family business) to another who acquires thereby the right to the Gadi with all the prestige and privileges of the donor. A donee in such cases is known as the donor's adopted son. Bulak Lal (P. W. 1) in his evidence says :

Among Gayawals a person will be called Paser Matamana (adopted son) of a Gadi which he will get by gift. This custom is ancient and exists from before my hosh. The epithet of Gadi received by gift is added to the name of the donee.

Bulak Lal's case on this point receives some support from the defendant's evidence also. D. W. 6 says :

Among Gayawals adoptions are very common. One Gayawal became malik of 4 or 5 Gadis, by being adopted by all the Gadis.

D. W. 14 says : "Gayawals become malik of several Gadis by means of adoption." Of course such adoption is not adoption in the accepted sense of the term under the Hindu

law and it cannot have the effect of removing the adopted boy from his natural family. This peculiar kind of adoption amongst the Gayawals was considered by their Lordships of the Judicial Committee in 22 Cal 609¹ in which their Lordships observed that amongst the Gayawals there exist peculiar and loose customs in regard to adoption. So it seems Bulak Lal has a plausible explanation for his statements in the documents executed by him subsequent to the deed of gift Ex. A. With reference to the mortgage, Ex. B (1) executed by him in order to raise money for his daughters' marriage, it has been argued by Mr. S. M. Mullick, the learned advocate for the appellant, that this is inconsistent with his being a member of his natural family because then the marriage expenses would have been met by his elder brother, the karta of the family. But if sufficient joint family funds were not available, there was nothing unlikely in Bulak Lal raising loan on the security of his own properties. As regards the recital in the deed of gift, Ex. A to the effect that the adoption had actually taken place 18 years ago, it is falsified to some extent by suit register Ex. 8 and the deed of exchange Ex. 3 and most effectively by the recitals in the sale deed, Ex. 1 executed by Narayan Lal himself. It is worthy of notice that the suit register, Ex. 8 and the deed of exchange, Ex. 3 are the earliest documents on the record and much prior to the deed of gift, Ex. A. If the adoption had in fact taken place in 1887, it is extremely difficult to understand why in 1893 Narayan Lal would, against his own interest, join Bulak Lal as a co-plaintiff in the suit for ejectment referred to in Ex. 8. The khewat Ex. 7 of 1912 in respect of the Basti property and the judgments and decrees of 1915 and 1917 (Exs. 4, 5, 4b, 4a and 5a) relating to that property are also inconsistent with the story of Bulak Lal having been adopted away in 1887.

The explanation given by Narayan Lal regarding these suits is that they were filed by his am-mukhtar Jitan Singh but the am-mukhtarnama, Ex. G in favour of Jitan Singh was dated 23rd March 1917, and it cannot therefore account for the suits of 1915. It was no doubt prior to the suits disposed of by the judgment, Ex. 4 (a) and the decree, Ex. 5 (a) but it was executed by Narayan Lal Mahtha alone and it is futile

1. Lachman Lal Chowdhari v. Kanhaya Lal Nowar, (1895) 22 Cal 609 = 22 I A 51=6 Sar 558 (P O).

to suggest that Jitan Singh on the strength of this am-mukhtarnama filed the suits on behalf of Narayan Lal and also Bulak Lal without their authority or knowledge. It has been suggested by Mr. S. M. Mullick that it might be that because the Basti property was recorded in the khewat Ex. 7 in the names of both the brothers the suits were instituted by both. This suggestion rather strengthens the evidentiary value of the khewat which shows that the brothers had equal shares. Thus, on the side of the defendant, there is no satisfactory explanation for the aforesaid documents relied on by the plaintiffs. It is also significant that in the deed of gift, Ex. A itself which was executed 18 years after the alleged adoption, plaintiff 1 was described as Bulak Lal Mahtha and not as Bulak Lal Choudhuri which would have been the case if the adoption was true. Indeed the ancestral Gaya properties have been recorded in the name of defendant 1 alone but this is not inconsistent with the plaintiffs' case because defendant 1 is the elder brother.

Upon a careful consideration of the entire documentary evidence in the case, it is difficult to hold that Bulak Lal was in fact adopted by Hira Lal in 1887 or during the lifetime of Radha Kishun. In all likelihood, what actually took place was that Hira Lal who had no son and also lost his wife in his old age, as the recital in the deed of gift Ex. A goes, treated his nephew Bulak Lal as his own son and with a view that his family Jatri business might continue, he executed the deed of gift, Ex. A in favour of Bulak Lal treating him as if he was an adopted son. As actual adoption at that time was not possible, Radha Kishun and presumably his wife also having died long before, certain recitals were entered in the deed of gift, Ex. A to show that a valid adoption had taken place during the lifetime of Radha Kishun. The falsity of these recitals is fully demonstrated by defendant 1's own statements in the sale deed, Ex. 1. After the deed of gift, Ex. A and after Hira Lal's death Bulak Lal dealt with Hira Lal's properties as his own and described himself in various documents as his adopted son. In the view I take of the documentary evidence, it is unnecessary to deal with the oral evidence adduced in support of the adoption which the learned Subordinate Judge did not believe and upon which the learned advocate in this Court also did not place much reliance. On the question of adverse pos-

session, the finding of the learned Subordinate Judge has not been assailed before us. I would therefore dismiss the appeal with costs.

Rowland J.—I agree. I would like to make it clear that I do not accept the proposition advanced in evidence by the plaintiff that among the Gayawals the customary rules regarding adoption are so relaxed that a man may be regularly adopted into another family and still retain his interest in the estate of his natural father. Reference is made to 22 Cal 609¹ in which there are observations as to "loose practices" prevailing among the Gayawals regarding adoption: it does not follow that there is no definite rule. It was not there laid down that an adoption in the Dattaka form could fail even among the Gayawals to have its usual consequence of loss of the rights of the son in his natural family. The present litigation has brought to light a number of instances of adoption so called with their consequences. The plaintiff's natural father Radha Kishun Mahtha was by birth the son of Damaji Hal. Damaji himself was by birth a Choudhary who was given by adoption to be the son of Bhairo Hal. It is undisputed that Damaji by this adoption lost his connexion with the Choudhary family. Damaji had three sons, Radha Kishun Mahtha, Ganga Bishan and Hira Lal. Of these, Radha Kishun was adopted into the Mahtha family and admittedly severed his connexion with the Hal Gadi in which there remained the other two sons Ganga Bishun and Hira Lal. Now Hira Lal is described as having been adopted by Maharani Dayee Choudhain, wife of Ram Mohan Choudhary deceased, but after the adoption he retained both names of Choudhary and Hal and on the death of Ganga Bishun without issue he succeeded to the entire properties left by Damaji Hal, as well as those left by Maharani Dayee Choudhain. Then again defendant 1, Narayan Lal, has four sons Madho Lal Mahtha, Kohan Lal, Gobind Lal, and Balaji. In a sale deed Ex. 1, executed by Narayan Lal on 16th March 1932, there is a recital that the executant had four sons out of whom he has given away three in adoption, one to Mohan Lal Babu Lal, one to Raj Gobinda Lal Nidhuria Bahadur, C. I. E., and the fourth to Shreeman Narayan Tatak alias Balaji Tatak, and they have become members of other families. The remaining son having died without issue, the executant asserts his own absolute right in

and possession over the 16 annas of the property.

We have seen nothing in these instances to throw doubt on the proposition that in order to sever the connexion of a son with his father's estate there must be giving and taking, and on the other hand that if there is the formal giving by the natural father and taking by the adoptive father, the severance of status inevitably follows. The case of Hira Lal was a case in which the adoptive father was dead and the widow took Hira Lal as her son. It does not appear that specific authority to adopt was given by her husband. It seems a not unnatural result that Hira Lal afterwards described himself by both names Choudhary and Hal and took inheritance in property of both families. The Privy Council case in 22 Cal 609¹ may have been similar. Mulchand was taken by his maternal uncle to whom there would be objections in Hindu law to his being given in Dattaka form. After the so-called adoption he used both the surnames of Choudhary and Nakphopha. Their Lordships quoted a remark by the lower Court that "even a person who gets another's property by gift assumes the surname of his donor and calls himself as his adopted son." The defendant has laid stress on the fact that in Exs. B (1) and D Bulak describes himself as Choudhary and not as Mahtha and Choudhary, the description contrasting with that of Hira Lal as Choudhary and Hal. The description is consistent with the case of the appellant, but if, as the admissions in Ex. 1 show, the "adoption" of Bulak Lal did not take place till after the death of his father Radha Kishun Mahtha, it cannot possibly have been a regular adoption in the Dattaka form. It can only be an instance of the practice referred to in the passage just cited.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 421

HARRIES C. J. AND MANOHAR LALL J.

Byomesh Mukharji — Defendant —
Appellant.

v.

Madhabji Mepa Maru, Plaintiff and others, Defendants — Respondents.

Appeal No. 173 of 1936, Decided on 10th January 1939, from original decree of Sub.Judge, Dhanbad, D/. 28th March 1936.

Lessor and Lessee — Lessee of coal mines granting sublease on terms that sublessee was to pay royalties—Sublessee executing mortgage

—Mortgagee putting prospective purchaser in possession of mines—Purchaser agreeing to pay royalties during possession—Sale not completed and interest of mortgagee not assigned to prospective purchaser — Purchaser entering into contract directly with lessor to pay royalties during period of possession—Lessor held could sue him directly for royalties even though he was not tenant of lessor.

A lessee of coal mines granted a sublease of the mines according to which the sublessee was liable to pay royalties. The sublessee executed a mortgage in favour of a bank. Subsequently, a person who desired to purchase the interest of the mortgagee made some payment to the mortgagee who put the prospective purchaser in possession of the mines, who agreed with the mortgagee to pay royalty during period of his possession. The sale was however never completed and the interest of the mortgagee was not assigned to the prospective purchaser. The royalties were not paid by the sublessee and the purchaser in order to retain possession entered into an agreement directly with the lessor by which he agreed to pay royalty during the period of his possession :

Held that in view of this agreement the lessor could sue the prospective purchaser directly for royalties for the period of his possession though he did not hold any assignment of the mortgagee's interest or was not in any way a tenant of the lessor. The fact that the mortgagee was also liable for the royalties was no defence to the prospective purchaser upon a claim on a special contract which he made with the lessor. [P 422 C 2; P 424 C 1,2]

B. N. Mitter and Ramsarup Sinha —

for Appellant.

R. S. Chattarji, Nitai Chandra Ghosh
and Sudhir Chandra Ghosh —

for Respondents.

Harries C. J.—This is an appeal by defendant 3 in the suit against a decree passed by the learned Subordinate Judge of Manbhum for a sum of Rs. 9416-14-3 for certain coal royalties due with interest thereon. On 16th June 1894, one Joseph Chater together with a Mr. Smith acquired by a lease the minerals underlying 838 bighas, 4 khata in mouza Kusunda excluding two plots of 150 and 100 bighas respectively. The interest under this lease is now admittedly vested in the plaintiff. On 11th February 1896, Messrs. Chater and Smith gave a sublease of these minerals to two persons of the name of Patel, and this sublease contains terms as to the payment of royalty by the sublessees. On 15th January 1923, this sublease became vested in A. Patel by reason of an assignment to him of the interest held by D. Patel. On 16th November 1923, A. Patel, the sublessee, executed a mortgage in favour of defendant 4, the Central Bank of India, Ltd., and later, on 1st December 1925, A. Patel executed a deed of gift of this lease in favour of N. Patel. Obviously this deed of

gift was subject to the mortgage which he had created in favour of the Central Bank of India, Ltd.

It appears that at the beginning of the year 1930, defendant 3 desired to purchase the interest of the Central Bank of India, and there can be no question that defendant 3 did make a payment to the Bank and was put in possession of these minerals. The sale to defendant 3 however was never completed, and on 10th January 1931, the Central Bank of India transferred their interest in the minerals to one Bijoy Kumar Chatterji. The present appellant, defendant 3, and N. Patel, the donee under the deed of gift to which I have referred, joined in this transaction and transferred their interests for whatever they were worth to Chatterji. Royalties had not been paid by the sub-lessees to the plaintiff, and accordingly this suit was brought on 10th April 1934 to recover a sum of Rs. 25,020-12-3 as arrears of royalty together with interest thereon. There was also a claim to possession of the property comprised in the indenture of 11th February 1896, on the ground that the sub-lease had been forfeited by reason of the failure to pay the royalties. Eventually, the learned Subordinate Judge came to the conclusion that the present appellant, defendant 3, was liable to pay a sum of Rs. 9416-14-3 as arrears of royalty due for the period from March 1930 to January 1931. He further decreed the plaintiff's claim against defendants 1, 2 and 5 for Rs. 21,816-2-3 for arrears of royalty due from them and interest thereon. Against this decree defendant 3 has preferred the present appeal.

In the first place, it has been argued by Mr. B. N. Mitter on behalf of the appellant that his client cannot be made liable for royalty for the period from March 1930 to January 1931. It is clear that Mr. Mitter's client was in possession of the coal seams during that period and that he actually worked the same. He contends that if he is liable to pay any royalty such liability is to the Central Bank of India who placed him in possession. In short his argument is that as between the appellant and the plaintiff there is neither privity of estate nor privity of contract of tenancy. The learned Subordinate Judge has agreed with this contention, but he has found as a fact that the appellant had entered into an independent or separate contract with the plaintiff to pay the royalty due in respect of coal mined during the period in which

the appellant was actually in possession. As I have pointed out, the appellant was put into possession as a prospective purchaser of these coal seams by defendant 4, the Central Bank of India. The interest of the Bank had not been assigned to defendant 3 and was never in fact so assigned. It would appear that defendant 3 was some form of tenant of the Bank, and it is clear that such an arrangement would not entitle the plaintiff to sue the appellant direct. He did not hold the sub-lease by assignment: neither had he taken a tenancy from the plaintiff. The learned Subordinate Judge has found that towards the end of the year 1930, the appellant agreed directly with the plaintiff to pay the royalty, and if such an agreement was made the appellant could be successfully sued upon it, though he did not hold any assignment of the Bank's interest or was not in any way a tenant of the plaintiff. It is clear that when defendant 3 was negotiating with the Central Bank of India for the purchase of the latter's interest he was anxious to obtain possession of these minerals. He paid the Bank Rs. 10,000 and did obtain possession of the mineral area. It is also clear that defendant 3 was somewhat anxious as to the liability for royalties, and this will be seen from certain letters which passed between the parties. On 11th January 1930, the appellant wrote to the Central Bank of India pointing out that he was desirous of taking immediate possession of the colliery on payment of Rs. 10,000 with a view to taking advantage of the season and the market. The appellant also points out that he had received a notice from the plaintiff's agent holding him responsible for all the arrears of royalty due to the plaintiff. He mentions that he had not replied to the plaintiff because of the negotiations. He was anxious to hear from the Bank in order to enable him to send a reply to the plaintiff before taking possession of the property and thus avoid future difficulties. On 22nd January 1930, a cheque for Rs. 10,000 in part payment of the purchase price of the colliery was sent by the appellant to the Bank. On 31st January the appellant again wrote to the Bank, and in that letter he makes his position clear as to the payment of the royalties. He says:

It is understood that we shall not be liable for royalty and surface rent prior to our taking over possession.

From this letter it is clear that the arrangement made between the appellant

and the Bank was that the Bank were to remain liable for arrears of royalty due up to the time when the appellant took possession and thereafter the appellant was to be liable for such royalties. Clearly, such an arrangement between the appellant and the Bank could not give the plaintiff a cause of action, and the plaintiff does not contend that such is the case. However, it is clear that towards the end of the year the plaintiff was becoming anxious concerning the royalties, and on 2nd November 1930, the plaintiff's agent wrote to the Bank pointing out that the Bank's tenant, namely the appellant, had not paid anything towards royalty since March. The plaintiff further points out that owing to the appellant's failure to pay the royalty they had no alternative but to look to the Bank. On 5th November 1930, the Bank wrote to the appellant pointing out that royalty was in arrear and the letter ends with this sentence :

We have to give you this final notice that if you do not satisfy the landlords immediately we shall have to take against you very unpleasant measures, which please note. Please let us hear immediately what you decide.

On 7th November 1930, the appellant wrote to the Bank in reply to the Bank's letter of 5th November 1930. In that letter the appellant states that he had seen Mr. Rawal, the agent of the plaintiff, and had made arrangements with him for royalty payment. On 18th November 1930, the Bank wrote to the appellant stating that Mr. Rawal had informed them that no arrangements had yet been made by the appellant for payment of royalty and the Bank made it clear that they were very anxious about the matter. Again on 19th November 1930, the Bank wrote to the appellant that no arrangement had yet been made for payment of the royalty by the appellant and the latter is warned that unless royalty is paid in future he would be inviting serious trouble for himself. The letter concludes with these words :

We should like to know immediately and definitely and in a straightforward manner from Mr. Mukherjee himself as to how he proposes to settle the question of royalty in arrears and of future payments.

From this correspondence it is clear that the appellant had arranged with the Bank that he would pay the royalty whilst he was in possession. Further, it is clear that he had failed to do so and was being pressed both by the Bank and the plaintiff to discharge the obligation for royalty. On 23rd November 1930, Ex. 13 (n), the appellant wrote to Mr. Rawal, the plaintiff's agent,

and in this letter he refers to some verbal arrangement made between the two for payment of royalty. The letter is an important one and I quote it in extenso :

I am sorry I could not go over to your place this afternoon for my friend suddenly fell ill. I hope to spend some pleasant evening in near future at your place. Herewith I am sending a cheque for Rs. 300, rupees three hundred only, as per our verbal arrangement. I hope you will kindly take the trouble of informing the Central Bank people and smooth the situation for myself.

This letter makes it clear that the appellant was realizing the seriousness of the position. Both the Bank and the plaintiff were pressing him, and it is clear that if the royalties were not paid, the plaintiff would have been turned out of possession by the Bank and any hope of completing the purchase would be gone. Accordingly he must have made some arrangement direct with Mr. Rawal, the agent of the plaintiff, for payment of these royalties and on 23rd November 1930 he makes a payment of Rs. 300 towards the arrears of royalties due from March 1930. The matter does not end there, because on 1st December 1930, the appellant wrote another letter to the plaintiff, Ex. 13 (o). That letter is in these terms :

I beg to enclose herewith please find the cheque No. CX-829448 of 30th November 1930 on the Central Bank of India Ltd., in favour of M. M. Maru, Esq., for Rs. 300 (three hundred only) against our royalty.

Here again there is another payment by the appellant to the plaintiff in respect of "our royalty," that is royalty due from the appellant, who was trading as B. Mukherjee & Co., to the plaintiff. On 20th December 1930 the appellant wrote another letter, Ex. 13 (p) to the plaintiff and that letter is in these terms :

I beg to enclose herewith the cheque No. C-312826 of 15th December 1930 on the Central Bank of India Ltd., for Rs. 300 (rupees three hundred only) drawn in favour of M. M. Maru Esqr.

Please credit this amount to our account for the royalty due to you from this Company. A formal receipt is requested.

As I have stated, the appellant was trading as B. Mukherjee & Co., and the reference "royalty due to you from this Company" is a reference to the royalty due from the appellant to the plaintiff. There was also evidence that the plaintiff had opened separate royalty account in the name of the appellant and in this account these payments by the appellant have been credited. On that evidence the learned Subordinate Judge came to the conclusion

that the appellant had agreed directly with the plaintiff's agent to pay the royalty due from him during the period of his possession and that in pursuance of the agreement he had actually made three payments of Rs. 300. It is somewhat unfortunate in this case that no verbal evidence was led on this point; but, in my view, the learned Judge was perfectly entitled to hold upon these letters and upon the facts that such an arrangement had been made. It must be remembered that the appellant, as stated by him in the letter of 11th January 1930, was anxious to obtain possession and thus take advantage of the season and the market. That letter also makes it clear that the appellant was prepared to pay the royalty whilst he was in possession though he was not prepared to pay arrears of royalty due before he took possession. The later letters passing between the appellant and the Bank shew that the Bank were growing very anxious owing to the failure of the appellant to pay the royalties and they were threatening the appellant with most unpleasant consequences. The plaintiff was also anxious, and had not some arrangement been made concerning the payment of these royalties, it is clear that the appellant would have soon been dispossessed. In those circumstances, it is most probable that the appellant did make an arrangement direct with the plaintiff's agent for the payment of these royalties. The terms of the three letters passing between the appellant and the plaintiff, namely Exs. 13 (n), 13 (o) and 13 (p) show that an agreement was made and that the appellant had undertaken to pay the royalty directly to the plaintiff. That such an agreement was made is further evidenced by the fact that a royalty account in the name of the appellant was opened by the plaintiff. The references made by the appellant to "our royalty" and "royalty due to you from this Company" show that the appellant had undertaken to pay this royalty to the plaintiff. In my view there was abundant documentary evidence to show that the appellant and the plaintiff had entered into an agreement whereby the appellant was to pay royalty to the plaintiff in order to retain possession of this property. There was consideration for this agreement and accordingly the plaintiff could sue the appellant upon it. In my view, the learned Subordinate Judge was right in holding that the appellant was liable under this agreement to pay the

royalties due from March 1930 to January 1931.

Mr. Mitter has relied on certain later letters showing that the plaintiff claimed the royalty in question also from the Bank. The Bank were the mortgagees of the sub-lease, and as they were holding the property the plaintiff was entitled to claim the royalties from them in the event of the appellant failing to perform his contract. The fact that the Bank is also liable for this is no defence to the appellant upon a claim on a special contract which he made with the plaintiff. The plaintiff might have two strings to his bow, but that is no reason why he should not in the first place sue the appellant. Mr. Mitter has also urged that upon the plaintiff's own showing the royalty for March 1930 had been paid. He referred to a letter, Ex. A-2, addressed to the appellant from the plaintiff. In that letter, the royalties are said to have accrued from April 1930 and according to Mr. Mitter that is an admission that nothing was due for March 1930. The present claim is for arrears from March 1930 to January 1931, and Mr. Mitter argues that the royalty for March 1930 should not be included in the present claim. In point of fact, the appellant had paid more than the royalty due in March and therefore the plaintiff was quite right when he said in Ex. 2 on 16th November 1933, that royalty was due from April 1930. In the present claim what has happened is this, that the plaintiff has shown the royalty due from March 1930 to January 1931 and credited towards that amount the payments made. It is to be observed that no real point was made in the Court below upon the amount due and in our view the decree cannot be challenged on that ground. It seems to have been agreed that the only question was who was liable to pay the amounts claimed.

Lastly Mr. Mitter has contended that the plaintiff's claim against defendant 3 is barred by limitation. The agreement under which the appellant has been held liable, was made in 1930 and under that agreement the appellant was to pay royalty for the period he was in possession. He ceased to be in possession after January 1931 and accordingly he was bound to pay the royalties at latest on 1st February 1931. Mr. Mitter has argued that this is a contractual debt and that the period of limitation is three years. The suit was not brought until 10th April 1934, and according to

Mr. Mitter the suit was barred on 1st February 1934. Accordingly he says that the suit is a little over two months out of time.

It is to be observed that limitation was not pleaded in the written statement of appellant, defendant 3, nor indeed in the written statement of any of the defendants. It is further clear that the point was never taken in the Court below. No issue was framed on the question of limitation and there is no reference to this point anywhere in the long and detailed judgment of the learned Subordinate Judge. Clearly, the point has been appreciated for the first time in this Court. Mr. Chattarji who appears on behalf of the plaintiff-respondent has urged us to reject this plea on the ground that it was not taken in the Court below. The Court however must take notice of the point if it appears to the Court that the suit is barred by time. It may be that there are acknowledgments of this debt or other grounds upon which it can be urged that the period of limitation has been extended. As the point was never raised in the Court below, it is obvious that the plaintiff-respondent is not in a position to meet it here. In my view before this question of limitation can be decided, it will be necessary to remit an issue to the Court below in order that that Court can go into the question and record its findings. I would therefore remit the following issue to the Court below: "Is the claim against defendant 3 barred by time." The parties will be at liberty to adduce such further evidence upon this issue as they may deem proper, and the Court below will return its findings to this Court within three months of the date of receipt of the record from this Court. The usual fifteen days will be given to the parties to make objections to the finding.

Manohar Lall J.—I agree.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Patna 425

HARRIES C. J. AND AGARWALA J.
Mali Ram — Petitioner.

v.

Ramgobind Sah and others —

Opposite Party.

Letters Patent Appeal No. 14 of 1939, Decided on 20th March 1939, from judgment of Agarwala J. in S. A. No. 1005 of 1936, D/- 24th January 1939.

(a) Letters Patent (Patna), Para. 11—Nature of rights conferred upon High Court—Para. 11

does not give jurisdiction to High Court to hear appeals from decision of single Judge of High Court.

Paragraph 11, Letters Patent, does not give jurisdiction to the High Court whatever to hear an appeal from a single Judge of the High Court. The right conferred by Para. 11 is a right to hear appeals from the Civil Courts of the provinces and from all other Courts subject to the superintendence of the High Courts. In short Para. 11 gives the High Court a right to hear appeals from what are commonly called the subordinate or lower Courts. [P 425 C 2 ; P 426 C 1]

(b) Letters Patent (Patna), Para. 10—Single Judge in second appeal refusing leave for Letters Patent appeal—High Court has no jurisdiction to hear appeal—Provisions of Letters Patent are not inconsistent with Sec. 9, High Courts Act.

High Court can only hear an appeal from a judgment of a single Judge delivered in a second appeal in cases where such single Judge has granted leave to appeal. Where such leave has been refused, High Court has by the very terms of the Letters Patent no right whatsoever to hear the appeal. The Letters Patent of the Patna High Court govern the jurisdiction of Patna High Court, and there is nothing in S. 9, High Courts Act, which is inconsistent with the provisions of the Letters Patent. [P 426 C 2]

M. N. Pal and D. P. Sinha —

for Petitioner.

Harries C. J.—This is an application by the appellant praying that an appeal from a judgment of a single Judge of this Court in a second appeal be heard by a Bench of this Court though that single Judge refused to certify that the case was a fit one for appeal. It appears that a second appeal was heard by a single Judge who allowed the appeal with costs. Application was there and then made for leave to appeal under the Letters Patent, but such was refused. The appellant has now applied for the appeal to be heard and has contended that this Court has jurisdiction to hear such an appeal though leave to appeal was refused by the learned single Judge. The appellate jurisdiction of the Patna High Court in civil matters is defined by Paras. 10 and 11, Letters Patent. Para. 11 provides that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Provinces of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

It is clear that Para. 11, Letters Patent, gives this Court no jurisdiction whatever to hear an appeal from a single Judge of the Court. The right conferred by Para. 11

is a right to hear appeals from the Civil Courts of the provinces and from all other Courts subject to the superintendence of the High Courts. In short, this paragraph gives the High Court a right to hear appeals from what are commonly called the subordinate or lower Courts. Para. 10, Letters Patent, however expressly provides for hearing appeals from single Judges of the High Court and that Paragraph provides that an appeal will lie from a judgment of a single Judge in a second appeal provided that such single Judge has declared that the case is a fit one for appeal. The relevant words are,

and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to S. 108, Government of India Act, made on or after 1st February 1929, in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided.

The provision which I have cited leaves no doubt whatsoever that no appeal can be entertained by the High Court from a judgment of a single Judge in a second appeal unless such single Judge declares that it is a fit case for appeal. In the present case the learned single Judge refused to grant leave to appeal under Para. 10 of the Letters Patent. It has been urged that Para. 10 of the Letters Patent of this Court is in conflict with S. 9, High Courts Act, 1861. That Section is in these terms :

Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty, and Vice-Admiralty, Testamentary, Intestate, and Matrimonial jurisdiction original and appellate and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct subject however to such directions and limitations as to the exercise of Original, Civil and Criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts.

The High Courts Act of 1861 contemplated the creation of three Presidency High Courts and in due course, Letters Patent were issued to each of these Courts and which were shortly afterwards re-issued. The Letters Patent defined the jurisdiction of the Courts and the relevant paragraphs of the Letters Patent of the Calcutta High Court are Paras. 15 and 16. Para. 15 dealt with the jurisdiction of the Court to hear appeals from decisions of single Judges, and Para. 16 gave the Court jurisdiction to hear appeals from Civil Courts in the Presidency. It has been contended that the effect of S. 9, High Courts Act of 1861, was to give the High Court of Judicature at Fort William in Bengal all the powers which the Courts in existence in Bengal before 1861 had had. Those Courts were abolished and the High Court substituted in their stead, and it has been urged that the jurisdiction of the High Court of Judicature at Fort William was co-extensive with the jurisdiction of the abolished Courts from the moment it was created. S. 9 however makes it clear that Her Majesty by Letters Patent could limit and define the jurisdiction of the High Court and by Para. 15 it defined the jurisdiction of the Court to hear appeals from single Judges of the Court. The Patna High Court came into existence in the year 1916, and I have quoted the relevant paragraphs of the Letters Patent which defined the jurisdiction of this Court. The provision relating to the jurisdiction of the Court to hear appeals from single Judges was amended in the year 1928 and from the date of that amendment onwards it is abundantly clear that this Court can only hear an appeal from a judgment of a single Judge delivered in a second appeal in cases where such single Judge has granted leave to appeal. Where such leave has been refused, this Court has by the very terms of the Letters Patent no right whatsoever to hear the appeal. In my judgment, the Letters Patent of this Court govern the jurisdiction of this Court, and there is nothing in S. 9, High Courts Act of 1861, which is inconsistent with the provisions of the Letters Patent of this Court. For the reasons which I have given, I am satisfied that this Court has no jurisdiction to hear the appeal in question and accordingly this application fails and is dismissed. The appeal which has been filed must therefore be dismissed.

Agarwala J.—I entirely agree.

N.S./R.K.

Application dismissed.

A. I. R. 1939 Patna 427

JAMES AND ROWLAND JJ.

*Bachu Lal and others —**Plaintiffs — Appellants.*

v.

*Jang Bahadur Rai and others —**Defendants — Respondents.*

Appeal No. 608 of 1937, Decided on 17th January 1939, from appellate decree of Dist. Judge, Saran, D/- 12th February 1937.

(a) Transfer of Property Act (1882), S. 76 (h)—Mortgagee obtaining thika zarpeshgi lease at reserved rent retaining for himself fixed amount of rent as specified interest upon zarpeshgi money and agreeing to pay balance to mortgagor—Mortgagee failing to pay money as agreed to mortgagor — Suit for redemption — Court can make account on principle laid down in Sec. 76 (h) — Sub-mortgagees are not liable to account on basis of original zarpeshgi deed.

Where by a thika zarpeshgi lease the mortgagee obtains a thika lease at a certain reserved rent, retaining for himself a fixed amount of the rent as specified interest upon the zarpeshgi money and agrees to pay the balance to the mortgagor, the mortgage is a usufructuary mortgage and if the mortgagee fails to pay the balance as agreed to the mortgagor the mortgage money is from time to time reduced and the Court in a redemption suit is entitled in making the account on the principle laid down in Sec. 76 (h). But the sub-mortgagees are not liable to account on the basis of the original zarpeshgi deed because there is no privity of contract between them and the original mortgagor and the decree for payment of money cannot properly be made against them, though the mortgagor's decree for recovery of possession will of course be valid against them : *A I R 1936 Pat 583, Disting.* [P 428 C 1, 2]

(b) Limitation Act (1908), S. 19—Sub-mortgage reciting mortgagee's rights and liabilities under original mortgage—This is acknowledgment.

Where the sub-mortgage effected by the original mortgagee clearly recites mortgagee's rights and liabilities under the original mortgage, this is an acknowledgment within the meaning of Sec. 19 : *A I R 1930 Bom 466 (F B), Rel. on.* [P 428 C 2]

B. N. Mitter and Jadubans Sahay —

*for Appellants.*Dasu Sinha — *for Respondents.*

James J. — This appeal arises out of a suit for redemption of a usufructuary mortgage of 10th April 1863. The sum advanced was Rs. 400 in consideration of which a thika was given at an annual rent of Rs. 35.5.0. Rupees 30 out of that sum was set aside for the mortgagee as interest at 7½ per cent. per annum on the money advanced ; Rupees 4 was set aside for collection charges and the balance of Re. 1.5.0 was to be payable by the mortgagee to the

mortgagor. This haqazri had never been paid since the execution of the mortgage. The plaintiffs had prayed for an account, praying that if the account should show a balance in their favour, a decree should be given entitling them to realize that amount on payment of the requisite court-fee. The Munsif found that the mortgage had actually been redeemed owing to the defendants' failure to pay the haqazri as it fell due, and that a sum of Rs. 924.13.0 was payable to the plaintiffs. He arrived at this result by treating the haqazri as if it had been realized by the plaintiffs, reducing the principal amount due on the mortgage so long as the account showed that anything did remain due on the mortgage, and henceforth he treated the mortgagee as liable to pay the full amount of Rs. 31.5.0 reserved by the mortgage deed, since the mortgagee was no longer entitled to any interest because the principal had already been swallowed up by the accumulating haqazri.

On appeal, the District Judge modified the decree of the Munsif, merely calculating the arrears of haqazri without reducing the amount of the principal money due year by year ; and calculating by this method he found that a sum of Rs. 90.15.4 was due to the defendants. The plaintiffs have appealed from that decision; and a cross-objection has been preferred by certain respondents who held some mortgages of the property. The learned District Judge in adopting his method of calculation, considered that he was bound by the decision in 17 P L T 684,¹ but as Mr. B. N. Mitter points out on behalf of the appellants, in that case the rate of interest to which the mortgagee was entitled was not specified in the bond. The learned Chief Justice dealing with the zarpeshgi deed in that case, treated the mention of haqazri as fixed and consolidated jama as if that were a fiction ; but the present deed is a thika zarpeshgi lease in the ordinary form, whereby the mortgagee obtains a thika lease at a certain reserved rent, retaining for himself a fixed amount of the rent as interest upon the zarpeshgi money. The transaction is a transaction both of lease and of mortgage; but it certainly is a usufructuary mortgage, because by the deed the mortgagee retains the thika property as security for the repayment of the four hundred rupees advanced. The deeds recite that the mortgagee is entitled to interest

1. Muhammad Sadiq v. Harakh Narain, (1936) — 23 A I R Pat 583 = 166 I C 545 = 17 P L T 684.

at 7½ per cent. per annum on the amount advanced and that he is liable to pay Rupee 1.5.0 annually to the mortgagor. When at the earliest period of the mortgage the mortgagee failed to pay that amount, the amount due to the mortgagee was reduced by Re. 1.5.0 and in the following year the amount of interest due on that advance at 7½ per cent. was slightly reduced, and in the end the liability of Rs. 400 was by this lease completely wiped out. We consider that the learned Munsif acted rightly in thus making the account on the principle laid down in S. 76 (h), T. P. Act, and that in a case like this, where the rate of interest is actually specified, the method of accounting adopted in 17 P L T 684¹ would not be properly adopted.

The learned advocate for the respondents suggests that the plaintiffs who are successors of the original malikanadars are entitled only to claim rent from the date of the assignment, citing the decision in 6 Cal 213.² In that case the zarpeshgidars whose possession has been obstructed had obtained a decree for recovery of possession with mesne profits. Subsequently their zarpeshgi interest had been sold; and the purchaser on the strength of that sought to execute the decree for mesne profits. The Privy Council held that this could not be done, because the purchaser had not purchased the decree but merely the existing rights under the zarpeshgi. In the present case the plaintiffs acquired the rights of the mortgagor under the mortgage deed of 1863 whatever they might be, including the right to claim an account for the whole period of occupation in a suit for redemption. The learned advocate for respondents 2, 3 and 4, Gokhul Pande, Ram Brich Mahto and Ramsakhi Mahto, is on stronger ground when he claims that these respondents should not be liable to account on the basis of the original zarpeshgi deed. Gokhul Pande obtained a sub-mortgage in 1911 and Ram Brich Mahto and Ramsakhi Mahto obtained a sub-mortgage in 1912, each of a portion of the area covered by the original zarpeshgi. The leases which they obtained were in the thika zarpeshgi form; but if they had been ordinary leases and not mortgages, the plaintiffs, far from being able to call for an account, would not have been able even to eject them if they were settled raiyats of the village when they obtained their leases. As it is, they are sub-

mortgagees, and are liable to ejection, with certain rights against their mortgagor defendant 1 of this suit; but there is no privity of contract between them and the plaintiffs; and the decree for payment of money cannot properly be made against them, though the plaintiffs' decree for recovery of possession will, of course, be valid against them.

In support of the cross-objection the learned advocate argues that the suit was barred by limitation: but the sub-mortgage effected by the original mortgagee on 13th June 1879, (Ex. 4) clearly recites the mortgagees' rights and liabilities under the mortgage of 10th April 1863, and this is an acknowledgment within the meaning of S. 19, Limitation Act: 54 Bom 625.³ The result is that the decree of the District Judge will be set aside and the decree of the Munsif restored, with this modification that defendants 2, 3 and 4 are exempted from liability to make any payment to the plaintiffs on account of the failure to pay haqazri. They are liable to pay costs because they contested the suit on various other grounds; and the plaintiffs are entitled to their costs throughout. The cross-objection is dismissed with costs.

Rowland J.— I agree.

D.S./R.K.

Decree set aside.

3. Moti Lal v. Samal Bechar, (1930) 17 A I R Bom 466 = 128 I C 417 = 54 Bom 625 = 32 Bom L R 1096 (F B).

A. I. R. 1939 Patna 428

WORT J.

Jadunandan Das and another —

Plaintiffs — Appellants.

v.

Mt. Maho and others — Defendants — Respondents.

Appeal No. 275 of 1938, Decided on 10th February 1939, from appellate decree of Sub.Judge, Purnea, D/- 11th December 1937.

(a) Evidence Act (1872), S. 92— Oral agreement modifying registered contract of lease is not admissible in evidence.

Where a lease from month to month is registered, a subsequent oral agreement which modifies the contract of the lease is not admissible in evidence. [P 430 O 1]

(b) Transfer of Property Act (1882), S. 108— Lease joint — One co-lessor alone cannot enforce covenant.

Where the plaintiff who is a co-proprietor along with other alone sues to enforce a covenant of lease but the other co-proprietor who though did not decline to join as co-plaintiff is impleaded as

2. Ganesh Lal v. Shamnarain, (1881) 6 Cal 213.

co-defendant with the lessee, and comes forward to support the latter in establishing an oral agreement made by the lessee with his father which modified the lease :

Held that in the circumstances one of the joint lessors or lessees could not enforce the covenants of the lease : (1931) 1 Ch D 60, *Rel. on.*

[P 430 C 1]

(c) **Transfer of Property Act (1882), S. 106** — Notice — If lessee from month to month is allowed to construct building lessor cannot claim demolition thereof but must give him notice to quit.

Where the lessee is allowed to construct a building on the land leased, and the lease is found to be one from month to month it is unjust for the lessor to claim the structure to be demolished. He should give the lessee a notice to quit.

[P 430 C 2]

J. M. Ghosh — *for Appellants.*

R. S. Chatterjee — *for Respondents.*

Judgment.—This appeal by the plaintiff arises out of an action in which he claimed a declaration that the defendant first party had no right to build permanent walls on the land in suit, and also prayed for a mandatory injunction calling upon him to demolish the objectionable buildings. The defence to the action was that as far back as 1923 when the thatched buildings had been destroyed by fire the interested defendants approached the plaintiffs' father and he agreed that the defendants could rebuild by constructing what is ordinarily known in this country as pucca buildings. The trial Court came to the conclusion that the agreement had not been proved but disallowed the plaintiffs' claim as regards certain rooms but ordered the demolition of the wall. It appears that the reason why there was no order as regards the rooms was that no claim had been included in the plaint with regard to them. The Appellate Court allowed the appeal coming to the conclusion that the agreement put forward by the defendants had been established. In this Court for the first time it is contended that it was not open to the defendant to prove the agreement of 1923 as it was contrary to the provisions of S. 92, Proviso (4), Evidence Act. S. 92 prohibits the proof of an oral agreement in variation of a written agreement, but the Proviso allows for the proof of "any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property," and there is an exception tagged on to the Proviso that if such "contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force," then the Proviso does not apply. It seems to me quite clearly that it is necessary to decide whe-

ther the expression "or has been registered" refers to the fact of registration and not to the requirement of law and therefore, being an agreement although by law not required to be in writing but has been registered, and not an agreement to rescind or modify such contract, is inadmissible in evidence. The question therefore to be determined in the first place is whether the agreement proved by the defendant was an agreement to rescind or modify a contract.

Before dealing with that point, I would refer to another question which arose during the course of the argument and that relates to the form of the lease. It appears that the plaintiff proved no patta, called for no patta from the defendant, nor did the defendant produce it, nor is there any indication in the record of the case that any such patta exists. Therefore the lease was ineffective in law by reason of the decision of this Court in 16 P L T 451¹ if it is to be construed as a lease for a year or more than a year. If that be so, it is obvious that the plaintiff cannot prove the covenant to build a thatched house only. I have had the kabuliyat translated and in my opinion the lease must be construed as a lease from month to month under S. 106, T. P. Act, determinable on fifteen days' notice and not as suggested determinable at will. Any suggestion made by the defendants therefore that they have got a permanent lease is disposed by their Lordships of the Judicial Committee in *Ariff's case** and the subsequent decision of this Court with regard to the matter. That being so, it is quite clear that the plaintiff was entitled to establish or prove the covenant in the agreement or kabuliyat which was adduced in evidence in the case. That aspect of the case has certainly an important bearing upon the relief which the plaintiff claimed with which I shall deal in a moment; in the meantime it is necessary for me to decide whether this is a case in which the defendant attempted to prove an agreement to rescind or modify any such contract. I must say I find considerable difficulty in coming to a conclusion with regard to the matter. It might be said that the so-called agreement which the defendant proved was an attempt to prove the case which exonerated him from what *prima facie* was a breach of contract: in other words, in proving his

1. *Ramkrishna Jha v. Jainandan Jha*, (1935) 22 A I R Pat 291=157 I O 98=14 Pat 672 = 16 P L T 451 (F B).

*See A I R 1931 P O 79.

agreement he might have been understood to say: "Yes, I have broken the terms of my agreement but my reason for doing so was the arrangement made by you that I should be allowed to do so." Whatever else may be said about the case, it seems to me to be very unjust on the part of the plaintiff in this case, the facts being what they are: the father having agreed to allow him to rebuild a more substantial building than that which existed on the land before and one of the sons now coming forward and trying to ignore the arrangement made by the father.

The only question that remains is whether it is an agreement which modifies such a contract. With very considerable hesitation I come to the conclusion that it does modify the contract and therefore in that sense was not admissible in evidence. But that does not dispose of the case. The plaintiff, as I have said, was among many joint proprietors and he alone sued as plaintiff. It is not a case in which the plaintiff being one of joint proprietors sues for a sum of money and his co-proprietor declines to join as a plaintiff and the plaintiff suing claims the full amount, but a case in which the co-proprietor of the plaintiff who is one of the defendants comes forward to support the defendants in proof of the agreement which the Judge in the Court below allowed the defendants to establish. That can only be construed as meaning that the co-proprietor who is on the side of the defendants is not enforcing the contract contained in the kabuliyat. In those circumstances it seems to me that the matter is covered by the decision that one of two joint lessors or lessees cannot enforce covenants of the lease. There are a number of decisions in India but I refer to the decision in (1931) 1 Ch D 60.² It is true that in that case Maugham J. was construing the Law of Property Act of 1925 in England in which the word 'lease' was used, but that is immaterial as it was declaratory of the common law and the question that arose was whether the lessee being entitled to relief against forfeiture out of a number of lessees would be entitled to such relief in the absence of a joint claim by his joint lessees, and it was held that he was not.

It was contended by Mr. Chatterjee on behalf of the respondents in this case that

2. T. M. Fairclough and Sons, Limited v. Berliner, (1931) 1 Ch D 60=100 L J Ch 29=144 L T 175=74 S J 703=47 T L R 4.

in the circumstances the plaintiff cannot enforce the term of the agreement relating to the erection of a thatched house. I think the contention is right. There is another aspect of the case which I have already stated at the commencement of my judgment, and that is that on the true construction of the kabuliyat it can be construed that only a lease from month to month was granted under S. 106. It seems therefore unjust in the circumstances that the plaintiff claimed that the structure to which he objected should be demolished; he should give the defendant a notice to quit. In my judgment the appeal fails and the action should be dismissed with costs.

S.G./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 430

WORT J.

Deoki Singh and others—Decree-holders
— Petitioners.

v.

Sri Thakur Raghavindra Bhagwan
through Mahant Satrughan Chari —
Claimant — Opposite Party.

Civil Revn. No. 498 of 1938, decided on 23rd November 1938, from order of Munsif, Second Court, Patna, D/- 18th July 1938.

(a) Civil P. C. (1908), O. 21, R. 58—Property sold before application under R. 58 coming for hearing—Court has jurisdiction to hear application.

Where an application under O. 21, R. 58 is filed but owing to congestion of business is not heard till after the sale has been held, the Court does not cease to have jurisdiction to hear the application merely because the sale has already taken place: *A I R 1924 Pat 76, Not foll.* [P 431 C 1]

(b) Revision—High Court has jurisdiction to revise order which is unjustifiable and almost perverse.

Although a Judge has decided a question of fact or law erroneously, it does not give jurisdiction to the High Court to disturb his judgment or order. But where the order made by the Judge is one which is entirely and absolutely unjustifiable and is almost perverse High Court has jurisdiction to revise the order. [P 431 C 2]

(c) Pleadings—Suit against idol—Title—Description in title must be taken as whole—Whether name of idol is followed by that of mahant or vice versa, action is deemed to be against idol.

Where in a suit against an idol, the title began with the name of the shebait describing him as manager of the said idol and there was some doubt whether it was the proper and apt title by which the deity or idol could be sued or whether it was an apt title for a claim against the shebait in his personal capacity:

Held that the mere accident of whose name appears first could not possibly determine a matter

of such gravity. It was the description taken as a whole which must determine the matter. The deity might have been sued by giving the name of the idol sued through so and so, or reversing the order so and so as shebait of the deity, either of which descriptions would have complied with the rules and would have aptly described an action against the idol. [P 431 C 2]

(d) Civil P. C. (1908), O. 21, Rr. 58 and 63—Owing to order passed on application under O. 21, R. 58 decree-holder forced to bring suit under O. 21, R. 63—Question whether there was justification for decree under execution could not be reagitated in suit.

Where a decree-holder was forced to bring an action under O. 21, R. 63 by reason of an order passed on an application under O. 21, R. 58 and it was contended that the question to be determined was not whether the claimant had any right to the property as the matter had already been decided but whether there was any justification in the circumstances of the case for the decree which was the basis of the execution :

Held that this was not what is contemplated by O. 21, Rules 58 and 63 and that the decree-holder could not be forced to try out the suit in which he had already obtained a decree.

[P 432 C 1]

B. N. Roy and Girjanandan Prasad —
for Petitioners.

Sarju Prasad — *for Opposite Party.*

Order.—This rule, directed against the order of the Munsif dated 18th July 1938, arises out of a claim case. I propose to deal at once with one of the points taken, that point being that the Munsif had no jurisdiction to hear the case as the sale had already been held. Whatever may have been the view of this Court held in 4 P L T 544,¹ I am quite clearly of the opinion that the present amendment is an answer to that contention. An application under O. 21 R. 58 may be filed and owing to congestion of business may not be heard till after the sale has been held although it has not been confirmed; but it seems to me to be idle to suggest that the mere accident of the circumstances to which I have referred would shut out a claimant for ever from getting his property released from attachment. I say no more as regards that. The real point of substance is as regards the liability of the present respondent to this application. The present respondent is the shebait of the idol. He came forward in a claim case asking for the release of the idol's property which had been taken in execution by the petitioner. The Judge in the Court below proceeded to decide whether judgment in that case out of which the execution arose, had been made against

the idol or against the shebait ; and, shortly stated, he came to the conclusion that it had been entered against the shebait personally. I take a very strict view of my revisional powers and have consistently held the view that even although a Judge has decided a question of fact or law erroneously, it gives me no jurisdiction to disturb his judgment or order. But neither that view nor the view expressed by their Lordships of the Judicial Committee with regard to this matter ties my hands when I find that the order made by the Judge is one which is entirely and absolutely unjustifiable. It seems to me that his order in this case is almost perverse.

In the first place the Judge discussed whether Sri Mahanth Basudeb Brahmachari Swami chela Sri Mahant Rajendra Dhari Swami, Manager Sri Thakur RagHAVINDRA BHAGWAN JEO, etc. was the proper and apt title by which the deity or the idol could be sued or whether it was an apt title for a claim against the shebait in his personal capacity. There may be some justification in the Judge saying that there is some room for doubt, but certainly there is no justification for the Judge saying that if the deity had been described first the matter would have been concluded. The mere accident of whose name appears first cannot possibly determine a matter of this gravity. It is the description taken as a whole which must determine the matter. The deity might have been sued by giving the name of the idol sued through so and so, or reversing the order so and so as shebait of the deity, either of which descriptions would have complied with the rules and would have aptly described an action against the idol. But leaving that for a moment and assuming that the Judge was right in saying that there was some ambiguity, he proceeds to consider the documents in the case for the purpose of determining whether the deity was sued or the shebait was sued in his personal capacity. I describe his judgment as almost perverse because of the various expressions which the learned Judge has made when he comes to consider the point which I have stated. Now, it must be stated that the decree out of which the execution arose was in an undefended suit—whether the defendant had put in a written statement or not is immaterial ; the suit was undefended. Looking at the decree the Judge found that he got no more help from it than he got from the description which he

1. Puhupdei Kuar v. Ramoharitar Barhi, (1924)
11 A I R Pat 76=74 I O 87=4 P L T 544.

describes as ambiguous, so he was forced back to consider the plaint, it be remembered that there was no judgment and it was an ex parte decree.

The first thing that is noticed that the person sued is described as trustee to Sri Thakur so and so; then in para. 2 of the plaint he says the defendant as trustee to the estate of Sri Thakur Ragho Gobind Bhagawan Jeo aforesaid borrowed Rs. 1100 for the necessity of paying rents, also for meeting other valid and necessary expenses with regard to Sri Thakur Jeo aforesaid. Whatever justification or lack of justification there might have been for the decree, it is impossible to suggest that the action was not brought against the idol and that circumstances were alleged which were irrelevant for the purpose of charging the idol and not the shebait in his personal capacity for the debt which was claimed. I have nothing to do with whether the decree had been obtained by fraud or whether there was justification for it; those questions do not arise; so long as the decree stood, it had to be accepted. There is one other matter. Assuming that the present decree-holder was forced to bring an action contemplated by O. 21, R. 63 by reason of this order the question there to be determined was not whether the claimant had any right to the property; that matter has already been decided, there can be no doubt about it; the point to be determined would be the justification in the circumstances of the case for the decree which was the basis of the execution. That is not what is contemplated by O. 21, Rr. 58 and 63, and in my judgment the decree-holder should not be forced to try out the suit in which he has already obtained a decree. One other point was mentioned by Mr. Sarju Prasad appearing on behalf of the respondent and that was that at the time that the debt had been incurred, i. e. the debt of Rs. 1100, the shebait against whom judgment was obtained had ceased to be the shebait of the idol. That was a proper defence in the action which was not advanced—certainly not supported by any evidence and not by the fact. It may be, I do not decide the point, that the present shebait as representing the deity may have some right of action. That again has nothing to do with this Court in this matter. It is an extraordinary case but I have no hesitation in the circumstances to come to the conclusion that the order of the Munsif should be set aside and this rule made

absolute with costs: hearing fee two gold mohurs.

N.S./R.K.

Rule made absolute.

A. I. R. 1939 Patna 432

HARRIES C. J. AND ROWLAND J.

Ramgati Singh — Defendant —

Appellant.

v.

Shitab Singh and another, Plaintiffs and others, Defendants — Respondents.

Appeal No. 118 of 1938, Decided on 19th December 1938, from appellate decree of Dist. Judge, Saran, D/- 6th September 1937.

Civil P. C. (1908), O. 7, R. 11 (c) — Memorandum of appeal insufficiently stamped cannot be rejected unless opportunity is given to appellant to make good deficit.

A memorandum of appeal not sufficiently stamped cannot be rejected summarily on that ground unless an opportunity is given to the appellant to explain or to make good the deficiency within a stated time: *A I R 1937 Pat 550 (S B) and A I R 1939 Pat 83, Rel. on.* [P 432 C 2]

K. N. Lal — *for Appellant.*

Rowland J.—This second appeal by the defendant is against a decision of the District Judge summarily rejecting his memorandum of appeal as being insufficiently stamped and thereafter refusing to restore the appeal. The office on presentation of the memorandum of appeal pointed out that the court-fee was deficient by Rupees 141-8-0. The District Judge should then have called on the appellant to make good the deficiency within a stated time: *vide* O. 7, Rule 11, Cl. (c), Civil P. C., which under Sec. 107 of the Code has been held applicable to appeals. Failing an opportunity to the appellant either to explain or to make good the questioned court-fee, the District Judge's order summarily rejecting the memorandum cannot be supported: *vide* 18 P L T 665¹ and 19 P L T 885.² I would allow the appeal, set aside the order of the District Judge and remand the appeal to him for disposal according to law after fixing a date within which the appellant is to make good the deficit court-fees. The respondents not having appeared, there will be no order for costs.

Harries C. J.—I agree.

N.S./R.K.

Appeal allowed.

1. Baijnath Prasad Singh v. Umeshwar Singh, (1937) 24 A I R Pat 550 = 172 I O 138 = 16 Pat 600 = 18 P L T 665 (S B).
2. Ram Sawari Kuer v. Motiraj Kuer, (1939) 26 A I R Pat 83 = 178 I O 150 = 17 Pat 687 = 19 P L T 885.

* * A. I. R. 1939 Patna 433

FULL BENCH

WORT, VARMA AND MANOHAR LALL JJ.

Gokhul Mahton and others—Defendants
— Appellants.

v.

*Sheoprasad Lal Seth and others —**Plaintiffs — Respondents.*

Appeal No. 354 of 1936, Decided on 21st March 1939, from appellate decree of Deputy Commissioner Sub-Judge, Hazaribagh, D/- 25th March 1936.

(a) Limitation Act (1908), Arts. 74 and 75—Art. 74 does not apply where there is default clause—Instalment bond with default clause—Claim to recover some only of instalments after two defaults is hit by Art. 75.

It cannot be said that Art. 74 provides a period of limitation for promissory notes or bonds payable by instalments both in those cases in which there is a default clause and in those in which default clause is absent, and that if the creditor chose to sue on the default clause for the full amount, then and then only Art. 75 comes into operation. In the case of an instalment bond with default clause the claim of the plaintiff to recover some only of the instalments provided by a registered instalment bond after two defaults had occurred is hit by the provisions of Art. 75. [P 437 C 2; P 440 C 1; P 441 C 2]

(b) Bond — Ordinary instalment bond and mortgage bond payable by instalments—Difference.

There is an essential difference between an ordinary instalment bond and a mortgage bond payable by instalments because latter is governed by Art. 132 and the former is governed by Art. 75, Limitation Act : *A I R 1932 P C 207, Rel. on.* [P 440 C 1]

(c) Limitation Act (1908), Arts. 74 and 75—Distinction between, explained.

There is a well-defined distinction between Arts. 74 and 75. Art. 74 applies to an instalment bond which does not contain any default clause and therefore in such cases the plaintiff is entitled, by the very terms of his bond, to sue only for such instalment as remains unpaid. No question of waiver of default can ever arise in such a case. But where the document provides that in the case of a default (which may be due to non-payment of one instalment or more than one instalment as provided in the bond) the obligee has the right to sue for the whole of the sum then remaining due, it is obvious that the promisor has a right *eo instanti* to pay the full amount and the obligee a corresponding right to receive and recover it. [P 440 C 2]

* * (d) Limitation Act (1908), Art. 75—'Waiver' — Instalment bond — Mere failure to sue or acceptance of portion of overdue instalment does not amount to waiver of default (Per Full Bench).

Waiver is a mixed question of law and fact in each case. Mere failure to sue or inaction by the creditor in the case of instalment bond is not a waiver of the default; something else must be

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established to show that the promisee has waived his rights. Where the promisee has accepted an overdue instalment it must be held that he has waived his rights which accrued to him on that default and that the starting point of limitation would be from the next default if not waived. But an acceptance of a portion of the instalment which was overdue or the acceptance of the interest only on the overdue instalment cannot be held to be a waiver of the default : (1878) 8 Ch D 201; *A I R 1925 All 499; 31 Cal 83 and A I R 1931 Pat 285, Rel. on.* [P 440 C 2; P 441 C 1]

* * (e) Limitation Act (1908), Art. 75 — Ordinary money instalment bond with default clause — Limitation runs from date of first default which is unwaived — Plaintiff has no option to wait till whole sum becomes due : *11 P L T 866=132 I C 112, Overruled.*

In the case of an ordinary money instalment bond with a default clause which provides that if any instalment is not paid the whole sum would be due, the limitation for claim to recover money due under the bond runs from the date of first default which is unwaived. The creditor cannot stop the period of limitation from running by waiting till the whole of the sum becomes due : *11 P L T 866 = 132 I C 112, Overruled; Case law discussed.* [P 442 C 1, 2]

Rai Gurusaran Prasad and T. K. Prasad
— for Appellants.

Sivanarain Bose for B. C. De —
for Respondents.

Facts. — The appellants executed an instalment bond in favour of the respondents on 9th Magh 1978 S.=6th February 1922, for a sum of Rupees 800. Ten instalments were fixed at Rs. 75 each and were payable on 30th Phagun each year, beginning 1979 S., an eleventh one was fixed at Rs. 50 and was payable on 30th Magh of 1989 S. The appellant paid the first three instalments in time. The fourth was due on 12th March 1926 but was paid on 10th April 1926 and accepted. The fifth was due on 3rd March 1927 and a portion only, namely Rs. 25, was paid on 18th March 1928=11th Chait 1984 S. These payments were as found by the trial Court and the first Appellate Court. The plaintiff brought a suit on 23rd March 1935 for Rs. 350 as principal and Rs. 252 as interest alleging that the first six instalments were paid and the remaining four of Rs. 75 and one of Rs. 50 were still due. As stated above, the trial Court found that only four instalments were paid in time or accepted. There was a default in payment of the fifth instalment which was due on 3rd March 1927. Limitation began to run from then. There was however a payment of Rs. 25 on 18th March 1928. And the trial Court held that limitation was to be computed from 18th March 1928. And as the suit

was instituted on 23rd March 1935, i. e. beyond 6 years, the suit was barred.

The first Appellate Court found that the payment of Rs. 25 constituted a waiver in respect of instalments due for 1983 S. and 1984 S. as payment was made on 11th Chait 1984, i. e. 11 days after the instalment for 1984 was due. There was no waiver for 1985 and therefore limitation began to run from 1st Chait 1985 S. and the suit was in time. The second appeal to the High Court was heard by Wort J. who made an order referring the case to a Division Bench. The Division Bench which heard the reference consisted of Wort Ag. C. J. and Manohar Lall J. and referred the case to a larger bench.

ORDER OF REFERENCE

Wort J.—I shall endeavour to state my reasons for asking for the assistance of another Judge, that is to say, referring the case to a Division Bench, as simply as possible. Having regard to the circumstances of the case it is necessary for me to express my view at some length. The appeal arises out of an action in which the plaintiffs were claiming instalments under a kistbandi bond for the years 1929 to 1933. Both the trial Court and the Appellate Court agreed in their view of the construction of the bond that the plaintiffs were limited to one particular mode of recovery, to use the expression in the judgment of the Deputy Commissioner-Subordinate Judge. The argument based on the construction of the bond itself was that the plaintiffs were entitled either to sue for the whole amount under the defeasance clause on default of payment of one instalment or to sue for one of the instalments only. That is an argument which in agreement with the Judges in the Courts below I cannot accept. It is an ordinary defeasance clause although perhaps expressed as translated in a rather awkward language; but its meaning is plain. The meaning to be attached is the meaning to be attached to all bonds of this kind with similar defeasance clause.

The Judge in the Court below disagreeing with the trial Court has held that there had been a waiver within the meaning of Art. 75, Limitation Act, by the acceptance by the plaintiffs of a sum of Rs. 25 against the instalment due in 1928. The instalment I should have said was of Rs. 75 and the plaintiffs had endeavoured to show that all the instalments had been paid prior to that date; but on that point he failed, the Judge

in the Court below coming to the conclusion that some of the earlier instalments were paid, but between the last complete payment and the payment of Rs. 25 some instalments remained due and owing. It was in those circumstances that the plaintiffs brought their action for those instalments which were within the period of limitation, that is to say within six years from the date of default and for the instalments of 1929 to 1933.

If the learned Judge is correct as regards waiver, the other and somewhat more difficult question does not arise. The question to which I refer is the proper construction to be placed on Art. 75, Limitation Act. As I have stated and repeat, the Judge in the Court below has held that there was waiver by acceptance of a part of the instalment of the year 1928. There are decisions in India regarding this matter. The first to which I refer is in 5 Cal 97.¹ There Jackson J. delivering the judgment of the Court said this: "By waiver in this case, we think, is meant a waiver of the condition by which a default in payment of any one instalment the whole amount unpaid became immediately payable," and held that there was no waiver in that case. The second decision is in 31 Cal 83² in which Rampini and Pargiter JJ. held that the payment of a part of an overdue instalment is if accepted not waiver and they referred to the case in 5 Cal 97¹ to which I have just made reference.

In this connexion reference was also made to the case in 15 Cal 502³ which it will be necessary to refer to on another point. Had the decisions in Courts in India been to the effect that the acceptance of payment of a part of an instalment amounts to waiver of the right of the plaintiff to sue, I should certainly have found myself in some difficulty. But the decision referred to in Vol. 5 of the Calcutta series to which I have already made reference is consistent with what I understand to be the general principles of law as expressed in (1878) 8 Ch D 201.⁴ I am quite aware that their Lordships of the Judicial Committee of the Privy Council have expressed the view that it is dangerous to refer to English autho-

1. *Cheni Bash Shaha v. Kadum Mundul*, (1880) 5 Cal 97.
2. *Mohesh Chandra Banerji v. Prosanna Lal Singh*, (1904) 31 Cal 83=8 C W N 66.
3. *Mon Mohun Roy v. Durga Churn Goodee*, (1888) 15 Cal 502.
4. *Keene v. Biscoe*, (1878) 8 Ch D 201 = 47 L J Ch 644=88 L T 286=26 W R 552.

rities where the question of the construction of an Indian statute comes up for decision; and although it may be true to say that I have here to construe Art. 75, Limitation Act, it is in one sense merely the construction of the expression 'waiver' which as I stated during the course of the argument is a juridical term imported into the law of India from England. Fry J. (as he then was) made this statement :

Where a right has accrued it can be waived, but to amount to waiver there must be something done which is inconsistent with the continuance of that right. Now, the right here was to immediate payment of £400 and interest, (I may add in parenthesis that there an instalment mortgage debt was under consideration) and the receipt of a portion of that sum is in no way inconsistent with that demand. I cannot conceive any case more different from that of receipt of rent after a forfeiture. In that case nonpayment of rent has given rise to a right of forfeiture, but if the landlord afterwards receives any rent, that puts an end to his right of forfeiture; for if, after knowing the circumstances, he accepts rent, he in fact says that though he might have avoided the lease he has chosen not to do so.

In my judgment there was no ground upon which the Judge in the Court below could say that there had been a waiver in this case. That leads me to the consideration of the other question which comes up for determination and that is, when did the right of action accrue. By a decision of the Privy Council the matter is governed by Art. 116: "For compensation for the breach of a contract in writing registered." I make no observation with regard to that as that question is now beyond dispute. But Art. 116 refers back to other Articles for provision as to the date from which the period of limitation would run: in this case Art. 75, which is an Article "on a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due." Col. 3 runs thus: "When the default is made, unless where the payee or obligee waives the benefit of the provision." I have held here there is no waiver. The question therefore is, does limitation run from the date when the default is made.

Shortly stated, there are two lines of cases. One which holds that the period of limitation runs from the date of default, that is to say when the plaintiff had a right to sue, and that means on the first default, while the other is to the effect that the creditor may choose—he may sue when default is made in payment of an instalment, or he may wait till the whole becomes due. The decisions which are binding upon

me are, first, the case in 11 P L T 835,⁵ (the same decision being reported in Vol. 4 of the Patna series). It is necessary to point out in the case to which I have just referred that what was under consideration was a mortgage bond payable by instalments. Ross and Scroope JJ. in 11 P L T 866⁶ followed the earlier decision⁵ as completely covering the point which came up before them for decision under what was usually called a kistbandi bond and not a mortgage bond. As I have said they followed the earlier decision⁵ which was to the effect that the plaintiff had an option, in other words, it was not obligatory for the mortgagee to bring a suit for the realization of the entire amount as soon as any one of the instalments was overdue. What was not noticed by Ross and Scroope JJ. in the later decision was that the decision of Kulwant Sahay and Sen JJ. was on a mortgage bond. The same question on a mortgage bond came up before their Lordships of the Judicial Committee in 53 I A 187.⁷ In that case their Lordships had to deal with Art. 132, Limitation Act, and not Art. 75, and referring to the Full Bench decision of the Allahabad High Court reported in 37 All 400⁸ Lord Blanesburgh made this observation :

The High Court held that under a clause in the above form a single default on the part of the mortgagors, without any act of election, cancellation or other form of response or acceptance on the part of the mortgagees, and even, it would appear, against their desire, operates, *eo instanti*, to make the money secured by the mortgage "become due" so that all right of action in respect of the security is finally barred twelve years later All this the High Court held, notwithstanding that the mortgage is for a term certain, a provision which may be as much for the benefit of the mortgagees as of the mortgagors.

Their Lordships however did not decide on the construction of the Article whether the plaintiff was bound to bring his action when the instalment first became due as they took the plaintiff at his own word, to use the expression of the Chief Justice of the Allahabad High Court in the Full

5. Ramsekhar Prashad Singh v. Mathura Lal, (1925) 12 A I R Pat 557 = 90 I O 249 = 4 Pat 820 = 11 P L T 835.

6. Ram Ohandra Nayak v. Gharbharan Ahir, (1930) 192 I O 112 = 11 P L T 866.

7. Pancham v. Ansar Husain, (1926) 13 A I R P O 85 = 99 I O 650 = 53 I A 187 = 48 All 457 (P O).

8. Gaya Din v. Jhuman Lal, (1915) 2 A I R All 189 = 28 I O 910 = 37 All 400 = 13 A L J 510 (F B).

Bench decision in 57 All 108⁹ and took his cause of action as stated in the plaint as having accrued beyond the period of limitation. The Full Bench decision to which their Lordships were referring was the case in 37 All 400.⁸ There the Full Bench was dealing with a mortgage bond and held that under Art. 132, Limitation Act, the mortgage money having become due when the first default was made, the action was barred by limitation. I have already pointed out the distinction between the two decisions of this Court reported in 11 P L T 835⁵ and 11 P L T 866,⁶ the earlier one being the case of a mortgage bond and the later one being the case of an ordinary kistbandi bond and not mortgage bond.

There is the most important decision of their Lordships of the Judicial Committee of the Privy Council which makes it necessary for me to make the reference as I stated at the commencement of my observation. That is the case in 59 I A 376.¹⁰ Now, this case deals with a very serious question as Lord Blanesburgh described it in Pancham's case reported in 53 I A 187⁷ and disposes of it. The question is whether under Art. 132 the mortgagee is bound to sue when the instalment was in default or whether he could wait till the principal sum became due; and the decision is that under Limitation Act, 1908, Sch. 1, Art. 132, a suit to enforce a mortgage for a stipulated period can be instituted within twelve years of the expiry of the period, although a default by the mortgagor has occurred during the period and by the terms of the mortgage the mortgagee thereupon had an immediate right to enforce the mortgage.

I have stated and I repeated that there is a very considerable distinction between a mortgage bond payable by instalments and an ordinary bond payable by instalments for the very obvious reason that in one case Art. 132, Limitation Act, has to be construed, while in the other Art. 75. Great as the authority of the Privy Council is, the case is not a decision on the particular point which comes up before me and in this connexion I propose to read the observation of Sir George Lowndes which in my judgment casts a doubt upon all those decisions under Art. 75. The observation is to this effect, while dealing with the point that the creditor has an option

either to sue when one of the instalments becomes due or to wait until the whole becomes due :

Their Lordships are not greatly oppressed by the authority in (1891) 2 Q B 509.¹¹ It is, they think, always dangerous to apply English decisions to the construction of an Indian Act. The clause there under consideration differed widely from that now before their Lordships, and indeed from the clauses with which the Allahabad Court had to deal (their Lordships were dealing with the Full Bench decision of the Allahabad High Court in 53 I A 187⁷); the question for decision would have fallen in India, not under Art. 132, but under Art. 75, which is in very special terms: (that means the point in (1891) 2 Q B 509¹¹ would have fallen under Art. 75 and not under Art. 132); and S. 3 of the Statute of James, with which the Court was concerned, made the time to run, not from the date when the money became due but from the date when the cause of action arose. If in the Indian cases the question were—'when did the mortgagee's cause of action arise?'—i. e. when did he first become entitled to sue for the relief claimed by his suit—their Lordships think that there might be much to be said in support of the Allahabad decisions (the Allahabad decisions I would state being to the effect that he was bound to sue when the first instalment became due). Judged by the Indian criterion, 'when the money sued for became due' upon the best consideration their Lordships have been able to give to this difficult question, they think that the decision of the Chief Court of Oudh was wrong, and that they should have held that the appellant's suit was within time.

Their Lordships stated that under Article 75 the question arising is when did the cause of action arise or accrue, whereas under Art. 132 the question is when did the money sued for become due, and they expressed the view that very different considerations would necessarily arise. Now, many decisions, indeed the decisions of this Court, have relied in the first place on 11 C W N 903,¹² a case of ordinary instalment bond. Sir Francis Maclean, in delivering the judgment of the Court, refers to a number of cases which, he decides, support the view that the plaintiff was entitled either to bring his action when the instalment became due or to wait until the whole and then makes this observation :

Speaking for myself, if the matter had been res integra I should have felt some doubt whether the case did not fall within Art. 75 of Sch. 2, Limitation Act, rather than within Art. 116.

It seems to me with great respect to the learned Chief Justice that he seems to be under a misapprehension as the case did fall under Art. 75 and Art. 116. Art. 116 extended the time whereas the other Art. 75

9. Jawahar Lal v. Mathura Prasad, (1934) 21 A I R All 661 = 151 I C 585 = 1934 A L J 1035 = 57 All 108 (F B).

10. Lasa Din v. Gulab Kunwar, (1932) 19 A I R P C 207 = 138 I C 779 = 59 I A 376 = 7 Luck 442 (P O).

11. Reeves v. Butcher, (1891) 2 Q B 509 = 60 L J Q B 619 = 65 L T 329 = 39 W R 626.

12. Rup Narain Bhattacharya v. Gopi Nath Mandol, (1907) 11 C W N 903.

provided the period from which limitation would run. The other cases of this Court relied upon are first the case in 10 Pat 173¹³ which was a case of a decree payable by instalments and under a different Article from that which I have to consider. Again in 15 Pat 1¹⁴ my Lord the Chief Justice and Varma J. had to decide a question arising under a mortgage bond, and their decision is in conformity with the latest decision of their Lordships of the Judicial Committee.

I only propose to make one more observation with regard to this matter and that is on the construction of Art. 75 which as I said provides for the period of limitation where there is a defeasance clause. Art. 74 provides for a period of limitation on an instalment bond where there is no defeasance clause, and, as one of the distinguished Judges very pertinently put it, if the Legislature intended the creditor to have a choice as between suing when the instalment was in default or waiting till the whole became due, then why was it necessary to enact Art. 75 at all. Art. 75 strictly speaking becomes nugatory, and in my judgment the Article seems to me to be plain beyond doubt. The period of limitation under this Article dates from when the default was made, in other words, (as in the English case in (1891) 2 Q B 509¹¹ to which their Lordships of the Privy Council referred) when the cause of action arose. I would refer to one more English authority on statute of limitations being the case in (1843) 4 Q B 519¹⁵ in which Lord Denman held in a case where there was a defeasance clause, that the action was barred by limitation and observed :

If he chose to wait till all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The statute of limitations runs from the time the plaintiff might have brought his action.

Here in this case the statute of limitations runs from the date when there was a default, in other words, when the plaintiffs might have brought their action. With these somewhat lengthy observations I

13. Ganga Bishun Marwari v. Raghunath Prasad, (1930) 17 A I R Pat 615=128 I O 786=10 Pat 173=11 P L T 609.

14. Raghunandan Singh v. Kishun Singh, (1935) 22 A I R Pat 383=156 I O 475=15 Pat 1=16 P L T 893.

15. Hemp v. Garland, (1843) 4 Q B 519=3 G & D 402=12 L J Q B 134=7 Jour 802.

would refer this case to a Division Bench for decision. (The case then came before the Division Bench which referred the case to the Full Bench.)

Judgment of the Full Bench

Wort J.—I do not propose to add much to what I stated in the judgment under which this case was in the first instance referred to a Division Bench. The facts of the case were set out in that judgment and I do not propose to repeat them. The first question which arose was whether there had been a waiver within the meaning of the third column of Art. 75, Limitation Act; the waiver alleged was the payment of Rs. 25 as a part-payment of the instalment or instalments then due. I content myself by repeating the observation of Fry J., as he then was, in (1878) 8 Ch D 201⁴ to this effect :

Where a right has accrued it can be waived, but to amount to waiver there must be something done which is inconsistent with the continuance of that right. Now, the right here was to immediate payment of £400 and interest, and the receipt of a portion of that sum is in no way inconsistent with that demand.

I refer to the facts of this case. The question may be asked—could the acceptance of Rs. 25 in any way prevent or be an answer to the cause of action which the creditor might have had to the other amount? There can be only one answer to that question and that answer is in the negative. From one point of view the conclusion that there was no waiver disposes of the matter; but Mr. Bose who appears on behalf of the plaintiff-respondents developed his argument before us and that argument requires consideration. His contention was, although perhaps not expressed in these words, that Art. 74, Limitation Act, was an omnibus Article providing a period of limitation for promissory notes or bonds payable by instalments both in those cases in which there was a default clause, and in those in which default clause was absent, and that if the creditor chose to sue on the default clause for the full amount, then and then only Art. 75 came into operation. In my judgment that is an argument which cannot be accepted and if what Mr. Bose contends were correct in my opinion Art. 75 would be redundant. Mr. Bose relies for his argument upon the decision of their Lordships of the Judicial Committee of the Privy Council in 59 I A 376.¹⁰ There, their Lordships were dealing with a default clause in a mortgage bond and were considering Art. 132 in coming to

the conclusion that the expression "when the money sued for becomes due" in col. 3 of Art. 132 had reference to the period for which the money was lent and had no reference to the earlier date under the default clause. The case was relied upon by Mr. Bose for the observation of Sir George Lowndes to the effect that the default clause was put in for the benefit of the mortgagee. But it is to be observed that their Lordships of the Judicial Committee considering this matter referred to the earlier case being the decision of Lord Blanesburgh in 53 I A 187⁷ in which it was observed that the default clause is both for the benefit of the mortgagee and the mortgagor. It is to be noticed that their Lordships of the Judicial Committee in *Lasa Din's case*¹⁰ referred to the decision in (1891) 2 Q B 509¹¹—an authority to which reference was made in my earlier judgment—and observed that the question which there was decided, had that fallen to be decided in India, would have come under Art. 132 and not under Art. 75, Limitation Act, "which" say their Lordships "is in very special terms" and it is the terms of Art. 75 which we have to construe in this case.

Mr. Bose also relied upon the decision of Sir Francis Maclean and another Judge in 11 C W N 903.¹² But the learned Chief Justice's decision there was that it was open to the creditor, if default were made, to sue at once for the whole amount or if he so elected to waive the benefit of the proviso.

The learned Chief Justice made this observation during the course of his judgment:

Speaking for myself, if the matter had been res integra I would have felt some doubt whether the case did not fall within Art. 75 of Sch. 2, Limitation Act, rather than within Art. 116.

It is to be observed therefore that he had some doubt as regards the Article but thought himself bound by decisions of the Court two of which I propose to refer to. But it will be seen that the case gives no assistance to Mr. Bose's argument. As the Court in that case decided, there had been a waiver, and if there had been a waiver there can be no dispute that the plaintiff-respondent in this case would not be barred by the six years' period provided by col. 3 of Art. 75 dating from the first default. I say there can be no doubt about that, but as I have already observed, it cannot be said in this case that there was a waiver. There is one observation I should have made at the time that I dealt with that point and that is this that even assuming

that Mr. Bose is right in his contention that it is a question of fact, the plaintiff could not be heard in this case to say that there had been a waiver because the circumstance which he alleged, namely that all the instalments to date had been paid was inconsistent with that plea. But I do not accept the argument that it is purely a question of fact and the observation of Fry J. to which I made reference a moment ago is sufficiently conclusive on that point.

Now dealing with the two cases upon which Sir Francis Maclean relied, one was the decision in 6 Cal 94.¹⁶ The decision there was that the suit to recover money due on a registered bond is a suit for compensation and is governed by Art. 116. Garth C. J. was there dealing with the question whether in 'ordinary legal parlance' (to use his expression) a suit to recover money upon a bond could be properly described as a suit for compensation as indicating the view held that a suit for compensation meant a suit for unliquidated damages. Nonetheless he decided that Art. 116 applied. The other case to which I propose to refer is 9 Cal 857.¹⁷ Again the decision there was that the execution creditor (it was a case in execution, it is to be observed) must be considered to have waived his right to execute the decree for the whole amount. Neither the decision of Sir Francis Maclean nor the two cases to which reference was made in this judgment assist the argument of Mr. Bose. It remains to make one observation with regard to Art. 75 itself:

On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.

The period of limitation is three years and read with Art. 116, six years. Col. 3 reads:

When the default is made unless where the payee or obligee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver.

"When the default is made" can have reference only to the default referred to in Art. 75. In my judgment, it is impossible to get away from the construction that if the default clause appears in the bond, apart from the question of waiver the cause of action arose at the first default. And referring to these matters their Lordships of the

16. *Nobocoomar Mookhopadhyaya v. Siru Mullick*, (1881) 6 Cal 94=6 C L R 579.

17. *Nilmadhab Chuckerbutty v. Ramsodoy Ghose*, (1888) 9 Cal 857.

Judicial Committee of the Privy Council in the case to which I have referred and upon which Mr. Bose places reliance, observes that Art. 132 deals not with the cause of action but the date upon which the money becomes due, whereas the Imperial Statute of James I which was being considered by way of comparison dealt with the date of the cause of action.

I referred in the course of my previous judgment to the decision of Ross and Scroope JJ. in 11 P L T 866⁸ and shall make no further observation with regard to that case other than the one I made on the previous occasion, namely that it relied upon a previous decision reported in 11 P L T 835,⁹ a case which was not under Art. 75 but was a case similar to the case in 59 I A 376,¹⁰ namely on a mortgage bond governed by Art. 132. I need only add that Ross J. made no reference to the terms of the Article but came to the conclusion that the case was completely covered by the earlier decision to which I have referred. Now, it is perfectly clear, if I may be allowed to say so with respect to Ross J. that their Lordships of Judicial Committee of the Privy Council, whatever their decision might be, if the matter came before them, declined to consider that the provisions of Arts. 132 and 75 are in any way similar. As I have already observed, the Judicial Committee have said that Art. 75, Limitation Act, "is in very special terms." In my judgment on the plain reading of the Article and having regard to the fact that there was no waiver, the action of the plaintiff was barred by limitation and the appeal therefore should be allowed and the action of the plaintiff dismissed with costs throughout.

Varma J.—I agree. The facts are very simple and in order to make my meaning clear I shall just narrate shortly as to what the suit was about. There was a registered money bond executed on 6th February 1922 under which payment was to be made by ten equal instalments of Rs. 75 and the last instalment was of Rs. 50 only. The first four instalments were paid and there is no difficulty with regard to that. The trouble seems to have begun from the fifth and sixth instalments. The fifth instalment was not paid at all, and while the term of the sixth instalment was running a sum of Rs. 25 was paid on 18th March 1928. The suit out of which this appeal arises was filed on 23rd March 1935. The whole question is whether the suit is barred by limi-

tation and whether Art. 75, Limitation Act, is applicable. The trial Court held that Art. 75 read with Art. 116 was applicable and that therefore the suit was barred by limitation. But the lower Appellate Court referring to the payment of Rs. 25 held that there was a case of waiver and therefore decreed the suit and allowed the appeal. Although the sum of Rs. 25 was paid on 18th March 1928 it is not clear from the document or the findings of fact as to which instalment it was paid for whether for the fifth or the sixth instalment, and the question is whether the payment of Rs. 25 and the acceptance thereof by the plaintiff amounted to a waiver by the plaintiff.

Now, it is clear on the authority of (1878) 8 Ch D 201⁴ that a part payment of this nature does not amount to a waiver. I shall deal specially with one aspect of Mr. Bose's argument advanced on behalf of the respondents, an argument evidently based upon the dissentient judgment in 57 All 108⁹ at page 129. The contention of Mr. Bose seems to be (if I have understood him rightly) that unless the suit is based on a default clause Art. 75 does not apply, and, as this suit was filed after all the instalments fell due, it was not a suit based on a default clause and therefore Art. 75 would not apply. This argument does not commend itself to me, because it presupposes that non-filing of a suit in the case of an instalment bond amounts to a waiver. But there are clear authorities on the point that non-filing of a suit does not amount to a waiver, for instance, I would refer to the decision in 47 All 552¹⁸ and the authorities cited thereunder. In 31 Cal 83² Rampini and Pargiter JJ. held that where an instalment bond gives the creditor the right to sue for the whole amount due under the bond on default of payment of a single instalment, there is no waiver of that right by acceptance of part of an overdue instalment, or by receipt of interest. As a matter of fact it is doubtful whether this question of waiver could be raised by the plaintiff in this suit in view of the statements made by him in the plaint. The plaint said that all the instalments for which the plaintiff was suing had already been paid.

The next point to be considered is whether the decision in 11 P L T 866⁸ expresses the correct view of the law on this point. That decision refers, as has been pointed out in *Kanhai v. Amrit*, (1925) 12 A I R All 499=87 I O 162=47 All 552=23 A L J 424.

out by my learned brother in his previous judgment, to an earlier decision in 11 P L T 835.⁵ In the case reported in 11 P L T 866⁶ it has been simply held that the case was covered entirely by the previous decision reported in the same volume at p. 835. The decision ignores the basic difference between the two suits that this Court was dealing with; in the latter decision the learned Judges were dealing with a money instalment bond while in the previous one they were (as will appear from the judgment) dealing with a mortgage bond. There was essential difference between these two cases; one was governed by Art. 132 and the other by Art. 75, Limitation Act. The nature of the difference has been fully explained by the Privy Council in 59 I A 376.¹⁰ The difference in the language employed in col. 3 of Arts. 74 and 75, Limitation Act, has been pointed out in many cases. Col. 3 of Art. 74 provides:

The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment; whereas that of Art. 75 lays down:

When the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.

In conclusion I agree with the previous judgment of my learned brother that this appeal should be allowed with costs.

Manohar Lall J.—The question in this case is whether the claim of the plaintiffs to recover some only of the instalments provided by a registered instalment bond after two defaults had occurred is hit by the provisions of Art. 75, Limitation Act. A large number of cases have been cited before us, some of which are difficult to reconcile. The confusion has arisen by applying the considerations, which are correctly applicable to mortgage instalment bonds, to ordinary instalment bonds also. In view of the recent decision of the Privy Council in 59 I A 376¹⁰ it is now authoritatively established that where a mortgage bond provides for a due date of payment of the principal and also for the payment of principal and interest in certain instalments with a default clause the Article which applies is Art. 132 and limitation would run not from the date of each default but from the due date, that is, when the principal amount is stipulated to be repaid although the plaintiff has an option to bring his suit earlier if he so chooses.

If this is kept in view a good deal of the

apparent contradiction in the decided cases can be dissolved. Again, it must be kept in view that there is a well-defined distinction between Arts. 74 and 75, Limitation Act. Art. 74 applies to an instalment bond which does not contain any default clause and therefore in such cases the plaintiff is entitled, by the very terms of his bond, to sue only for such instalment as remains unpaid. No question of waiver of default can ever arise in such a case. But where the document provides that in the case of a default (which may be due to non-payment of one instalment or more than one instalment as provided in the bond) the obligee has the right to sue for the whole of the sum then remaining due, it is obvious that the promisor has a right *eo instanti* to pay the full amount and the obligee a corresponding right to receive and recover it. Art. 75 provides in col. 3 how the starting point of limitation should be calculated in such a case; the starting point of limitation is in the first instance the date of the default but this starting point can be carried forward only if the default is waived. Now waiver must obviously be a mixed question of law and fact in each case and therefore the Article of the Limitation Act under consideration cannot be looked into to decide when the default has been waived as was sought to be argued.

The weighty observations of Lord Denman and Fry J., quoted in the Order of Reference correctly indicate how this question should be determined. It is there laid down that mere failure to sue or inaction by the creditor is not a waiver of the default, something else must be established to show that the promisee has waived his rights. For instance his acceptance of an overdue instalment or his communicating to the promisor for a consideration that he will not insist upon his rights which have already accrued to him on the default which has taken place, or, it may be that the promisor himself approaches the promisee or writes to him to stay his hands and not to proceed to demand the full amount and if the promisee agrees to such request, these will ordinarily amount to a waiver. In such cases it is clear that some overt act has been established from which the Court of fact can draw the conclusion that the obligee has waived the default.

In some cases it will be easy to decide this question by looking at the frame of the suit and to find from the plaint the

manner in which the allegations have been made. When the plaintiff alleges, for instance, that all the previous instalments have been paid he proceeds on the footing that there has been no default and no waiver, and if his allegations are, in the course of the trial, found to be false, in my opinion, it is not open to the promisee to turn round and ask the Court to infer any waiver. Some High Courts have held that a mere acceptance of an overdue instalment cannot be treated as waiver of the default in the view that the promisee is merely taking what was due to him. But the Calcutta High Court has consistently held that an acceptance of an overdue instalment amounts in law to a waiver of the default. As this High Court has adopted the view that where there is a *cursus curiæ* of the Calcutta High Court they will ordinarily adopt the same as a rule of law binding upon this Court. I am inclined to agree with the view that where the promisee has accepted an overdue instalment it must be held that he has waived his rights which accrued to him on that default and that the starting point of limitation would be from the next default, if not waived. The same cases of the Calcutta High Court also lay down, in agreement with the decision of the English Courts, that an acceptance of a portion of the instalment which was overdue or the acceptance of the interest only on the overdue instalment cannot be held to be a waiver of the default. To the same effect are the observations of this Court in 11 Pat 112¹⁹ at page 129 where Fazl Ali J. observed as follows :

Now there is a good deal of conflict in the decisions of the various High Courts in this country as to what would constitute a waiver and what would not. It has been held in several cases that mere abstaining from bringing a suit does not amount to a waiver and some of these cases were relied on by the learned advocate for the appellant. All those cases however were decided under Art. 75, Limitation Act, and it is clear that if it is held in cases falling under that Article that mere abstention from suing amounts to a waiver that would nullify the main provision in that Article which is to the effect that the time would ordinarily begin to run from the date of the first default.

Now if these considerations are kept in view the whole scheme of the Act becomes quite clear and plain and Art. 75 retains its place as a workable Article and is not rendered nugatory as has been held by

some of the learned Judges of the Allahabad High Court; otherwise every instalment bond with or without a default clause would be covered by Art. 74. Indeed it was so argued strenuously by Mr. Bose, the learned advocate for the respondent, but I do not agree with his contention.

I now turn to some of the cases of this Court cited before us, viz. 11 P L T 835⁵ and 11 P L T 866.⁶ The latter case at p. 866 professes to follow the earlier case reported at p. 835 but does not give any reason in law of its own and therefore is no authority for deciding the question before us. The earlier case related to a set of circumstances in which the question was whether the mortgage bond payable by instalments could be enforced only from the date of the default clause or from the due date as well and the learned Judges decided the case on the same lines as has now been decided by the Privy Council in 59 I A 376.¹⁰

The case however is no authority for the proposition that in cases where Art. 75 is applicable the date of default unwaived should not determine the starting point of limitation. The cases relied upon by the learned Judges in this case at page 835, namely 11 P L T 835,⁵ 39 Mad 981²⁰ and 10 Pat 173¹³ were noticed by the Privy Council in 59 I A 376,¹⁰ but their Lordships of the Judicial Committee deliberately refused to pronounce any decision on that matter for the simple reason that the question as to the applicability of Art. 75 did not arise before them. But Sir George Lowndes threw out an observation, which is very apposite, wherein he pointed out that Art. 75 deals with special terms of its own and therefore the considerations which prevail in that Article should not be allowed to be used in construing Art. 132 in order to find the starting point of limitation in suits to enforce mortgages. The exhaustive judgment of Sulaiman C. J. in 57 All 108⁹ supports me in my view. In that case a very large number of cases have been reviewed. The learned Chief Justice took great pains to point out the distinction between Art. 75 and Art. 132. It is true that the question of waiver was not specifically decided by the learned Chief Justice in that case, but he decided that very question specifically in 57 All 561.²¹

19. Mukhdeo Singh v. Harakh Narayan Singh, (1931) 18 A I R Pat 285 = 134 I C 609 = 11 Pat 112 = 12 P L T 755.

20. Narna v. Ammani Amma, (1917) 4 A I R Mad 951 = 35 I C 418 = 39 Mad 981.

21. Sukh Lal v. Bhoora, (1934) 21 A I R All 1039 = 153 I C 205 = 1934 A L J 1056 = 57 All 561.

The learned advocate for the respondent relied strongly on the dissentient judgment of Mukherji J. at p. 129 but with great respect I am unable to agree with the reasoning which commended itself to that learned Judge. At p. 133 the learned Judge takes the view that the description in Art. 75 "is not merely of the bond on which the suit is based but is also a description of the nature of the relief which is sought in the suit" and proceeds to fortify his conclusion by some examples. But the answer is that the wishes of the obligee under the bond with a default clause or the manner in which he frames his plaint are superseded by the fiat of the Legislature which has unmistakably laid it down that if you wish to recover money due or payable under an instalment bond with a default clause you must come within a prescribed period starting from the date of the first default unwaived. With the wisdom of this enactment this Court is in no way concerned. Again at p. 135 the learned Judge appears to lay down that it was open to the plaintiff to enforce or refuse to enforce the penalty clause provided for in the bond upon which he sues and therefore he could always get rid of the difficulty set up by Art. 75. If this view of the learned Judge were correct there would be no distinction between Art. 74 and Art. 75, Limitation Act. I venture to answer that the creditor may well show the indulgence, which he wants to show to his debtor, by giving up his claim for the full amount due, for example he can limit his claim to a smaller sum out of the remaining total then due but he must institute his suit within a stated period starting from the date when the default has occurred and not waived. I do not see any hardship to any body in this view. It is always open to a creditor to show unmistakably that he has in law and fact waived the default of his debtor.

The real question in all these cases is to find out from the document sued upon and the attendant circumstance as to when the default has taken place giving rise to a right to sue for the whole unpaid balance and once that is determined the suit must be instituted within the period fixed by Art. 75 (*see* Sec. 3). In cases governed by Art. 74, i. e. bonds without any default clause the bond itself provides for the payment of each instalment and therefore col. 3 provides that where each instalment has remained unpaid the period of limitation shall be three years — or six years if

the bond is registered—from the date when each instalment is unpaid. When we come to bonds with a default clause, the bond itself provides that where a default has happened the whole amount has become due. Therefore it is no longer in the option of the creditor, unless he waives the default, to stop the period of limitation under Article 75 from running.

Now, keeping these principles in view, the solution of the question in the present case is free from difficulty. The plaintiff framed his plaint upon the allegations that all the previous instalments were paid to him in full and that the overdue instalments were received by him along with damages at Rs. 13.8.0 and he alleged that the default took place by non-payment of the instalment which was due in March 1929 and therefore the suit instituted in March 1935 was within time. But these allegations have been found to be false. It has been established in the case that the fourth instalment was paid, though beyond time; but the fifth instalment was never paid. Now, in view of the decisions of the Calcutta High Court, which I have accepted as correct, although, the default occurred when the fourth instalment was not paid in time but the default was waived by the acceptance of that overdue instalment on 16th March 1926, and therefore the period of limitation for the suit did not begin in March 1926. Inasmuch as the fifth instalment was not paid at all the default took place in March 1927 and the present suit having been instituted beyond six years of that default the suit is beyond time.

But it was argued that as the plaintiff accepted the sum of Rs. 25 against the sixth instalment in March 1928 he must be held to have waived the previous default of the fifth instalment as well as the default of the sixth instalment. I have already held that the acceptance of a portion of an overdue instalment cannot amount in law to a waiver of the default and therefore the acceptance of Rs. 25 against the fifth or the sixth instalment (there is no evidence as to which overdue instalment was being paid in part) cannot be taken to have established that the default which had already occurred in 1927 and which again occurred in 1928 was ever waived. Whichever view is taken as to this payment of Rs. 25 the plaintiff gets no help. If this payment is attributed to the fifth instalment the fifth instalment still remains unpaid in full and the sixth instalment has never been

attempted to be paid; this makes the suit beyond six years of the due date even of the sixth instalment. If, on the other hand, the payment of Rs. 25 is attributed to the sixth instalment the fifth instalment has never been paid and the payment itself keeps the sixth instalment still unpaid in full. The result is that the suit is still more beyond the period of limitation.

I therefore conclude (1) that in the circumstances of the present case it is not open to the plaintiff to ask the Court to decide that he has waived the default when his case has been all along that no default ever took place, (2) that if this question is open to be decided by us I am coerced to hold that the defaults committed in March 1927 and March 1928 have never been waived and (3) that the case in 11 P L T 835⁵ is correctly decided, but the decision is of no assistance in deciding the present case, (4) that the observations at page 129 of 11 Pat 112,¹⁹ are absolutely correct, but the case in 11 P L T 866⁶ has been incorrectly decided. For these reasons I agree that this appeal should be allowed and the suit of the plaintiff dismissed with costs throughout.

D.S./R.K.

*Appeal allowed.***A. I. R. 1939 Patna 443**

FAZL ALI AND AGARWALA JJ.

Murgi Munda and another, Accused
Appellants

v.

Emperor.

Criminal Ref. No. 24 and Criminal Appeal No. 160 of 1938, Decided on 6th September 1938, reference made by and appeal from decision of Judicial Commissioner, Chota Nagpur, Ranchi, D/- 28th July 1938.

(a) Penal Code (1860), S. 300, Exception 1—Provocation—Nature of—Person not betrothed to girl but having intrigue with her sanctioned by custom—No obligation of marriage unless girl pregnant by him—Person seeing another man in act of sexual intercourse with girl and killing such other person is guilty of murder.

The mere fact that a person's desires are thwarted does not in law justify him killing the person who is thwarting him. The provocation which is mentioned in Exception 1 to S. 300 is something which is recognized as provocation in law and not merely something which arouses the uncontrollable anger of a particular individual. A man in love with a woman who has repulsed his suit might be so angry as to lose control of himself at the sight of her engaged in sexual intercourse with another but, if he killed one or both of them, he could certainly not plead grave provocation in

mitigation of his offence. In the case of a wife the position is entirely different. The law recognizes that a husband is entitled to expect fidelity from her. It is even possible that the provocation might be held to be grave in the case of a man who finds in the arms of another lover a mistress whom he maintains and from whom therefore he might reasonably expect faithfulness. But this is not so even in the case of a girl betrothed to the assailant much less in the case of a person who is not even betrothed to the girl but having between them only an intrigue sanctioned by the custom of the community in which they live which in no way entails an obligation of marriage unless and until the girl should become pregnant by the man. If therefore such a person kills another who is discovered to be in the act of sexual intercourse with the girl, the offence committed by such person is murder: *A I R 1932 Mad 25, Dissent.; A I R 1930 Cal 199, Ref.* [P 446 C 2; P 447 O 1]

(b) Criminal Trial—Murder—Motive—*M* and *G* charged with murder—*G* not actuated by motive but acting in concert with *M* in committing murder—*G* held guilty of murder but liable to lesser penalty.

In a case where there is direct evidence of the acts of the accused the question of motive is not material if the acts themselves are sufficient to disclose the intention of the actor. [P 447 O 2]

Where out of two persons *M* and *G* who were both charged with the offence of murder, *G* had not the amount of motive which actuated *M* in committing murder but there was evidence that *G* acted in concert with *M* and shared the same intention of *M* in committing murder:

Held that *G* was also guilty of murder and the absence of motive only served to mitigate his sentence from death to transportation for life: *A I R 1919 Pat 111 and A I R 1923 Rang 268, Ref.* [P 447 O 2; P 448 C 1]

Ganesh Sharma — *for Accused.*Asst. Advocate-General — *for the Crown.*

Agarwala J.—This is a reference under S. 374, Criminal P. C., by the Judicial Commissioner of Chota Nagpur, for confirmation of the sentences of death passed on Murgi Munda (aged 25) and Gangu Munda (aged 24), both of village Kurunga, for the murder of Gansa Munda (aged 20) of village Keora, six miles from Kurunga. On the occasion of the last Sarhul festival, i. e. on 8th April 1938, there was a village dance held on a hill adjacent to village Behonda. In the evening this dance was continued at the akhara of the village. As appears to be customary in that part of the country, it was attended only by the young people of the village, the elders being engaged in entertaining each other at their homes. Many of the young girls, who were present at the dance at the akhara have been examined as witnesses in this case, and from their evidence it appears that among the young men who were present were two accused and the deceased

Gansa Munda. At some time in the evening Gansa Munda left the akhara, and after an interval of time not specified, two girls Randai (P. W. 3) and Gangi (P. W. 4) also left, for the purpose of going to their respective homes to have their evening meal. On their way they met Gansa, who proposed to Randai that he should go to her home and smoke. She told him that there was no tobacco left, and eventually she and he went off together to the Jojhansa jungle. For what happened after that we have only the statement of Randai supported by circumstantial evidence. Before dealing with this statement and the evidence it is desirable to make a few observations with regard to the parties concerned. The witnesses in this case are Mundas, and they have spoken with extreme candour about a custom which prevails in their community. It appears that it is customary for unmarried girls to cohabit with unmarried men and that the only obligation this entails is that the man is expected to marry any girl who becomes pregnant by him. In village Behonda the scene of these matings is Jojhansa jungle, which lies a few hundred yards outside the village. Gansa Munda, the deceased, was the brother of the daughter-in-law of Charan Munda (P. W. 1), the Munda of village Behonda. Previously he used to work for the Munda. While he was so employed he carried on a love intrigue with Randai of the same village. Two years ago Gansa Munda left Behonda and took up his residence at village Keora. From that time Randai transferred her favours to Murgi Munda, the accused; but she has deposed that Gansa Munda was in the habit of visiting the village and that whenever he did so she used to cohabit with him in the jungle.

I will now revert to Randai's account of what happened on the evening of 8th April when she and Gansa went to the jungle. She said that by the side of a foot-path under a char tree Gansa prepared a bed of leaves and twigs and that thereupon they had sexual intercourse. After that they fell asleep in each other's arms. Later in the night, she awoke to find Murgi pulling her away from Gansa. He slapped her and kicked her. She noticed that the accused Gangu Munda was at this time engaged in pressing the neck of Gansa Munda with his hands. After pulling Randai away from Gansa, Murgi Munda then picked up a large stone and struck Gansa's head with

it three or four times with the result that he died. The two assailants then took the girl some little distance away and under pain of death extracted from her an undertaking that she would disclose to no one what she had seen. The two men then tied Gansa's body with his own cloth to a branch of a tree, which was found lying near by and carried him to the field of Balga which was partly under water. There they buried the body while the girl sat on the ridge of the field looking on. After this the two men washed their hands and feet in a water channel and Gangu set off in the direction of Behonda and Murgi towards his house with the girl. Murgi carried the pole for a part of the way but threw it away at Karipiri-tanr. According to the girl they reached Murgi's house at Kurunga after midnight. When they arrived there, they found that Samu Munda (P. W. 2) was also there. The girl stayed at Murgi Munda's house for the next three or four days, i. e. Saturday, Sunday, Monday and Tuesday morning. On the morning of Saturday Gangu arrived and had a talk with Murgi. While she was there she was warned twice by Murgi not to disclose what she had seen on Friday night. On Tuesday morning a police constable arrived at Murgi's house. Murgi was not there at the time as he was paying a visit to a lohar. The constable took charge of Randai. Then they went and fetched Murgi and Gangu and after that all three persons were produced before the Sub-Inspector who was at Behonda where the girl made a statement. The girl then took the Sub-Inspector to the char tree where he noticed the bed of leaves and twigs and marks of struggle. Five yards from the tree he found blood on the ground and on leaves and stones. The girl pointed out the place in Balga's field where the body of Gansa had been buried, and also the branch to which the body had been tied and which had been discarded at Karipiri-tanr. Although decomposition had set in, the girl and the villagers with the Sub-Inspector had no difficulty in identifying the corpse of Gansa Munda. The Sub-Inspector showed her a hair-pin which Randai said was hers.

This, as I have already said, is the only direct evidence we have of what transpired in the Jojhansa jungle on the night that Gansa Munda met his death, and the witness who has given this statement has told her story with a frankness and downright-ness which is extremely impressive even

when read in print. The learned Judicial Commissioner who had the advantage of hearing the witness make the statement was equally impressed both by her story and by her manner of telling it. Even in the absence therefore of any corroboration of it, it would be extremely difficult to discard this statement, more particularly as there is absolutely no motive for her to implicate the two appellants falsely. She admits and there is other evidence to the same effect, that both the appellant Murgi Munda and the deceased Gansa Munda were her lovers. Although on the night in question it was Gansa Munda whom she accompanied to the jungle, her regular lover (if one may use the term) was at that time, and had been for two years—Murgi Munda. There had been no quarrel or dissension between them. Nor is there any evidence that the appellant Gangu Munda had incurred either the anger or dislike of Randai, or of any other villager, so that there is no apparent motive for her to implicate him either.

Having thus given Randai's account of what happened to her and Gansa while they were in the jungle, it is necessary to refer to what went on in the village on the evening of 8th April and on the subsequent days, and for that purpose the most comprehensive evidence is that of the Munda of the village (P. W. 1). He says that on Saturday morning, when it was found that Gansa and Randai were missing, it was assumed that they had eloped. In the afternoon however Munda's son, Runka (P. W. 9), who had been in the Jojohansa jungle and had returned from there, told him that he had seen blood marks on a bed of leaves under a char tree. The Munda thereupon sent his daughter-in-law, Hisi, to inquire whether Gansa was at Kudapiri where her sister lives. He sent his son Binrai and other to Keora to inquire whether Gansa was there. All of these people returned on Sunday morning without having found Gansa. The chaukidar was then sent for and shown the blood-marks under the char tree. They found there a broken necklace of seeds, which had belonged to Gansa, and they also noticed a hair-pin which was subsequently picked up and given to Sub-Inspector and shown by him to Randai, who said it was hers. The Munda then summoned the young men and women of the village and asked them what they had seen Gansa and Randai doing on Friday night, and he was informed by them that

Gansa and Randai had left the akhara separately and that afterwards the two appellants, Murgi and Gangu, had inquired where Randai had gone. This information, coupled with what had been found under the char tree, led the Munda to conclude that either Gansa or Randai or both of them had been murdered. He therefore in the company of some of the villagers and the chaukidars set out for Tamar Police Station, which is 30 miles from Behonda, taking with him the necklace and the hair-pin. They arrived at the thana on the morning of Monday the 11th April. The Assistant Sub-Inspector recorded a first information on the statement of Mangal Chaukidar (P. W. 10). While this party was at the thana, another chaukidar, Soma Bhagta (P. W. 14), arrived there. He also had been shown the blood-marks under the char tree on Sunday and had discovered a trail of blood which began on the jungle path, not far from the char tree, and led up to the field of Balga. He had noticed, the water in the field was blood-stained, and had gone to the thana to report these facts. His statement was recorded in the form of a saneha, which is Ex. 7 in the case. The Sub-Inspector, the chaukidars and villagers left for Behonda the same day and reached the village on Tuesday morning. While passing through the jungle the Sub-Inspector deputed a constable to fetch Murgi and Gangu from Kurunga. The constable is Sukhari Oraon (P. W. 17). He found Gangu at his home and Murgi at the house of a Lohar. Both these men and Randai accompanied him to the Sub-Inspector without protest. The Sub-Inspector took charge of the dhoties which the two men were wearing. These were sent to the Chemical Examiner who reported that both of them had blood-stains but as the stains were disintegrated he could not determine their origin. Stains of human blood were found on the dried leaves taken from the bed under the char tree, on the mala, on the stone and on the earth which the Sub-Inspector scraped from the place of occurrence.

It will be observed that these facts amply corroborate the evidence of Randai in almost all material particulars. But as the appellant Gangu had no apparent motive to take part in this crime it is desirable to examine closely the evidence which implicates him. Of his relationship with Murgi Munda we know only that they come from the same village. The evidence of the girls

of the village that he was with Murgi Munda on the evening of the 8th when Murgi Munda inquired from them at the akhara as to the whereabouts of Randai is not challenged. There can be little doubt that two assailants were present at the commission of the crime. The stone with which Gansa Munda's head was battered has been produced in Court before us. It is a large piece of rock weighing $10\frac{1}{2}$ seers or 21 lbs. A stone of this weight to be used effectively as an implement of assault would have to be firmly grasped with two hands. The assailant could not have wielded it with one hand while the other hand held the victim. Unless therefore Gansa Munda was killed without a struggle while he was asleep the inference is that some one held him while Murgi Munda struck him with the stone. This in effect is what Randai's description of the assault amounts to. Then the corpse could hardly have been moved by Murgi Munda alone from the char tree to the field of Balga and buried there without any assistance. The branch to which Randai says the dead body was tied and carried is itself a heavy piece of wood. Medical examination disclosed that on Murgi Munda's right shoulder there was an abrasion which was about a week old at the time of the medical examination, which was on 14th April. This suggests that the branch on which the body was carried was slung on to the shoulders of the carriers and that it grazed the shoulder of Murgi Munda. The doctor also found on each of the shoulders of Gangu Munda marks of healed up ulcers but he was unable to determine their age or cause. The dhoties worn by both the accused however were blood-stained. The learned Judicial Commissioner asked each of the accused how he accounted for these stains. Neither of them offered any explanation. Although therefore the Chemical Examiner was not able to certify that the stains were those of human blood owing to disintegration there is no reason to suppose that they were stains of animal blood as in that case, the accused themselves would have said so. It would indeed be a strange coincidence if the two persons suspected of this murder and who had been seen in each other's company shortly prior to the murder should have on their clothes stains of animal blood which neither of them was able to account for. I therefore agree with the learned Judicial Commissioner and the four assessors who assisted him in the trial that both the

appellants were concerned in killing Gansa Munda.

It has however been contended that the offence they committed was not murder. With regard to Murgi Munda it was argued that as he found his lover in the arms of Gansa Munda in the circumstances already narrated, the provocation for him to kill Gansa Munda was so grave as to affect the nature of the offence which he committed. Reliance was placed on the decision of a Division Bench of the Madras High Court in 35 M L W 141.¹ The facts of that case were that the accused, finding his mistress in the arms of a former lover, stabbed her. The Sessions Judge who tried the accused in that case convicted him of murder although he was of the opinion that had the deceased been the wife of the accused he would not have come to this decision. Their Lordships of the Madras High Court observed :

We find it impossible to agree that the fact that Mahalakshmi was the appellant's mistress and not his wife makes any real difference. One cannot apply considerations of social morality to a purely psychological problem. The question is not whether the appellant ought to have exercised, but whether he lost control over himself. When a man sees a woman, be she his wife or his mistress in the arms of another man, he does not stop to consider whether he has or has not the right to insist on exclusive possession of her person. . . . She is a woman, of whose person he desires to be in exclusive possession and that is, for the moment enough for him.

With the greatest respect to the opinion of these learned Judges I disagree. The mere fact that a person's desires are thwarted does not in law justify him killing the person who is thwarting him. The provocation which is mentioned in Exception 1 to S. 300, Penal Code, is something which is recognized as provocation in law and not merely something which arouses the uncontrollable anger of a particular individual. A man in love with a woman who has repulsed his suit might be so angry as to lose control of himself at the sight of her engaged in sexual intercourse with another but, if he killed one or both of them, he could certainly not plead grave provocation in mitigation of his offence. In the case of a wife the position is entirely different. The law recognizes that a husband is entitled to expect fidelity from her. It is even possible that the provocation might be held to be grave in the case of a man who

1. Potharaju v. Emperor, (1932) 19 A I R Mad 25=1932 Cr C 5=186 I C 814=83 Cr L J 273 =35 M L W 141.

finds in the arms of another lover a mistress whom he maintains and from whom therefore he might reasonably expect faithfulness. But that this is not so even in the case of a girl betrothed to the assailant is clearly indicated in (1913) 2 K B 29.² In that case the girl to whom the accused was betrothed suddenly informed him that she had been prostituting herself. He thereupon seized her and cut her throat with a razor which he had in his pocket. Lord Coleridge J. who tried the case directed the jury that

no provocation by words, however opprobrious, in a case where a deadly weapon is used can, in law reduce the crime from murder to manslaughter.

This direction was challenged in the Court of Criminal Appeal by the accused. In delivering the judgment of the Court, Channell J. observed :

The Judge stated the rule in the old form, that words alone can never constitute sufficient provocation to reduce murder to manslaughter. It would perhaps have been more accurate in view of modern decisions if he had said that words cannot constitute sufficient provocation except in very special circumstances. But the only special circumstances which have been held sufficient for that purpose are where the words involved a confession of adultery. The reason for that exception is that a sudden confession is treated as equivalent to a discovery of the act itself. But here the relation between the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife. They were simply persons who were in the position of being engaged to be married. Under those circumstances, if the effect of the summing up was to leave the jury under the impression that they could not properly find a verdict of manslaughter we think that it was right.

It may be observed in the present case that Murgi Munda was not even betrothed to Randai. Between them existed an intrigue sanctioned by the custom of the community in which they lived but in no way entailing the obligation of marriage unless and until Randai should have become pregnant by Murgi. It may be noticed that the observations in the Madras case referred to above were mere obiter for the Court declined to interfere with the conviction for murder on the ground that before stabbing his wife the accused deliberately fastened the door of the room and searched for the knife with which he then stabbed her. In 124 I C 818³ a Division Bench of the Calcutta High Court held that the

2. *King v. Palmer*, (1913) 2 K B 29=82 L J K B 531=108 L T 814=77 J P 840= 23 Cox C C 877=29 T L R 349.

3. *Emperor v. Dinabandhu*, (1930) 17 A I R Cal 199=1930 Cr O 231=124 I O 818=81 Cr L J 737.

well-established law that when a husband discovers his wife in the act of adultery and thereupon kills her, he is guilty of manslaughter only and not of murder, has no application where the woman concerned is not the wife of the accused but only a public woman. In my opinion, the offence committed by Murgi Munda was murder. With regard to Gangu Munda it was contended that even if Murgi intentionally murdered Gansa that intention was not shared by Gangu. It is true that Gangu had not even that amount of motive which actuated Murgi; but in a case where there is direct evidence of the acts of the accused the question of motive is not material if the acts themselves are sufficient to disclose the intention of the actor. Reference was made to the case in 50 I C 337⁴ where a Division Bench of this Court pointed out that

the mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under S. 34 of the Penal Code

Their Lordships observed :

It is only when a Court can with some judicial certitude hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that S. 34 may be applied.

It was contended on behalf of the appellant Gangu that there was no evidence of a preconceived or premeditated plan between him and Murgi for the murder of Gansa. But on the other hand it cannot be denied on the evidence that has been accepted that he acted in concert with Murgi in bringing about the result which followed. The learned advocate for the appellants also cited the case in 1 Rang 390⁵ where it is observed :

The existence of a common intention being the sole test of joint responsibility, it must be proved what the common intention was and it must also be proved that the common act for which the accused is to be made responsible was acted in furtherance of that common intention.

The post mortem examination of the corpse in the present case revealed that the left temporal bone was broken in three pieces, the right temporal bone in two pieces and the parietal bone in six pieces, indicating that more than one blow was struck and as I have already shown, the evidence discloses that these blows were struck either while Gansa was asleep or

4. *Satrughan Patar v. Emperor*, (1919) 6 A I R Pat 111=50 I O 387=20 Cr L J 289.

5. *Maung Gyi v. Emperor*, (1923) 10 A I R Rang 268=76 I O 705=25 Cr L J 241=1 Rang 890.

else while he was deprived of the power of defending himself. The Sub-Inspector found marks of struggle near char tree and the bloodstains which he noticed were five yards from the tree. The blood-stained stones were also found at this place. This clearly indicates that Gansa was not killed in his sleep while lying under the char tree. If therefore he was awake he would have been in a position to put up some kind of defence against a person who had both his hands engaged in grasping a heavy stone unless his actions were impeded by some other person. The evidence, in my opinion, clearly indicates that his actions were so impeded by Gangu. From these circumstances the only inference is that at the time when Murgi battered the head of Gansa with the stone, the intention of killing him was shared by Gangu. In my opinion, therefore the offence committed by Gangu is also murder. The circumstances in which the crime was committed do not justify any mitigation of the sentence passed on Murgi Munda and this is confirmed; but with respect to Gangu the absence of motive for him to take part in committing the offence suggests that he was acting under the influence of his companion. I would therefore alter the sentence of death passed on him to transportation for life.

Fazl Ali J.—I entirely agree.

N.S./R.K.

Order accordingly.

A. I. R. 1939 Patna 448

HARRIES C. J. AND MOHAMAD NOOR J.

Hafiz Muhammad Zayauddin —

Plaintiff — Appellant.

v.

Shaikh Dargahan and others —

Defendants — Respondents.

Letters Patent Appeal No. 3 of 1938, Decided on 25th April 1939, from decision of Wort J.: *Reported in A. I. R. 1938 Patna 333.*

(a) Landlord and tenant — Permanent tenancy—Onus of proof.

Where a tenant alleges that his interest is a permanent one the onus lies upon him to establish such an interest : *A I R 1929 Cal 37, Rel. on.*

[P 449 C 1]

(b) Civil P. C. (1908), S. 100—Inference as to nature of tenancy from proved facts is question of law.

The inference to be drawn from the proved facts is not a question of fact but on the contrary is a question of law. An inference therefore as to the nature of a tenancy from proved facts is a question

of law : *A I R 1927 P C 102 and A I R 1929 Cal 37, Rel. on.*

[P 449 C 2]

(c) Permanent tenancy — Inference of — Origin of tenancy unknown — Tenant's predecessors in possession for 100 years having built substantial structures consisting of mud walls and tiled roofs—Possession for generation after generation without paying rent to landlord—Tenancy held permanent.

The fact that no rent is payable is entirely consistent with a tenancy-at-will ; but a tenancy-at-will cannot be inferred when it is known that the tenant who was paying no rent constructed a substantial building. The fact that for a hundred years no rent has been demanded or paid is good ground for inferring a permanent tenancy, particularly when it is found that the land together with the buildings upon it has devolved from generation to generation on the same family. The true test is not whether the buildings are pakka but whether the buildings are of a substantial nature. Where it is found that the structures, though kachha, are of a most substantial nature and are such as no poor man would be likely to build upon land unless his interest in the land was secured, then an inference of permanency is the only one which can be drawn. The inference of permanency can only be drawn where the facts point irresistibly to such a conclusion. Where the facts are equally consistent with permanency or a tenancy-at-will, then permanency cannot be inferred ; but where the facts are inconsistent with a tenancy-at-will and consistent only with a permanent tenancy, the latter is the only inference which can be drawn and the permanency must legally be inferred. [P 450 C 2; P 451 C 1]

The origin of a tenancy was unknown. The predecessors of tenant had been in possession of this land for over a hundred years and had built upon it a substantial structure consisting of mud walls, and tiled roofs. This structure was found to be very old and had been in existence for very many years. The possession of this land together with the structure thereon had been held by the tenant's family generation after generation without let or hindrance. No rent had ever been paid to the landlord and his predecessors for the said land and the latter made no attempt to eject the tenant or his predecessors :

Held that the tenancy was not a tenancy-at-will or a tenancy determinable at short notice; but was a permanent tenancy : *A I R 1929 Cal 37, Disting.; A I R 1929 Cal 473 and A I R 1927 All 342, Rel. on.* [P 450 C 1]

Sir Manmatha Nath Mukerji, B. C.

Mitra and Saiyid Ali Khan —

for Appellant.

Baldeva Sahay and C. P. Sinha —

for Respondents.

Harries C. J.—This is a Letters Patent appeal from a decision of Wort J. in a second appeal reversing a decree of the lower Appellate Court in favour of the plaintiff. The suit out of which this appeal, arises was brought by the plaintiff to recover possession of a small plot of land, 11 acres in extent situate in the village of Shakranwan. According to the plaintiffs, the

land had been originally let to the defendants' predecessors upon the terms that it should be given up to the plaintiff's predecessors when the latter required it. In short, the plaintiff alleged a tenancy at the will of the landlord. According to the plaintiff's case, this tenancy had been determined by notice and accordingly possession was claimed. The defence was that the tenancy was a permanent one, and therefore the plaintiff had no right to eject the tenant. The trial Court held that the tenancy was permanent and dismissed the plaintiff's claim; but on appeal the lower Appellate Court held that the tenancy was a tenancy-at-will and accordingly decreed the plaintiff's claim. In second appeal, *Wort J.* held that the tenancy was a permanent one and accordingly he reversed the decree of the lower Appellate Court and restored the decree of the learned Munsif dismissing the claim in its entirety.

The origin of this tenancy is unknown. The lower Appellate Court has found that the defendants' predecessors have been in possession of this land for over a hundred years and had built upon it a substantial structure consisting of mud walls and tiled roofs. This structure is found to be very old and must have been in existence for very many years. It is also found that the possession of this land together with the structure thereon has been held by the defendants' family generation after generation without let or hindrance. No rent has ever been paid to the plaintiff and his predecessors for the said land and the latter has, until the present proceedings, made no attempt to eject the defendants or their predecessors. From these facts *Wort J.* held that the inference to be drawn was that the tenancy was a permanent one. It has been argued before us that these facts do not support an inference of a permanent tenancy. It is clear that where a tenant alleges that his interest is a permanent one the onus lies upon him to establish such an interest. This is clearly laid down in 56 Cal 738.¹ At page 741 *Rankin C. J.* observed:

When a person claims to hold land as a tenant under a landlord it is for him to prove the existence, the nature and the extent of the interest which the owner of the full rights has granted to him.

In the present case it is common ground that the defendants are tenants under the plaintiff, and it is for them to show the

nature and the extent of the interest which they hold. This is conceded by *Mr. Baldeva Sahay* who appeared for the defendants. As I have stated, the origin of this tenancy is unknown and the nature and the extent of the interest must be inferred from the facts which have been proved in this case. The inference to be drawn from the proved facts is not a question of fact but, on the contrary, is a question of law. This has been laid down by their Lordships of the Privy Council in 54 I A 178.² At p. 185 *Lord Blanesburgh* observed:

They are well aware moreover that questions of law and of fact are often difficult to disentangle. It is clear however that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present, to be a legal inference from facts and not itself a question of fact. The High Court has described the question here as a mixed question of law and fact, a phrase not unhappy if it carries with it the warning that in so far as it depends upon fact, the finding of the Court on first appeal must be accepted. On these lines, which the High Court appear strictly to have observed, the appeal to that Court was competent, and it was in their Lordships' judgment open to the learned Judges there to entertain it as they did.

In that case the High Court had held in second appeal that an inference as to the nature of a tenancy from proved facts was a question of law, and their view was upheld by the Judicial Committee of the Privy Council. The case in 54 I A 178² was discussed by a Bench of the Calcutta High Court in 56 Cal 738¹ where it was held that whether a long standing tenancy of unknown origin is permanent or not is an inference of law to be deduced from the facts proved in each case, it being on the tenant to prove the facts leading to such inference. The Bench further held that neither possession for generations at a uniform rent nor construction of permanent structure, in itself, can be taken as conclusive proof of permanent right.

It has been urged strenuously before us by *Sir Manmatha Nath Mukerji* that the facts of the present case are precisely similar to the facts in 56 Cal 738,¹ to which I have referred, and it is contended that we should follow that case and hold that the facts proved in the case before us do not warrant an inference of permanent right. In 56 Cal 738,¹ *Rankin C. J.* observed that each case must depend upon its particular facts, and in my view there is a clear distinction between the case before this Court

1. *Kamal Kumar Datta v. Nanda Lal*, (1929) 16 A I R Cal 37=116 I O 378=56 Cal 738=33 O W N 211.

1939 P/57 & 58

2. *Dhanna Mal v. Moti Sagar*, (1927) 14 A I R P O 102=101 I O 355=54 I A 178=8 Lah 573 (PC).

and the case in 56 Cal 738.¹ In the latter case the land in question had been used for residential purposes for 60 years at least and the tenancy was nearly a hundred years old. The tenant and his family had held the land for generations at a uniform rate of rent which had never been enhanced. The buildings, however on the land are described as mud huts, whereas in the present case the buildings, though of kachha construction, are very substantial and can in no way be described as mud huts. The learned Subordinate Judge accepted the report of the Commissioner who had inspected the constructions and that report describes the building as consisting of 12 rooms and a shop with three verandahs and three courtyards. The roof of this building was tiled, and there were various signs in the building showing that it had been repaired from time to time with bricks. It is true that the building can be described as a kachha one, but the description given by the Commissioner makes it clear that it was an extremely substantial kachha construction. There is therefore one very marked difference between the present case and the case in 56 Cal 738.¹ The question therefore arises whether the same inference must be drawn from the proved facts in the present case as was drawn from the proved facts in the Calcutta case.

In my view it is impossible to draw the inference that the tenancy in the present case is a tenancy-at-will or a tenancy determinable at short notice. It appears to me that the buildings which have been constructed on this plot and maintained by generations of this family are such that no one would have built if his tenancy was a precarious one. It must be remembered that the defendants' family were weavers and the family continued to ply that trade until today. They were certainly in the past humble folk who could not be expected to erect pakka constructions costing a considerable amount of money. The present buildings must have meant a very considerable outlay for people of this class and from the nature of the building I am bound to hold that the tenants built it because they knew that their interest in the land was secured and permanent. Had their interest been precarious, it is inconceivable that a building of this kind would have been erected by them. The facts, as proved, show that the landlords never at any time objected to the construction of this very substantial building, and though it is

common knowledge that the value of land in villages has risen considerably they never made any attempt to obtain any rent from these tenants.

It has been argued that the fact that no rent was paid for this land strongly suggests that the tenancy was a tenancy-at-will. The fact that no rent is payable is entirely consistent with a tenancy-at-will; but a tenancy-at-will cannot be inferred when it is known that the tenant who was paying no rent constructed such a substantial building as that which stands on this land. Failure to demand rent may be due to the inactivity or kindliness of the landlord; but there is nothing in this case to suggest that the landlord was either inactive or kindly disposed towards the defendants. The learned Munsif found as a fact that the plaintiff and his father had been extremely vigilant and had dispossessed the tenants of their kasht land. The lower Appellate Court makes no reference to this finding, and therefore, I do not base my decision upon it. However, it is clear that there is nothing in the findings of the lower Appellate Court to suggest that failure to demand rent was due to anything other than the fact that no rent was payable for this land. The fact that land with a house upon it has been held for many years at a uniform or nominal rent has frequently been relied upon to support an inference of a permanent tenancy of land. In my view, the fact that for a hundred years no rent has been demanded or paid is equally good ground for inferring a permanent tenancy, particularly when it is found that the land together with the buildings upon it has devolved from generation to generation of the same family. It has been strenuously argued that an inference of a permanent tenancy should not be drawn even where substantial buildings have been erected unless such buildings are of pakka construction. Had the present buildings been pakka, the case would have been beyond all argument; but in my view the true test is not whether the buildings are pakka but whether the buildings are of a substantial nature. In 56 Cal 738¹ the question whether the existence of pakka buildings is necessary to support an inference of permanency was discussed by Rankin C. J. At page 745 he stated:

In 52 Cal 43,³ Chakravarti J. as a result of his analysis of previous decisions, considered that the absence of permanent pucca buildings on the land

3. Abdul Hakim Khan v. Elahi Baksh, (1925) 12 A I R Cal 309 = 85 I C 103 = 52 Cal 43 = 29 C W N 138.

would ordinarily be fatal to a claim for permanency. What I think he meant by this statement was that unless permanent pucca buildings existed on the land the tenant would not, as a rule, be able to point to anything more than matters which can be explained by the reluctance of a landlord to eject a reasonable tenant, i. e. to point to any other element showing that the tenant's long occupation at a uniform rate of rent is unequivocally referable to a permanent right. In my opinion, it cannot be laid down that the existence of permanent structures is the only unequivocal or unambiguous fact for the purpose of an inference in favour of the tenant.

The necessity or otherwise of the existence of pakka structures to support an inference of permanency was also considered by Iqbal Ahmad J. in 100 I C 479.⁴ According to the learned Judge,

a pakka building is a building more permanent than a kachha one, but a mere difference in the degree of permanence could not alter the nature of the tenancy. The fact that a kachha house had been in existence for a period of more than 60 years and had passed by succession to the heirs of the lessee who originally built the house, might be enough to lead to the presumption that the lease was a permanent one.

In 56 Cal 275,⁵ a Bench inferred that a tenancy was a permanent one though there was no evidence that there had ever been any pakka building or structure erected on the land. As I have stated earlier, each case must depend upon its particular facts. Normally the existence of unsubstantial kachha structures would not lead unequivocally to an inference of permanency; but where it is found that the structures, though kachha, are of the most substantial nature and are such as no poor man would be likely to build upon land unless his interest in the land was secured, then an inference of permanency is the only one which can be drawn. The inference of permanency can only be drawn where the facts point irresistibly to such a conclusion. Where the facts are equally consistent with permanency or a tenancy-at-will, then permanency cannot be inferred; but where the facts are inconsistent with a tenancy-at-will and consistent only with a permanent tenancy, the latter is the only inference which can be drawn and the permanency of the tenancy must legally be inferred. In my judgment the facts of the present case unequivocally and irresistibly point to a tenancy of a permanent nature, and that being so, I hold that the decision of Wort J. is right

and must be affirmed. I would therefore dismiss this appeal with costs.

Mohamad Noor J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 451

FAZL ALI AND MANOHAR LALL JJ.

Rameshwar Dayal Singh — Defendant
— Appellant.

v.

Ram Das Sahu and others, Plaintiffs
and others, Defendants—Respondents.

First Appeal No. 140 of 1936 and Second Appeal No. 722 of 1934, Decided on 24th February 1939, from decision of Special Sub-Judge, Palamau, D/. 10th February 1936 and from decision of Judicial Commissioner, Chota Nagpur, D/-10/11th May 1934.

(a) Chota Nagpur Encumbered Estates Act (6 of 1876), Ss. 2 and 12-A — Scope of — Holder includes members of joint Hindu family when entire estate is placed under management of Collector on application of karta of joint Hindu family—Disqualification as to alienation in Sec. 12-A applies not only to him but also to other members of family who are owners of property when application is made—Mortgage executed by them without Commissioner's sanction is invalid.

When an entire estate is placed under the management of the Collector or some other officer under the provisions of the Encumbered Estates Act upon the application of a person who is the karta of a joint Hindu family governed by the law of Mitakshara, such person being described as a "holder" in the notification issued under S. 2 of the Act which expression is used in the same sense as holder of land, the disqualification referred to in S. 12-A of the Act applies not only to that person alone but also to all the members of the joint family who were the owners of the estate on the date of the application, as his description as holder is in a representative capacity and applies to the entire family. Subsequent partition of the estate among such members after its release can in no way get rid of the superimposed disqualification.

[P 453 C 1; P 454 C 1; P 456 C 1, 2; P 457 C 1]

Under S. 2, the karta of a joint Hindu family consisting of himself, his son and brother placed in charge of the Deputy Commissioner the family estate which after his death was released and handed over to the brother and son as members of the joint family. Both of them executed a mortgage of a portion of the estate and later, on partition between the two, the brother mortgaged a portion of the estate which had been released without sanction of Commissioner :

Held that the mortgages entered into without sanction of the Commissioner could not be enforced so as to affect the portion of the property so released; but the mortgagee was entitled to enforce a personal covenant which was always implied in a mortgage unless it was time-barred : 40 Cal 784 (P O) and A I R 1929 Pat 376, Rel. on.

[P 454 C 1; P 457 C 2]

4. Mt. Sitara Shahjahan Begam v. Munna, (1927) 14 A I R All 842=100 I C 479.

5. Pramatha Nath v. Champa Dasi, (1929) 16 A I R Cal 478=118 I C 353=56 Cal 276.

(b) Bihar Moneylenders Act (3 of 1938), S. 11—Applicability.

Section 11 being repugnant to the earlier existing law is void to the extent of the repugnancy and hence it cannot be applied to the mortgage transaction long before it was enacted : *A I R 1939 Pat 55 (F B), Foll.* [P 454 C 2]

(c) Chota Nagpur Encumbered Estates Act (6 of 1876), Ss. 2 and 12-A—Holder—Meaning of.

The word "holder" is expressly used to mean a landholder who has a title to the property in question as owner in possession and includes all sorts of proprietors or the owners of the estate which is going to be assumed charge of irrespective of their personal law. [P 454 C 1, 2]

(d) Limitation Act (1908), S. 19 — Acknowledgment—Execution of fresh mortgage by one co-mortgagor in consideration of previous mortgage after separation from other is not acknowledgment of or on behalf of latter.

Where one of the two co-mortgagors in consideration of a previous mortgage executes a fresh mortgage and absolves himself from all liabilities under the first mortgage after separation between them, the subsequent bond cannot be an acknowledgment of liability under the first bond by or on behalf of the other : *A I R 1918 Pat 646, Ref.; A I R 1920 Mad 418 ; A I R 1926 Cal 150 and A I R 1927 All 209, Disting.* [P 455 C 2; P 456 C 1]

Sir Sultan Ahmed and Phulan Prasad Varma (in No. 140) and S. M. Mullick, Sarjoo Prasad and A. N. Lall (in No. 722) — *for Appellants.*

S. M. Mullick, Sarjoo Prasad and A. N. Lall (in No. 140) and Sir Sultan Ahmed and Phulan Prasad Varma (in No. 722) — *for Respondents.*

First Appeal No. 140 of 1936.

Manohar Lall J.—This is an appeal by the principal defendant against the decision of the learned Subordinate Judge of Daltonganj dated 10th February 1936 by which he decreed the suit of the plaintiffs which was instituted to recover the dues on a mortgage bond dated 21st October 1927 executed by the defendant Parmeshwar Dayal Singh in favour of plaintiff 1 for Rs. 4250 along with interest at the rate stated in the bond. The defence to the action was that the loan was contracted for purposes not binding upon the joint family of the defendants, that the bond was invalid and for no consideration and that the rate of interest was excessive. The learned Subordinate Judge decided all the issues in favour of the plaintiffs and these findings were not challenged before us. Another defence raised was that the bond in suit was void in view of the provisions of S. 12-A, Chota Nagpur Encumbered Estates Act, but the learned Subordinate Judge repelled that objection also and this was the main contention advanced before us on behalf of the appellant.

In order to understand this objection it is necessary to state that the family of the defendants was at one time a joint Hindu family governed by the Mitakshara School of Hindu law descending from one Saligram Singh who had two sons, Nageshwar and Parmeshwar (defendant 1). Nageshwar was the father of Chandrika (defendant 3), of Bhagwat (defendant 4) and of Lal Bahadur (defendant 5). The appellant Parmeshwar Dayal is the father of Rameshwar Dayal (defendant 2). Defendants 6, 7 and 8 are the sons of Chandrika, Bhagwat and Lal Bahadur respectively. In the year 1894 Nageshwar Dayal, the father of defendant 3 and brother of the appellant, made an application to the proper authorities for the assumption by the Encumbered Estate of the Namudag Estate belonging to the joint family of Nageshwar and Parmeshwar and their descendants. On 10th December 1894, by a notification (Ex. A) the Namudag Estate was placed in charge of the Deputy Commissioner of the Palamau District under the provisions of S. 2, Chota Nagpur Encumbered Estates Act (6 of 1876) (hereinafter to be referred to as the Act.) The Notification describes the name of the property as Namudag Estate and the name of the holder is stated therein as Nageshwar Dayal Singh. Nageshwar Dayal at that time, as the evidence discloses, was the karta of the joint Hindu family consisting of Nageshwar, Parmeshwar and their sons about whom the evidence is not clear as to which of these other than Chandrika (defendant 3) were not born at that time; but that is not material for the purpose of this case. Nageshwar Dayal died in 1895 but the Namudag Estate continued to be managed under the Encumbered Estates Act until it was released on 26th August 1910 by a notification (Ex. A-1) and handed over to Parmeshwar Dayal, defendant 1, and Chandrika, defendant 3. On 15th February 1920 Chandrika and Parmeshwar executed a mortgage bond in favour of the respondent giving as security a portion of the Namudag Estate which had been released to them in 1910. This transaction forms the subject of Second Appeal No. 722 of 1934 and will be considered later. In the year 1922 a partition was effected between the two branches of Nageshwar and Parmeshwar. After this partition the mortgage bond in suit was executed by Parmeshwar alone; the total amount advanced was made up of the half share of Parmeshwar in the dues under the mortgage bond

of February 1920 and some other advances which were made to him by the plaintiff on handnotes and orally. These facts have been amply proved in this case and were not seriously challenged by either side.

The question which arises is whether upon these facts the provisions of S. 12-A operate to make the mortgage bond in suit invalid because it is admitted that the mortgage bond was executed without the sanction of the Commissioner as required by that provision in the Act. The learned Subordinate Judge held that the holder who made over charge of the estate to the Encumbered Estate in 1894 was Nageshwar and that the disqualification which is provided in S. 12-A extended only to that holder and not to the heirs of the holder. The learned advocate for the respondents adopted this view of the learned Subordinate Judge and further submitted that by virtue of the partition of 1922, the estate which was given as security under the mortgage bond in suit was now a different estate from that which was taken over charge in 1894, but this in my opinion is a wholly untenable contention. If a disqualification attaches in law to the alienation of the entire estate as it existed in 1894, a subsequent partition after the release of the estate can in no way get rid of that superimposed disqualification. It was also argued that a creditor is not required to look beyond the notification assuming charge of the estate and the notification which released the estate, and submitted that the creditor should be held to be amply protected, for, by reference to the notification of 1894, he found that the holder who gave the estate in charge of the Encumbered Estate was Nageshwar and the notification of 1910 showed that the persons to whom the estate has been released were different from the holder and therefore it is argued that by virtue of S. 12-A (vi) the only hindrance in the way of these persons who have been restored to possession is that the debt for which the alienation may be made should not be with respect to a period during which the authorities were in charge.

In my opinion the crucial point to determine in the present case is whether the holder who made over charge of the estate in 1894 was Nageshwar Dayal only or whether it was the entire joint Hindu family consisting of Nageshwar, Parmeshwar, Nageshwar's son Chandrika and others. The evidence in the present case discloses

that Nageshwar and Parmeshwar were joint and Nageshwar Dayal was the karta at the time when the estate went under the management of the Encumbered Estate and of his sons Chandrika at least was then alive. The defendants had specifically pleaded in the written statement that Parmeshwar and Nageshwar were persons of extravagant habits and were about to squander away the ancestral property of the family when the Government took away the property from the hands of the then members of the family and that Nageshwar was the karta. The evidence is to the same effect (see witness 1 for the defendants who was not cross-examined on this point). It seems to be established therefore that on the date when the authorities assumed charge the Namudag Estate belonged to Nageshwar, Parmeshwar and Chandrika as members of a joint Hindu family governed by the Mitakshara School of Hindu law. Again the estate when it was released was made over not to the heir of Nageshwar only but to Nageshwar's heir Chandrika and to Nageshwar's brother Parmeshwar, showing that the estate was released to these persons as members of a joint Hindu family who were the then owners of the estate. In these circumstances, I must construe the two notifications as indicating that the property referred to in the notification, namely the Namudag Estate, must be deemed to have been the immovable property which constituted the ancestral estate of the joint family of which Nageshwar was the karta and which was under his management. It was that ancestral property which it had been proposed by the karta should be taken under the superintendence of the authorities so that the liabilities of the family should be liquidated. This view is in accord with the decision of their Lordships of the Privy Council in the case in 40 I A 117.¹ In that case upon the application of Maharaja Singh and Duli Chand who were brothers and were the senior and managing members of a joint Hindu family governed by the School of Mitakshara along with their sons, the property was taken charge of by the Court of Wards and it was contended that the Court of Wards must be assumed to have taken possession only of the unascertained and unpartitioned shares in the joint family property of the applicants Maharaj Singh

1. *Gulab Singh v. Raja Seth Gokuldas*, (1913) 40 Cal 784 = 19 I C 521 = 40 I A 117 = 9 N L R 117 (P O).

and Duli Chand only. But their Lordships of the Judicial Committee repelled the argument and held that

the property referred to in that notification (similar to the notification in the present case), must, in their Lordships' opinion be deemed to have been of the immovable property which constituted the ancestral estate of the joint family which was under the management of Maharaj Singh and Duli Chand and was referred to in their application. It was that ancestral property which it had been proposed by the Deputy Commissioner should be taken under the superintendence of the Court of Wards until the liabilities of the family should be liquidated.

I therefore have no hesitation in holding that the prohibition under S. 12-A applies in the present case not only to Nageshwar but also to Parmeshwar and Chandrika who were the owners of the property at the time when the authorities assumed charge on the application of Nageshwar who must be assumed to be acting as a karta with the implied authority of the other members to place the property belonging to himself, Parmeshwar, Chandrika and others who were then alive for the benefit of the joint family. When the property was released in 1910 to Parmeshwar and Chandrika the bar under Sec. 12-A remained operative against these two at least and any subsequent partition in 1922 could not operate to remove that bar. The conclusion which I have arrived at is that the mortgage bond in suit executed by Parmeshwar in favour of the plaintiff-respondents cannot be enforced so as to affect the property, a portion of the Namudag Estate, as the transaction was entered into without the sanction of the Commissioner.

Mr. S. M. Mullick appearing on behalf of the respondents argued that there is no definition of the word "holder" in the Encumbered Estates Act and therefore he contended that it must mean only a single person in possession at the time and that we have no power to read beyond the notification and must assume that the holder of the estate was Nageshwar only and nobody else. He also argued that a joint Mitakshara Hindu family can never be a holder within the meaning of the word "holder" used in the Act. I do not agree with this contention. In my opinion the word "holder" is expressly used to mean a land-holder who has a title to the property in question as owner in possession. It is a compendious way of describing the proprietors or the owners of the estate which is going to be assumed charge of. It comprises every sort of proprietor irrespective of his

personal law whether he is a Christian or a Mahomedan or is governed by the Dayabhag or Mitakshara School of Hindu law. In each case, therefore, it will have to be decided whether the owner who had made over charge of the estate has placed only his share of the estate in charge of the Court of Wards or whether he, as representing the entire owners, has induced the authorities to take over the whole of the estate of the joint family or of the other co-owners also under their superintendence. As was pointed out by their Lordships of the Judicial Committee in the case referred to above, it is impossible to hold that an undivided interest in a joint Mitakshara Hindu family can be dealt with or was intended to be transferred to the Court of Wards. Just as their Lordships decided in that case it must be decided in the present case after construing the two notifications (Exs. A and A-1) in the light of the circumstances that the entire Namudag Estate, belonging to a joint Hindu family of which Nageshwar was the karta along with Parmeshwar and Chandrika, was intended to be taken possession of by the authorities with the express request of the karta and with the implied consent of the other members including Parmeshwar and Chandrika, in the interest and for the benefit of the entire joint Hindu family.

The due date for the payment of the mortgage dues under the mortgage bond (Ex. 8) is 27th November 1928. The present suit has been instituted on 17th November 1934, that is, within six years thereof. The plaintiff-respondents are, therefore, entitled to a personal decree for the amount due under this mortgage bond which cannot be enforced as a mortgage bond. The plaintiffs, will be entitled to a decree for the amount as fixed by the learned Subordinate Judge and the same will carry interest at 6 per cent. per annum from 9th August 1936 till the date of realization. We were asked to apply the provisions of Ss. 9, 10 and 11, Bihar Money-Lenders Act, 1938, but in view of a recent Full Bench decision of this Court reported in 20 P L T 1,² the argument must be overruled; the appellant, however is entitled to a certificate that this appeal is fit to be taken to the Federal Court as it involves a construction of certain Sections of the Government of India Act, 1935. I

2. *Sadanand Jha v. Aman Khan*, (1939) 26 A I R Pat 55=179 I O 379=18 Pat 13=20 P L T 1 (F B).

would therefore partly allow the appeal and pass a money decree, instead of a mortgage decree, for the amount as stated above. The respondents are entitled to the costs of the Court below and to half the costs of this Court.

Second Appeal No. 722 of 1934.

This appeal relates to the enforcement of the mortgage bond of 15th February 1920 executed by Chandrika and Parmeshwar against a portion of the Namudag estate. The only question which arises for consideration is whether by the provisions of S. 12-A of the Act the plaintiffs are precluded from enforcing the mortgage bond. The learned Munsif held that the mortgage bond was executed for legal necessity and for consideration. As to the objection under S. 12-A, he held that the property that Nageshwar Prasad was holding at the time when the estate was taken charge of by the authorities was the ancestral property. He held further that Parmeshwar and Nageshwar were governed by the Mitakshara School of Hindu law, that Chandrika was born before the estate was taken charge of by the Encumbered Estates authorities and that Nageshwar Dayal was the head member of the family and was in charge of the estate when the estate was vested in the hands of the Encumbered Estates officials. He, therefore, came to the conclusion that S. 12-A was an obstacle in the way of the plaintiffs enforcing the mortgage which was given without the sanction of the Commissioner. On appeal, the learned Judicial Commissioner came to the same conclusion.

It is unnecessary to repeat the arguments which were considered by me at length in First Appeal No. 140 of 1936, which was heard along with this second appeal. For the same reasons I hold that Sec. 12-A prevents the enforcement of the mortgage given by Chandrika and Parmeshwar in 1920, because Chandrika, Parmeshwar and Nageshwar must be held to have made over the property to the authorities in 1894 when they were the holders of the estate within the meaning of the Chota Nagpur Encumbered Estates Act and that they were the persons to whom the property was released in 1910. The decision of the Courts below is correct and the plaintiffs are not entitled to a mortgage decree.

It was then argued that the plaintiffs should be given a personal decree, but the suit has admittedly been filed more than six years after the due date as was pointed

out by the learned Munsif at page 10. To overcome this difficulty, it was submitted that in 1335 corresponding to 1928 there was an agreement by which defendant 7, Parmeshwar Dayal, was absolved from all liabilities under the bond and this was said to constitute an acknowledgment by Chandrika of his liabilities within the meaning of Ss. 19 and 20, Limitation Act. This matter was put in this way. On 21st October 1927, Parmeshwar Dayal executed a mortgage bond which was the subject of consideration in First Appeal No. 140 of 1936 by which he was absolved from all liabilities under the mortgage bond of February 1920, the bond under consideration in the present appeal in which both he and Chandrika were liable. It was stated therefore that the execution of the mortgage bond in October 1927 by Parmeshwar amounted to an acknowledgment of the liability under the bond of 1920 on behalf of Chandrika also. I am unable to agree with this argument. On the date of the so called acknowledgment Chandrika and Parmeshwar were admittedly separate and Parmeshwar was absolving himself from all liabilities under the bond of 1920 by entering into a fresh transaction with the plaintiffs in October 1927; in other words, on that date he was erasing his liability under the first bond. This cannot mean an acknowledgment of the liability under the first bond by, or on behalf of, Chandrika. Chandrika never made any acknowledgment of his liability under the bond of 1920 in October 1927.

It has been decided in this Court that an acknowledgment of liability by a co-mortgagor will ordinarily give a fresh start of the period of limitation against the mortgagor who acknowledges the same: *see* 43 I C 351.³ I am aware that a contrary view has been taken, for instance, in 55 I C 763,⁴ 90 I C 774⁵ and 99 I C 424;⁶ but these cases can be distinguished on the ground that in the circumstances thereof the mortgagor who was making the acknowledgment must be held to have made it as agent of the other co-mortgagors within the meaning of S. 21, Limitation Act, but in the circumstances of the present

3. *Sarab Narain Das v. Top Ojha*, (1918) 5 A I R Pat 646=43 I C 351.

4. *Muthu Chettiar v. Muhammad Hussain*, (1920) 7 A I R Mad 418=55 I C 763.

5. *Achola Sundari Debi v. Doman Sundari Debi*, (1926) 13 A I R Cal 150=90 I C 774.

6. *Ibrahim v. Lala Jagdish Prasad*, (1927) 14 A I R All 209=99 I C 424.

case Parmeshwar was never making the acknowledgment on behalf of Chandrika. He was expressly putting an end to his own liabilities on the mortgage bond of 1920. I therefore hold that the plaintiffs are not entitled even to a money decree in the present case. The appeal of the plaintiffs therefore fails and is dismissed but without costs.

Fazl Ali J. — The principal question which has to be decided in these appeals may be formulated as follows: When an estate is placed under the management of the Collector or some other officer under the provisions of the Encumbered Estates Act upon the application of a person who is the karta of a joint Hindu family governed by the law of Mitakshara, such person being described as a "holder" in the notification issued under S. 2 of the Act, whether the disqualification referred to in S. 12-A of the Act applies only to that person or to all the members of the joint family who were the owners of the estate on the date of the application. S. 12-A provides that when the possession and enjoyment of property is restored ... to the person who was the holder of such property when the application under S. 2 was made, such person shall not be competent without the previous sanction of the Commissioner (a) to alienate such property, or any part thereof, in any way, or (b) to create any charge thereon extending beyond his lifetime.

In the present case the Namudag estate was placed under the Encumbered Estates management in 1894 upon the application of Nageshwar Dayal who is now dead, and its possession was restored in 1910 to Nageshwar's brother Parmeshwar Dayal, his son Chandrika and certain other members of his family. It is well settled that the disqualification contained in S. 12-A does not apply to the heir of the holder, because he was not the holder of the estate when the application under S. 2 was made. There is however no direct authority to show whether it would or would not apply to the members of a joint family other than the person on whose application protection was given under the Act to the estate held by the joint family and who was described as a holder in the proceedings taken under the Act. It is contended on behalf of the plaintiffs that as Nageshwar alone was described as a holder in the notification of 1895, Parmeshwar and Chandrika were entitled to mortgage the property to them without the previous sanction of the Com-

missioner. The defendants, on the other hand, contend that the disqualification referred to in S. 12-A extends to these persons also, as they were no less holders of the estate than Nageshwar and as Nageshwar had acted only as a representative of the entire joint family, when he moved the authorities to take charge of the estate under the provisions of the Act.

The expression "holder" has not been defined in the Act, but there can be no doubt that it is used in the same sense as the expression "holder of land" which occurs in the Preamble to the Act and as such would apply to all such person or persons as own any particular property. Therefore the description of Nageshwar as a holder in the notification (Ex. A) is by no means conclusive to show that he alone was the holder. As he was the karta of the family, it is evident that this description was given to him in the notification only in a representative capacity and must be held to apply to the entire family. From this it follows that the disqualification laid down in S. 12-A applied not only to Nageshwar but to the entire body of persons who were the holders of the Namudag Estate in 1895. It was contended on behalf of the plaintiffs that the intention of Sec. 12-A is to disqualify only that particular person from alienating or encumbering the properties of the estate after release from the Encumbered Estates management whose negligence and extravagance had put the estate in jeopardy at the time when the Act was applied. This contention is to some extent supported by the following words which occur in sub-cl. (ii) of S. 2 of the Act, such Deputy Commissioner is satisfied, after making such inquiry as he may think fit, and after considering and placing on record all representations if any made by such holder, that such holder has entered upon a course of wasteful extravagance likely to dissipate his property.

Now S. 2 provides that an application to the Commissioner under the Act may be made by (a) any holder of immovable property, (b) when such holder is a minor or of unsound mind or an idiot by his guardian, committee or other legal curator or the person who would be the heir to such holder if he died intestate and (c) by the Deputy Commissioner. Sub-cl. (ii) of the Section which refers to the extravagance of the holder applies only when the application is made by the Deputy Commissioner. In the case of other applicants all that the Section requires is that it should be stated in the application that the holder of the property

is subject to, or that his property is charged with debts or liabilities other than debts due or liabilities incurred, to Government. There is nothing in the Act to prevent the manager of a joint family from applying for protection under the Act on behalf of the entire family and where such an application is made by him in a representative capacity, the whole family and not he alone will be deemed to be the holder of the estate. There is also nothing in the Act to suggest that a Mitakshara joint family is not entitled to protection under the Act. The following observations made by the Judicial Committee in 40 I A 117¹ seem to me to support the view expressed by my learned brother and myself :

It appears to their Lordships to be obvious that the intention of Maharaj Singh and Dulichand in making that application was that the Court of Wards should in the interest of all the members of the joint family assume the superintendence of the immovable property which was the ancestral property of the joint family, and not merely the management and superintendence of the then unascertained and unpartitioned shares in the joint property which on a partition of that property, not then in contemplation, might possibly come to Maharaj Singh and Dulichand. Neither Maharaj Singh nor Dulichand had more than the mere coparcenary interest of a member of the joint family in the family property. Neither of them had any defined shares. It was held by this Board in 1903, in 30 I A 165,⁷ that the interest of an undivided Mitakshara family in the family property is not individual property. It had previously been held by this Board in 1866, in 11 M I A 76⁸ that no member of a joint Hindu family whilst it remains undivided, can predicate of the joint or undivided property that he has a certain definite share. It has not been shewn to their Lordships that it was the practice of the Court of Wards of the Central Provinces to assume the superintendence of the unpartitioned interest of some only of the members of a joint Hindu family in the family property, nor has it been explained in this appeal how a joint family property could be preserved for the members of a joint family by a Court of Wards assuming the superintendence of the unpartitioned interests of some only of the members of the family. Under the circumstances of the family, Maharaj Singh and Dulichand acted prudently and in the best interest of the joint family in applying to the Deputy Commissioner of Hoshangabad to have the family property taken under the management of the Court of Wards, and in their Lordships' opinion Maharaj Singh and Dulichand in making that application acted within their powers and authority as the managing members of the joint family.

There can be no doubt that in the present case Nageshwar had asked for the pro-

tection of the entire estate and not only his unascertained and unpartitioned share in it. In my opinion therefore the disqualification set out in S. 12-A applies to the executants of the mortgage bonds in suit and that being so, no mortgage decree can be passed in favour of the plaintiffs. At the same time as was held by this Court in 8 Pat 212,⁹ Sec. 12-A only prohibits the alienation of the property or the creation of a charge thereon, but does not debar the person affected by the Act from borrowing money. Thus, although the plaintiffs cannot get a mortgage decree, they must be held in First Appeal No. 140 to be entitled to enforce the personal covenant by the mortgagor to repay the loan which is always implied in a mortgage. The plaintiffs cannot enforce the covenant in Second Appeal No. 722, as they instituted the suit after the expiry of the period of limitation. I therefore agree with my learned brother that Second Appeal No. 722 of 1934 must be dismissed and First Appeal No. 140 of 1936 should be partly allowed by substituting a money decree for the mortgage decree passed by the learned Subordinate Judge.

S.G./R.K.

Order accordingly.

9. Bhaiya Balmukund Sahay v. Bhagwat Narayan, (1929) 16 A I R Pat 375 = 121 I C 367 = 8 Pat 212 = 11 P L T 258.

A. I. R. 1939 Patna 457

ROWLAND AND MANOHAR LALL JJ.

Nanhak Singh and others —

Defendants — Appellants.

v.

Ram Lagan Dubey and others, Plaintiffs and others, Defendants — Respondents.

Appeal No. 131 of 1934, Decided on 23rd December 1938, from original decree of Sub-Judge, Gaya, D/- 14th July 1934.

(a) Contract Act (1872), S. 74 — Penalty — Interest at higher rate in case of default if amounts to—Rate of interest need not be restricted to one agreed in primary contract but Court can give reasonable compensation which will not be higher than higher rate stipulated.

The stipulation for higher interest after default is on a different footing from the primary contract and must be read as stipulation by way of penalty. But it does not follow that the rate of interest after default is to be restricted to the rate agreed on in the primary contract. On the contrary, S. 74 requires the Court in such a case to assess a reasonable compensation. If the higher rate stipulated for is found not to be unreasonable, the compensation may be as high as that but shall not be higher : 34 Cal 150 (P C), Ref. [P 459 O 1, 2]

Mortgagor agreed to pay interest at 9½ annas per cent. per month and hypothecated his property as

7. Gharib-ul-lah v. Khalak Singh, (1903) 25 All 407 = 30 I A 165 = 8 Sar 483 (P O).

8. Appoviar v. Ramasubba Aiyar, (1866-67) 11 M I A 76 = 2 Sar 218 = 8 W R 1 = 1 Suther 657 (P O).

security for principal and interest. The mortgage bond provided that in case of non-payment on the due date interest would run at Re. 1-4-0 per cent. per month which the creditor would recover after the expiry of the due date from the person and property of the mortgagor :

Held that the words were appropriate to a personal undertaking to pay money rather than to a mortgage loan and the bond operated as a mortgage only to the extent of principal with interest at 9½ per cent. per month. [P 459 C 2]

(b) Bihar Money-Lenders Act (3 of 1938), S. 11—Scope of.

There is nothing in S. 11 to prevent the creditor from recovering at least the principal amount of his loan however much he may previously have realized on account of interest. [P 460 C 1]

K. Husnain and A. N. Lal —

for Appellants.

Rajkishore Prasad, Girijanandan Prasad and S. P. Srivastava for Deputy Registrar — *for Respondents.*

Judgment.—This is an appeal from the preliminary decree in a mortgage suit. The bond was executed by defendant 1 on 17th July 1907, for a principal sum of Rupees 1633-10-10¾. The mortgagor made an admitted payment of Rs. 1500 on 12th September 1919. He sold a part of the mortgage property on 19th July 1921, to defendant 10 for a consideration of Rupees 2615-10-0 of which Rs. 170-11-0 was paid to the vendor in cash. Rs. 322 was left with the purchaser for payment to a creditor Asghar Ali, Rs. 400 similarly was left in deposit for payment to another creditor, a co-operative bank, and Rs. 1722-15-0 was similarly left in deposit for the satisfaction of this mortgage. The purchaser made a payment on account of this mortgage on 22nd August 1921 of Rs. 1200. According to the plaintiff no further payment was made and the mortgage debt with interest at bond rate amounted at the date of suit to Rs. 5113-9-10. The defence was that a further payment of Rs. 695-7-9 was made on 23rd March 1929, leaving only Rupees 126-15-0 due which the defendant was ready to pay with interest to date but the plaintiff was not willing to receive. It is also said that interest is not payable at the rate charged by the plaintiff, that being a penal clause in the bond and not enforceable. The Subordinate Judge negatived both these contentions of the defendant and decreed the entire claim.

In appeal the same points have been raised and in addition it has been contended that having regard to the provisions of the Bihar Money-Lenders Act, 1938, the plaintiff is entitled at the most to a very much

smaller amount than that claimed. We propose to discuss first the plea of payment. It is supported by a receipt purporting to be signed by the plaintiff Ram Lagan Dube. The Subordinate Judge compared the disputed signature with admitted signatures of Ram Lagan and found the disputed signature not to be genuine. Ram Lagan is an old man whose sight according to the evidence has been failing for the last seven or eight years. The signatures on the admitted documents as well as on the disputed ones have been placed before us. The appearance of the admitted signatures is entirely consistent with their being made by an old and feeble man who can hardly see what he was writing. Those on the disputed documents are clearly and firmly written as if by a very much younger man. They cannot possibly have been written by the same hand as the admitted signatures unless in the admitted signatures the plaintiff was deliberately disguising his handwriting which there is no reason whatever to suppose. When the earlier payments were authenticated by endorsement on the back of the bond, it is, as the Subordinate Judge has pointed out, not very probable that the defendant would make a substantial payment like this without getting such an endorsement. We therefore maintain the finding of the Subordinate Judge that the payment pleaded has not been established.

Next we take the plea that the rate of interest claimed is penal and not enforceable. The stipulation in the bond was that the borrower should repay the money on the due date, 30th Jeth 1315 with interest at As. 9-6 per cent. per month. It was further stipulated that in case of non-payment, the creditor would be entitled to get interest at Re. 1-4-0 per cent. per month from after the due date. On this basis the creditor has calculated interest at As. 9-6 from the date of the bond to the due date of payment and thereafter at Re. 1-4-0 per cent. Compound interest is not charged. The defendant's contention is that the stipulation for the payment of higher rate of interest from the date of default is a stipulation by way of penalty and under S. 74 of the Indian Contract Act the creditor is not entitled to enforce it. Interest is only payable at the rate engaged for in the primary contract, namely at 9½ annas. The question whether an agreement that interest at a higher rate shall be recoverable in default of payment on the due date is an agreement by way of penalty or no has been

discussed in numerous decisions and the views expressed in the several High Courts have from time to time differed. It is unnecessary to go through all those decisions; it will be sufficient to refer to the Privy Council decision in the leading case in 34 I A 9=34 Cal 150.¹ In this case it was decided that where in default of payment on the due date a higher rate of interest was payable retrospectively from the date of the bond, that must always be regarded as a stipulation by way of penalty, but on the other hand where a lower rate of interest was payable up to the due date of payment and a higher rate of interest thereafter, that might or might not be a penalty according to the circumstances of the particular case. The point which the Courts have to consider is what was the primary contract between the parties. For this we have to refer to the mortgage bond (Ex. 1). The executant therein states that

I the declarant have executed this mortgage bond for Rs. 1,633-10-10½ bearing interest at the rate of 9½ annas per one hundred rupees per mensem in favour of Ram Lagan Dube.

Further he states:

I do declare that I shall pay up in full the Rs. 1,633-10-10½, principal with interest on 30th Jeth 1915 Fasli in one lump.

It is further stated that:

If I fail to pay up in full the principal with interest in one lump on 30th Jeth 1915 Fasli, the due date of payment, the said Mahajan or his heirs and representatives will be competent to recover the same from the person and properties of me, my heirs and representatives by bringing a suit.

This as it stands is sufficient to constitute a complete contract. Then follows the stipulation that

in case of non-payment on the due date interest will run at Re. 1-4-0 per cent. per mensem and the creditor will recover interest at the rate of 1½ per cent. per mensem after the expiry of the said due date from the person and properties of me, the declarant as well as from my person.

Then it is said as security for principal and interest: "I have mortgaged and hypothecated 1 anna 12 dams pukhta share of Jagdispur." I think that the stipulation for higher interest after default is on a different footing from the primary contract and must be read as stipulation by way of penalty. It does not follow that the rate of interest after default is to be restricted to the rate agreed on in the primary contract. On the contrary S. 74, Contract Act, requires the Court in such a case to assess

a reasonable compensation and if the higher rate stipulated for is found not to be unreasonable the compensation may be as high as that but shall not be higher. In our opinion simple interest at Re. 1-4-0 per cent. per annum was not unreasonable. We have still however to see whether the mortgage property was hypothecated for the payment of interest at the penalty rate or only for the payment of interest at the bond rate. We have already quoted the declaration in Ex. 1 in which the mortgage bond is said to be executed for Rupees 1633 odd bearing interest at the rate of 9½ annas per one hundred rupees per mensem. In connexion with the stipulation for a higher rate in the event of default the provision in the bond is that this higher interest is recoverable from the person and properties of the executant. The words are appropriate to a personal undertaking to pay money rather than to a mortgage loan. When the bond says "as security for the principal and interest I have mortgaged and hypothecated" the mortgage property the words, it seems to us, are to be read with the previous declaration: "I have executed this mortgage bond for Rs. 1633 bearing interest at the rate of 9½ annas per one hundred rupees per mensem" in the absence of any express provision that the interest at the higher rate will also be recoverable from the mortgage property. In this connexion it is noticeable that in the account Ex. B dated 12th September 1919, the genuineness of which is admitted and which was signed by Bisesar Dube, one of the plaintiffs, interest from 1907 to 12th September 1919 was calculated at 9½ annas only and not at the higher rate. In the present suit there is no claim for a money decree against the executant. Such a claim if preferred would obviously have been barred by time and we are of opinion that the bond in suit operates as a mortgage bond only to the extent of principal with interest at 9½ annas per cent. per month. The defendants propounded another account dated 22nd August 1921 Ex. B.1. This purports to have been signed by Ram Lagan Dube but the signature is denied and is not accepted by the Subordinate Judge as genuine. With that finding we agree for reasons already given but the calculation of principal and interest in that account is arithmetically correct on the basis of Ex. B and of interest charged at 9½ annas. It is possible that the account was prepared at the time but not signed

1. Sundar Koer v. Rai Sham Krishen, (1907) 34 Cal 150=34 I A 9=5 O L J 106=11 O W N 249 (PO).

and for the purpose of authenticating it a signature not genuine has been affixed at some later date. It is admitted that the payment of Rs. 1200 was made on 22nd August 1921 and it appears that by arithmetical reckoning there remained due on that date a balance of Rs. 533.15.0. Calculation of the amount due on the mortgage on the date of suit ought to be made accordingly, subject to what remains to be said regarding the next objection.

This objection arises out of the passing of the Bihar Money-Lenders Act, 1938. Reliance is placed on S. 11. In that Section, which by the Bihar Money-Lenders (amendment and application to pending suits and proceedings) Act, 1938, is made applicable to pending litigations instituted before as well as after the passing of the principal Act and to appeals as well as suits, it is enacted that:

Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, . . . pass a decree for an amount of interest for the period preceding the institution of the suit which together with any amount already realized as interest through Court or otherwise is greater than the amount of the loan advanced, or if the loan is based on a document, the amount of loan mentioned in the document on which the suit is based.

If this enactment is effective and applies to the present proceedings the maximum amount that can be decreed as owing at the date of the suit is double the principal less realizations to date. Double the principal is Rs. 3267.5-9½ realizations to date are Rs. 2700, the balance is Rs. 567.5-9½. No interest can be decreed in excess of that amount. It has been argued that all the previous realizations were on account of interest and nothing on account of principal and that there is nothing in S. 11 to prevent the creditor from recovering at least the principal amount of his loan however much he may previously have realized on account of interest. The proposition of law is correct but the facts do not support the argument for the respondents for, as I have shown, it is clearly established by Ex. B that of the realizations more than a thousand rupees had been credited against the principal as far back as 1919. The amount, Rs. 567.5-9½ is therefore the maximum amount to be taken as due on account of principal and interest at the date of suit provided that the provisions of S. 11 of the Act are effective and apply to the case before us. But the recent decision of the Full Bench in

(1938) P W N 913² compels us to overrule this contention. The mortgagee, we must hold, is entitled to a decree for the amount due on the mortgage calculated in the manner previously explained. The decree under appeal is to be modified accordingly. Appellants are to have costs of this appeal in proportion to their success. Respondents are to have costs of the Court below calculated on the amount decreed by us, and to bear their own costs of the appeal. We certify that this is a fit case for appeal under S. 205, Government of India Act.

S.G./R.K.

Decree modified.

2. Sadanand Jha v. Aman Khan, (1939) 26 AIR Pat 55=179 I C 379=18 Pat 13 = 20 P L T 1=1938 P W N 913 (F B).

A. I. R. 1939 Patna 460

MOHAMAD NOOR AND VARMA JJ.

Harnandan Lal — Petitioner.

v.

Rampalak Mahato and another —

Opposite Party.

Criminal Revn. No. 413 of 1938, Decided on 12th August 1938, from order of Magistrate, First Class, Patna, D/- 28th March 1938.

(a) Criminal P. C. (1898), S. 133 — Public right — Meaning of — Right enjoyed by such large number of persons as to make them unascertainable and to make them class or community is public right—Right claimed by selected number of persons in village is private right — Question has to be decided on facts of each case.

A class or community residing in a particular locality may come within the term "public", and the right enjoyed by them is a public right. The number of persons claiming the right and the nature of right itself will no doubt be the criteria on which conclusions may be arrived; but the best criterion will be to see whether the right is vested in such a large number of persons as to make them unascertainable and to make them a community or a class. The question has to be decided on the facts of each case. A right claimed by some of the tenants in a village of 200 houses to irrigate their fields with the water of a channel is not a public right: *A I R 1928 All 627 and 20 All 501, Rel. on; 34 All 345 and A I R 1931 All 433, Ref.; 16 I C 162, Disting.* [P 461 C 2]

(b) Criminal P. C. (1898), Ss. 133 and 139—Requirements of — Mere existence of reliable evidence in support of denial of right is sufficient to stop hands of Magistrate in proceeding under S. 133.

In a proceeding under S. 133 what S. 139-A requires is that a Magistrate should be satisfied that there is reliable evidence in support of denial of the public right. The moment he finds that, he has to stop his hands and leave the matter for the Civil Court to decide. As to what is reliable evidence, it will depend upon the circumstances of

each case. But a good test will be this, that if the evidence adduced stands un rebutted, the public nature of the right will be demolished.

[P 461 C 2; P 462 C 1]

Brahmadeva Narain — *for Petitioner.*

W. H. Akbari and R. J. Bahadur —
for Opposite Party.

Mohamad Noor J.—This is an application in revision against an order of a First Class Magistrate staying under S. 139.A, Criminal P. C., a proceeding under S. 133 of the Code after taking evidence contemplated by the former Section. It appears that the petitioner filed before the Sub-divisional Magistrate of Patna a complaint alleging that the opposite party had obstructed a public water channel. The opposite party appeared before the Magistrate and one of them (opposite party 1) at any rate denied the obstruction and further contended that the right claimed by the petitioner was not a public right. The case was made over to the learned Magistrate whose order is in revision before us. He took some evidence. One witness was examined on behalf of the opposite party, and thereupon the learned Magistrate stayed the proceeding or in other words dropped it holding that the right claimed by the petitioner was not a public right. There was an unsuccessful application before the learned Sessions Judge and then the matter has come up before this Court in revision.

It is contended on behalf of the petitioner that the right involved was a public right and therefore the proceeding ought not to have been dropped. It is not disputed that the right claimed by the petitioner in the channel in dispute is a right to bring through it water from a certain reservoir for the irrigation of the fields of the cultivators including himself. According to the only evidence on the record, the village Poonawan, where the channel is situated, contains 200 houses of which 60 are cultivators' and some of these 60 use the channel for bringing water from the reservoir for the irrigation of their lands. The question for consideration is whether this right of cultivators of using the channel for the purpose of irrigation can be said to be a public right within the meaning of S. 133, Criminal P. C., or in other words about 60 cultivators can be said to be public. As the learned Sessions Judge has pointed out, the word "public" is not defined in the Criminal Procedure Code; but for the purposes of the Code the definition given in the Penal Code is to be adopted. S. 12, Penal Code,

says that "public" includes any class of the public or any community. This definition is inclusive and does not define the word "public." It only says that class of public or community is included within the term "public."

It must be conceded that the learned Magistrate has gone a bit too far when he says that "it (public) evidently means the class or community throughout the world." A class or community residing in a particular locality may come within the term "public." The question is whether the cultivators who use the channel form a class or community. That obviously is not necessary. The learned Sessions Judge has relied upon 50 All 871¹ where Dalal J. held the right to be of a private nature and not a public right. In 34 All 345,² where a certain act was likely to cause damages to the inhabitants of two villages, Tudball J. held that the right of passage was a public right. The question has to be decided on the facts of the case. There may be a case where there cannot be any doubt that the right claimed is a public right. On the other hand, there may be a case in which there cannot be any doubt that the right claimed is a private one. There may however be a case in which it may be arguable whether the right claimed is or is not a public right. The number of persons claiming the right and the nature of right itself will no doubt be the criteria on which conclusions may be arrived. The best criterion will be to see whether the right is vested in such a large number of persons as to make them unascertainable and to make them a community or class. Judging from this point of view, I have no hesitation in holding that though, as I have said, the learned Magistrate has gone far he was perfectly right in holding that the right claimed was a private right vested only in a selected number of persons who claim to irrigate their fields from this channel, and his order, in my opinion, was perfectly correct.

The learned advocate for the petitioner has further contended that the learned Magistrate was not justified in entering into the question of the nature of right at that stage. His inquiry ought to have been confined in ascertaining whether reliable evidence exists in support of the denial of

1. Munna Tiwari v. Chandarbali, (1928) 15 A I R All 627=110 I O 213=50 All 871=29 Cr L J 661=26 A L J 1285.

2. Emperor v. Bharosa Pathak, (1912) 34 All 345=18 I O 999=9 A L J 355=13 Cr L J 183.

the existence of the public right and he ought not to have gone into the question whether the right is or is not a public right. In my opinion, this case goes much beyond what is contemplated in law. The law requires that the mere existence of reliable evidence in support of the denial of the public right is sufficient to stop the hands of the Magistrate from proceeding further with the case. But in this case not only reliable evidence exists in support of the denial but as the fact shows, the public right does not exist at all. The application is rejected.

Varma J.—I agree. The application is directed, as has been pointed out, against the order of the Magistrate dropping the proceedings under S. 133, Criminal P. C. The argument advanced by the petitioner before us is that on the materials before the Magistrate he was not justified in holding that the right claimed by the applicant in the case was not a public right. In a proceeding under S. 133, what S. 139-A, requires is that a Magistrate should be satisfied that there is reliable evidence in support of the denial of the public right. The moment he finds that, he has to stop his hands and leave the matter for the Civil Court to decide. As to what is reliable evidence, it will depend upon the circumstances of each case. But a good test seems to be this, that if the evidence adduced stands un rebutted the public nature of the right will be demolished.

Mr. Brahmadeva Narain for the petitioners has drawn our attention to various cases from which he has tried to show that from the facts of this case the Court ought to have come to a finding that the right claimed by the applicant before the Magistrate was in the nature of a public right. A public right does not depend upon the number of individuals who enjoy it. It is, generally speaking, that which must be enjoyed by members of the general unascertained mass of the public: *vide* Desai's Dictionary of Legal Terms, and the decision in 20 All 501.³ The decisions which have been referred to by the Sessions Judge are 34 All 345,² 50 All 871¹ and 53 All 706.⁴ I venture to suggest that the decision reported in 50 All 871¹ is very much in point.

3. Queen-Empress v. Jasoda Nand, (1898) 20 All 501=1898 A W N 141.

4. Emperor v. Raghunandan Prasad, (1931) 18 A I R All 488=1931 Cr O 705=136 I O 621=33 Cr L J 881=53 All 706=1931 A L J 912.

The decision in 16 I C 162⁵ referred to by the advocate for the petitioners does not help him and seems to be based chiefly on whether S. 133, Criminal P. C., was applicable to prevent a breach of the peace on the facts of that case. I would therefore discharge the rule.

S.G./R.K.

Application rejected.

5. Budha v. Mohan Lal, (1912) 16 I C 162=13 Cr L J 594.

A. I. R. 1939 Patna 462

HARRIES C. J. AND CHATTERJI J.

*Sahdeo Karan Singh and others —
Defendants — Appellants.*

v.

*Usman Ali Khan, Plaintiff and others
— Defendants — Respondents.*

First Appeal No. 175 of 1935 and Misc. Appeal No. 16 of 1938, Decided on 9th March 1939, from original decree of Sub-Judge, Gaya, D/- 17th May 1935 and 15th September 1937, respectively.

(a) Civil P. C. (1908), O. 21, Rr. 58 and 63 — Claim to attached property rejected upon merits—Suit by claimant under O. 21, R. 63 — Onus is on him to show that he is owner.

Where in proceedings under O. 21, R. 58 evidence is called and a person's claim to the attached property is rejected upon the merits, the onus in a suit by him under O. 21, R. 63 is upon him to show that he is the owner of the property. [P 464 C 1]

(b) Advancement—English rule of advancement does not exist in India—Purchase of property by father in name of son—Son claiming property as his own by alleging gift of this property by his father—Onus to establish gift is on son.

There is no rule in India corresponding with the presumption of advancement which is in existence in England. If A purchases property and takes a conveyance or transfer in the name of B, B is not a beneficial owner of the property but holds it in trust for A. There is a resulting trust in favour of the person who provided the consideration. In England, however, if the conveyance or transfer is made not to a stranger but to the wife or child of the person who provided the consideration, then no resulting trust arises. If the transaction is wholly unexplained, the law in England presumes an intention to benefit wife or child. In India no such rule exists. Hence where property is purchased by father in the name of the son and the latter claims the property as his own by alleging that the father intended to make a gift of the property to him, onus rests upon him to establish such a gift: 13 M I A 232 (PC); A I R 1921 P C 56; A I R 1928 P C 172 and A I R 1925 P C 181, Rel. on. [P 464 C 1, 2]

(c) Benami—Purchase by father in name of son—Father obtaining mutation of names and granting receipts in name of son—This does not establish gift by father to son.

Where a father has purchased property in the name of his son, the fact that he has obtained mutation of names and granted receipts in the name of son does not establish a gift by him in favour of son, as such acts are entirely consistent with transaction being a purely benami one. Indeed such acts inevitably follow a benami transaction : 13 M I A 232 (PC), *Rel. on.* [P 466 C 1]

(d) **Benami**—Benami transaction may be for no apparent reason.

Experience has shown that frequently benami transactions are entered into in this country for no apparent reason. [P 466 C 2]

(e) **Gift**—Parents setting aside property for maintenance of their children—Gift to children cannot be inferred.

Parents usually make provision for the education and maintenance of their children and they may set aside property for such purpose, but they do not as a rule gift the property to the child. [P 467 C 2]

B. C. De, N. K. Prasad II, Ramanugrah Prasad and R. K. Sinha —

for Appellants.

Hareshwar Prasad Sinha, Qazi Nazrul Hasan and M. Rahman —

for Respondents.

Harries C. J.—First Appeal No. 175 of 1935 is a defendants' appeal from a decree of the learned Subordinate Judge of Gaya decreeing the plaintiff-respondent's claim for a declaration that he was the owner of certain property. Miscellaneous Appeal No. 16 of 1938 is an appeal by the plaintiff against an order of the Court below awarding him certain mesne profits. The plaintiff being dissatisfied with the amount of mesne profits awarded has asked this Court to grant him a further amount. The suit out of which this appeal arises was brought by the plaintiff against defendants 1 and 2 who are respondents in the appeal and defendants 3 to 17 who are the appellants in the appeal. The plaintiff is a minor and is the son of defendants 1 and 2. Defendants-appellants are purchasers of the property in question in an execution sale.

The facts of the case can be shortly stated as follows: The property in dispute consists of a 1 anna 12 dams odd share in village Jawania and 53.78 acres bakasht land in village Singhpore. These two properties originally belonged to Mt. Alimunnissa. Defendants 1 and 2 had carried on litigation with Mt. Alimunnissa which had ended in their favour in this Court. The result of such litigation was that defendants 1 and 2 held a decree for costs against Mt. Alimunnissa for a sum of Rs. 1500 odd. In due course defendants 1 and 2 proceeded to execute this decree and the properties now in dispute were attached.

On 26th July 1926, Mt. Alimunnissa executed a sale deed of the properties in dispute in favour of the plaintiff who was then five or six years of age. By the terms of that deed Mt. Alimunnissa sold the property for a sum of Rs. 2201.9.3. No part of the consideration money was paid because it was arranged that defendants 1 and 2 would give Mt. Alimunnissa a complete discharge in respect of the decree for costs which they held against her amounting to Rs. 1576.9.3 and further defendants 1 and 2 undertook to pay off a mortgage upon this property held by one Wajid Khan amounting to a sum of Rs. 625. In this manner the whole consideration of Rs. 2201.9.3 was accounted for. After the sale deed was executed defendant 1 did pay off the mortgagee and further it is clear that mutation was obtained in the name of the minor plaintiff. It also appears that for some considerable time defendant 1 managed the property and gave receipts in the name of his minor son. Later, it will be seen that defendant 1 also dealt with this property as his own and executed a number of mortgages in which he describes this property as having been purchased benami in the name of his son.

Defendants 3 to 17 obtained a money decree in Suit No. 95 of 1928 against defendants 1 and 2 and in execution case No. 16 of 1930 the properties now in dispute were attached upon the allegation that they belonged not to the plaintiff-respondent but to defendants 1 and 2. The present appellant made a claim under O. 21, R. 58, Civil P. C., but this claim was rejected upon the merits after investigation. The property in question was thereupon sold and later an application was made to set aside the sale under O. 21, R. 90, Civil P. C., but this application was also dismissed. Accordingly the plaintiff brought the present suit under the provisions of O. 21, R. 63, Civil P. C., to establish his title to the property. It was the plaintiff's case that the property was purchased in his name in order solely to benefit him. It was said that Mt. Alimunnissa had great love and affection towards the minor plaintiff and that she only agreed to transfer this property in satisfaction of the decree held against her on condition that the property should be given to the minor plaintiff. In short the plaintiff's case was that the transaction amounted to a gift by his parents to him in order to provide for his maintenance and education.

The main defence was that this transaction was a benami one and that the beneficial owners of the properties were defendants 1 and 2. Accordingly, it was contended that the property could be validly attached and sold in execution of the decree which the appellants held against defendants 1 and 2. After hearing the evidence in the case, the learned Subordinate Judge came to the conclusion that this property was purchased by defendants 1 and 2 in order to benefit the plaintiff and that the plaintiff was the owner thereof. Accordingly, he decreed the claim as prayed. It has been argued on behalf of the defendant-appellants that the findings of the learned Subordinate Judge cannot possibly be sustained upon the evidence adduced in this case. In the first place, it has been urged that the onus of establishing that this transaction amounted to a gift in favour of the plaintiff rests upon the plaintiff. With that view I agree. It must be remembered that the plaintiff sought to claim this property in proceedings under O. 21, R. 58, Civil P. C., and in those proceedings evidence was called and the present plaintiff's claim was rejected upon the merits. That being so, the onus is upon the plaintiff to show that he is the owner of this property. Further in the present case it is common ground that the plaintiff provided no part whatsoever of the consideration. It is an admitted fact that the consideration was entirely provided by defendants 1 and 2, the parents of the plaintiff. In short this is a case where property was transferred to the plaintiff in consideration of money provided entirely by his parents.

It has been frequently held by their Lordships of the Privy Council that there is no rule in India corresponding with the presumption of advancement which is in existence in England as in India. If *A* purchases property and takes a conveyance or transfer in the name of *B*, *B* is not a beneficial owner of the property but holds it in trust for *A*. There is what has been described as a resulting trust in favour of the person who provided the consideration. In England, however, if the conveyance or transfer is made not to a stranger but to the wife or child of the person who provided the consideration, then no resulting trust arises. If the transaction is wholly unexplained, the law in England presumes an intention to benefit the wife or child. In India no such rule exists. That has been

clearly laid down in a number of cases, the earliest of which is 13 M I A 232.¹ That case has been followed in a number of later cases: see 48 Cal 260,² 56 Cal 944³ and 48 Mad 605.⁴ These cases lay down that if *A* provides the consideration and the conveyance or transfer is made in favour of *B*, prima facie *A* is the beneficial owner of the property and *B* is merely a benamidar. If *B* alleges that it was the intention of the parties that he should be the owner of the property by reason of the transaction then the onus rests on him to establish that such is the case. In 48 Mad 605⁴ cited above, this is clearly laid down. In that case property was purchased in India by an Indian out of his own money and the transfer was made in the name of his wife. The latter alleged that she was the owner of the property by reason of the fact that the transaction was entered into in pursuance of an ante-nuptial arrangement between her husband and herself. Their Lordships of the Privy Council held that the onus of establishing such an ante-nuptial agreement lay on the wife. In that case their Lordships came to the conclusion that such an agreement was not proved and accordingly held that the husband was the real owner of the property.

Applying the principle laid down in the Madras case to the present case, the onus clearly rests upon the plaintiff. Here the property was purchased by defendants 1 and 2 in the name of the son. If the latter claims the property as his own, he must show that his parents intended that the property should be his. In the present case it is said that defendants 1 and 2 intended to make a gift of the property to the plaintiff, and in my view the onus rests upon the plaintiff to establish such a gift. The learned Subordinate Judge came to the conclusion that this transaction did amount to a gift in favour of the plaintiff. The most important witness in the case was Kurban Ali, defendant 1, who, it is to be observed, gave evidence in favour of his minor son, the plaintiff. Nowhere in his

1. Moulvie Sayyud Uzbur Ali v. Mt. Bebee Ultaf Fatima, (1869-70) 13 M I A 232 = 13 W R 1 = 4 Beng L R 1 = 2 Sar 522 (P C).

2. Kerwick v. Kerwick, (1921) 8 A I R P C 56 = 57 I O 884 = 47 I A 275 = 48 Cal 260 (P C).

3. Guran Ditta v. Ram Ditta, (1928) 15 A I R P C 172 = 109 I C 723 = 55 I A 235 = 55 Cal 944 (P C).

4. Laskshmiah Chetty v. Kothandarama Pillai, (1925) 12 A I R P C 181 = 88 I C 327 = 52 I A 286 = 48 Mad 605 (P C).

evidence does he state in terms that he intended to make a gift in favour of the minor plaintiff. In examination-in-chief he said :

I and my wife had obtained a decree against Alimunnissa for costs. We executed it and then compromise was made. Under the compromise Alimunnissa sold the property in suit to the plaintiff and it will be in satisfaction of our decree. The incumbrance was payable by the plaintiff. We accepted the compromise. Rs. 2201-9-3 was fixed as consideration for the property in suit. It was satisfied by credit of Rs. 1576-9-3 as our decree money and Rs. 625 was left to be paid to Wajid Khan. Alimunnissa treated Usman Ali as her nati (daughter's son).

He then mentions that he paid what was due to Wajid Khan by mortgaging his own property and that he realized this money from the income of the property in suit. He then says :

Neither I nor defendant 2 ever acquired title in the property in suit. Plaintiff had got possession of this property. Neither I nor defendant 2 ever got possession as maliks. I collected rents for four years as guardian of plaintiff. Bisar Ali made collection for one year. He did this as he adopted plaintiff as his son.

It is true that in his evidence Kurban Ali suggests that his son was the owner of the property; but as I have stated he never said positively that it was his intention to gift the property to his son. Other witnesses who depose to this transaction give an entirely different version. For example, Faiz Mohammad Khan (P. W. 4) stated that in the execution proceedings instituted by defendants 1 and 2 against Alimunnissa a compromise was arrived at. Alimunnissa is alleged to have said that she would give the property in suit to the plaintiff on condition that the decree be declared to be satisfied and that the encumbrance on Jawania be paid. This was accepted by defendants 1 and 2 and the sale deed was accordingly executed. The same version is given by Basar Ali (P. W. 7) plaintiff's uncle, who is now his next friend in the suit. According to him, during the discussions leading up to the compromise Alimunnissa stated that she would compromise only if the property was purchased for Usman Ali. This condition was accepted by defendants 1 and 2 and the sale deed was accordingly executed. Faiz Mohammad Khan (P. W. 3) stated that he was present when a compromise was discussed and that the talk then was that the property would be purchased for Usman Ali to meet his education.

The learned Judge appears to have thought that some such arrangement must have

been made. In his view Alimunnissa must have been kindly disposed towards the plaintiff and it is reasonable to think that she wished to benefit him. At one time there can be no doubt, Alimunnissa was very kindly disposed towards defendant 2, the plaintiff's mother, and many years ago she appears to have given her property. It must be remembered however that this sale took place in execution proceedings as a result of the decree for costs held by defendants 1 and 2 against Alimunnissa. There had been long and bitter litigation between the parties culminating in the attachment of the properties in question. In those circumstances it is somewhat difficult to believe that Alimunnissa would still be kindly disposed towards the minor plaintiff. Further, the witnesses who speak of this compromise seem to suggest that Alimunnissa refused to transfer the property except on condition that the transfer should be made for the benefit and in the name of the plaintiff. I cannot understand how Alimunnissa was in a position to lay down any conditions whatsoever. The property in dispute had been attached in execution of a decree and would undoubtedly have been sold unless Alimunnissa had come to some arrangement. She was in no position whatsoever to dictate her terms, and it is very difficult to accept this part of the plaintiff's case.

What is more strange is, that if such a discussion and arrangement took place, how is it that defendant 1 makes no reference to it in his evidence. All he says is that Alimunnissa treated the plaintiff as her nati; but nowhere does he say that this arrangement was made as a result of conditions imposed by Alimunnissa. The evidence of defendant 1 and the other witnesses is not consistent, and I find it impossible to hold that the plaintiff has established that the transfer was made in his name by reason of an arrangement made with Alimunnissa that he should be the owner of the property and that it should be for his maintenance and education. Had such an arrangement been arrived at, it is reasonable to assume that defendant 1 would have given evidence about it. It has been suggested that defendant 1 is hostile to the plaintiff; but there is no sign of that in his deposition. His interests in this case are not adverse to the plaintiff, and if the suit was decreed in favour of the plaintiff it would obviously be for the benefit of defendant 1.

It has been further urged on behalf of the plaintiff that the subsequent conduct of defendant 1 clearly establishes that a gift was intended. After this sale deed was executed in the plaintiff's name, his father as his guardian obtained mutation of names in the plaintiff's favour. Thereafter the plaintiff's name appeared as the owner of the property and receipts were granted in his name. It is urged that this clearly shows that defendant 1 recognized that there had been a gift in favour of the plaintiff and that he was merely managing the property on behalf of his infant son. Obtaining mutation of names and granting receipts and acts of that kind do not establish a gift, as such acts are entirely consistent with the transaction being a purely benami one. Had the intention of the parties been that the plaintiff should be a mere benamidar, mutation in his name would have followed and rent receipts would have been given in the name of the recorded proprietor. Such acts, as I have said, are not inconsistent with the benami nature of a transaction, and indeed such acts inevitably follow a benami transaction. This matter was considered in 13 M I A 232.¹ At page 247, Sir James Colville referring to such acts says :

Again, when we come to the evidence which has been given in the suit, it appears to their Lordships to be all on one side. As we have said before, the evidence of acts of ostensible ownership prove nothing; but we have proof, so far as there is any proof in the suit, of the source from which the money proceeded, that the money was the father's.

The subsequent conduct of defendant 1, on the other hand, tends to show that the transaction was a benami one and that no gift in favour of the plaintiff was ever intended. On 25th May 1929, defendants 1 and 2 actually mortgaged the property in dispute and in the deed it is recited that all other properties belonging to the executors, defendants 1 and 2, were already mortgaged and accordingly the property now in dispute was mortgaged. This property is described as having been purchased in the farzi name of the plaintiff. There are two earlier mortgages dated 12th February 1929 and 15th April 1929 by which this property is also mortgaged, and in these bonds it is stated that the property was purchased farzi in the name of the plaintiff. Another mortgage was entered into on 13th February 1930, and again the property is described as having been purchased farzi in the name of the plaintiff. These transactions require explanation and all

that counsel for the plaintiff-respondent can urge is that defendant 1 must have turned dishonest. The learned Judge does not attach much importance to these transactions, because in his view defendant 1 was in all probability compelled to make these statements by reason of the fact that he had fallen into the clutches of the defendants-appellants. Further, he seems to be of opinion that certain of these mortgages were never given effect to as alleged by defendant 1. I find it difficult to understand why the defendants-appellants should in the year 1929 have compelled defendant 1 to mortgage this property which was not his own and why they should have insisted that the property should be described in the mortgage deeds as property purchased farzi in the name of the plaintiff. It is true that at this time defendant 1 was heavily indebted and the probabilities are that he was driven eventually to mortgage this property which he had previously hoped to save. In my view, there is no real basis for the suggestion that these mortgages were the result of the machinations of the defendants-appellants. The fact that the property in dispute is described in these mortgages as property purchased by defendants 1 and 2 farzi in the name of the plaintiff is very strong evidence that defendants 1 and 2 never intended the transaction in question to be a gift in favour of the plaintiff. In my view these mortgages clearly negative any intention on the part of defendants 1 and 2 to make a gift.

The learned Subordinate Judge appears to have been impressed by the fact that there was no motive for this being a benami transaction. Experience has shown that frequently benami transactions are entered into in this country for no apparent reason and this has been commented upon frequently by their Lordships of the Privy Council. Time and again cases appear in these Courts where benami transactions have been entered into for no known reason. However, in this case, there was in my view a reason why this sale should be a benami one. The learned Judge appears to have thought that at the date of this sale, namely 26th July 1926, defendants 1 and 2 were not financially embarrassed. It must be remembered that there had been long and bitter litigation between them and Alimunnissa; and even before this transaction was entered into defendant 1 had been compelled to mortgage a part of his property. On 11th April 1925, he mort-

gaged certain property for Rs. 700 which he required to repay previous debts on handnotes and the costs of the appeal. On 1st August 1926, he executed another mortgage [Ex. B (7)] for Rs. 300 which was due for household expenses. On 8th January 1927, he again mortgaged his property for Rs. 2500 to pay various debts; and on 19th June 1927, he executed an ijara deed for Rs. 937, Rs. 500 of which was required for payment of earlier debts. As I have stated, in the year 1929 defendant 1 recited in a mortgage of 25th May of that year that all other properties belonging to himself were already mortgaged except the property now in dispute; and he proceeded to execute in quick succession other mortgages upon the property in dispute. Having regard to the fact that a long and expensive litigation had taken place and to the fact that immediately after this sale deed was executed defendant 1 was compelled to execute a number of mortgages, it seems pretty clear that on 26th July 1926, defendants 1 and 2 were financially in a low state. That being so, the transaction may well have been carried out in the name of the son with a view to protecting the property in case of attachments and sales occurring later on. That defendants 1 and 2 had no money at the time of the sale deed in question is clear, because they had to raise by mortgage the sum necessary to pay off Wajid Khan. In my view the situation existing at the time of this transaction was just such a one as might induce defendants 1 and 2 to obtain this conveyance benami in the name of their infant son.

Having regard to the financial condition of defendants 1 and 2, it is difficult to believe that they were in a position to make a gift in favour of their son. Nothing is suggested as to why they should have desired to make a gift at this particular time. It is urged on behalf of the respondent that he was the only son of defendants 1 and 2 and therefore it was only natural that the parents should have desired to benefit him. He had been their only son for five or six years, and there is no reason suggested why his parents should have suddenly decided to make this gift in his favour. Further it is urged that this gift was made in order to provide for the boy's education and maintenance. Parents usually make provision for the education and maintenance of their children, but they do not as a rule make gifts of property to children for such purpose. They may set aside pro-

perty for such a purpose, but they do not as a rule gift the property to the child. The suggestion that in these circumstances the transaction was in fact a gift is, in my view, a most improbable one.

In the present case the only facts that have been satisfactorily established are that the property was transferred to the plaintiff as a result of his parents paying the consideration money. As I have stated, *prima facie* the plaintiff is a benamidar, and in my view he has wholly failed to prove that his parents intended to make a gift of the property to him. The conduct of the parents, on the other hand, suggests strongly that they never regarded this transaction as a gift and always regarded the property as their own and which they could mortgage in order to raise money for their own purposes. In my view the plaintiff has failed to show that he is the owner of this property and accordingly his claim should have been dismissed. In the result therefore I would allow First Appeal No. 175 of 1935, set aside the decree of the learned Subordinate Judge and dismiss the plaintiff's claim. The appellants are entitled to their costs in this Court and in the Court below. As I have stated earlier in this judgment, Miscellaneous Appeal No. 16 of 1938 is an appeal by the plaintiff who was dissatisfied with the amount awarded to him as mesne profits. As I have held in First Appeal No. 175 of 1935 that the plaintiff is not the owner of this property, it follows that he is entitled to no mesne profits. Miscellaneous Appeal No. 16 of 1938 is, in the circumstances, not pressed and I would dismiss it and make no order as to costs.

Chatterji J.—I entirely agree.

D.S./R.K.

Order accordingly.

A. I. R. 1939 Patna 467

MOHAMAD NOOR AND DHAVLE JJ.

Sourendra Mohan Sinha and others —
Petitioners.

v.

Kumar Jogendra Narain Sinha and others — Opposite Party.

Civil Revision Nos. 339, 442 and 443 of 1938, Decided on 27th January 1939, from order of Sub-Judge, Bhagalpur, D/. 10th June 1938.

(a) Receiver — Administration suit between mortgagors—Court administering estate through receiver has no power to alter priority of mort-

gages already created in favour of debts incurred by the receiver under its orders except in case of salvees — Question of priority ought to be decided in ordinary way and not in proceeding for leave to execute decree against properties in hands of receiver.

Under the Transfer of Property Act a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan. Therefore, after a mortgage has been created, what is left in the owner of the property is his original, full rights minus the right which he has already transferred in favour of the mortgagee, and if thereafter the property of the owner comes under the administration of a Court and the Court administers it through a receiver, what is being administered is not the entire interest of the owner but only what is left in him after his transfer in favour of the mortgagee. What has already been transferred is not the subject-matter of administration and is therefore not under the control of the Court, and hence a Court while administering an estate under mortgage through a receiver has no power to order that the priority of the mortgages already created on the estate should be altered in favour of a debt incurred by receiver under its orders except in favour of salvees; and it makes no difference if the money was utilized by the receiver towards the payment of the instalment of the holder of a mortgage decree. Such question of priority ought to be decided in the ordinary way and not in a summary proceeding for leave taken by a mortgagee decree-holder to execute the decree against the property in the hands of a receiver appointed by the Court in administration suit between the mortgagors inter se. The proper course would be to allow the creditors to proceed with their execution and face proceedings in which the question of priority could in the ordinary course be decided by an order having the force of a decree and thus subject to appeal: *34 Cal 427, Explained and Disting.*; *5 C W N 15, Ref.*

[P 471 C 2; P 472 C 1; P 474 C 1; P 475 C 1, 2]

(b) Santal Parganas Regulation (3 of 1872) — Applicability.

All Courts exercising jurisdiction in Santal Parganas are bound by the provisions of Santal Parganas Regulation, 3 of 1872. [P 477 C 2]

P. R. Das, J. C. Sinha and Niraj Ch. Ganguli (in No. 339), Dr. D. N. Mitter and Harians Kumar (in No. 442), and Sir Sultan Ahmed and S. C. Mazumdar (in No. 443) — *for Petitioners.*

S. C. Mazumdar and Sir Sultan Ahmed (in No. 339), P. R. Das and J. C. Sinha (in No. 442), and P. R. Das and N. N. Roy (in No. 443) — *for Opposite Party.*

Order. — These three applications in revision are directed against an order of the learned Subordinate Judge of Bhagalpur in an Administration Suit (No. 617 of 1928) relating to the Maheshpur Estate in the district of the Santal Parganas. The suit was originally instituted at Pakaur in the Santal Parganas but was under the orders of this Court transferred to Bhagalpur. It appears that in about 1872 the

estate was held by Maharani Janki Kumari who died on 20th February 1893. By a will she bequeathed it to her younger son, Indra Narain, her elder son Harendra Narain having pre-deceased her. Indra Narain died in 1896 leaving a widow, Radha Peari, and four sons Jogendra Narain, Devendra Narain, Jyanendra Narain and Fanindra Narain. By his will he had made his widow, Radha Peari, executrix of his estate. She took out probate and administered the estate till her death. Thereafter, the four sons of Indra Narain became executors of the estate under the terms of the will of Indra Narain. One of the sons, Devendra, died leaving a son Kali Kinker who is the plaintiff in the administration suit, while his uncles are defendants. Rai Bahadur Suraj Narain Singh, the ancestor of the petitioners, in Civil Revision No. 339 of 1938 had advanced on 30th April 1874 to Maharani Janki Kumari a sum of Rupees 30,000 and obtained a mortgage from her. Certain payments were made and later on the said Maharani executed a second mortgage in favour of the Rai Bahadur on 9th May 1881. The loans swelled up and on 6th January 1893 there was a third mortgage for Rs. 1,64,488.8.3 which included the amounts due under the two earlier mortgages also which had remained unpaid. There was on the same date another mortgage for one lac of rupees by the Maharani and Kumar Indra Narain in favour of the Rai Bahadur. Then again on 10th March 1894, Kumar Indra Narain who, at that time had become the sole owner of the Maheshpur Estate executed a mortgage for two lacs of rupees in favour of the Rai Bahadur. This covered various sums advanced which need not be stated in detail. Thus, the Rai Bahadur held three mortgages, two dated 6th January 1893 executed by the Maharani and Kumar Indra Narain, one for Rs. 1,64,481 and the other for Rs. 1,00,000 and a third dated 10th March 1894 for Rs. 2,00,000 executed by Kumar Indra Narain alone.

The Rai Bahadur brought a suit to enforce the three mortgages in the Court of the Subordinate Judge of Murshidabad (Suit No. 368 of 1903). The claim was for Rs. 10,24,030. The Murshidabad Court was selected obviously to avoid the application of the special rule of interest prevailing in the Santal Parganas, viz. S. 6 of Regn. 3 of 1872, though the bulk of the properties mortgaged was situated in that district. The suit was contested and decreed and

there was an appeal by the defendants to the Calcutta High Court where a compromise was effected. Its terms need not be mentioned here in detail. The decree was executed, an objection to its execution was disallowed and an appeal against the order was dismissed on 20th December 1915. Two suits were however instituted in the Court of the Subordinate Judge of Pakaur, one in 1914 by Rani Radha Peari, the executrix of the estate of her deceased husband, Kumar Indra Narain, and another in 1916 by some other members of the family. The first suit was for redemption of the aforesaid three mortgages in favour of Rai Bahadur Suraj Narain Singh on payment of Rs. 5,58,000 or for an injunction against the execution of the compromise decree which the Rai Bahadur had obtained in the High Court, and the second was for a declaration that the mortgage decree was invalid and in the alternative for redemption on taking accounts.

The first suit was by an order of the Calcutta High Court transferred to Alipur in the 24 Parganas, where a compromise was effected between all the parties concerned. It was to the effect that the amount of the decree of the Rai Bahadur be fixed at 17 lacs of rupees. This was to be paid in 22 instalments of Rs. 50,000 each and a 23rd instalment of 6 lacs of rupees. Each instalment was to be paid on 13th April of each year (last day of Chait of the Bengali era) commencing from 1917, and the last instalment of 6 lacs of rupees was payable on 13th April 1939. It was provided that in case of default interest would be payable at 9 per cent. per annum on the amount not paid and in case of two successive defaults the entire decretal amount then due would be realizable at once. The instalments were paid up till April 1934 and then there was a default, and the petitioners in Civil Revision No. 339 of 1938 who are the representatives of the Rai Bahadur want to execute the decree according to the terms of the compromise. In the meantime Kali Kinker Singh instituted a suit for the administration of the estate in which his three uncles are defendants. The suit which was instituted at Pakaur was, as has been stated, transferred to Bhagalpur and there, under the circumstances which will be stated later, a receiver was appointed under an order dated 1st March 1930. After various changes which will be dealt with later, the present receiver, Rai Sahib Surendra Nath Basu has been in charge of the estate.

The decree-holders applied for leave to execute the decree referred to above against the receiver, to which various objections were raised and in order to appreciate them it is necessary to detail some facts leading up to the present receiver taking charge of the estate. It appears that in the beginning of 1930 the executors of the estate, who are defendants in the administration suit, were unable to pay the instalment of the decree-holders which was to fall due in the April of that year. On 1st March 1930 the learned Subordinate Judge ordered the appointment of a receiver. Rai Bahadur Nilamani De, a retired Deputy Collector, was willing to act as a receiver and offered to find a creditor who would advance Rs. 55,000 for the immediate needs of the estate, out of which Rs. 50,000 was to be paid as the instalment due to the decree holders in April of that year. This was on the condition that the creditor be given the first charge on the estate for the money advanced by him. The learned Subordinate Judge was inclined to accept the terms and appoint the Rai Bahadur as the receiver. There was an appeal, and by its order dated 7th March 1930 in Miscellaneous Appeal No. 81 of 1930 this Court upheld the order to appoint a receiver but did not approve of the appointment of the Rai Bahadur on the aforesaid terms. It observed as follows:

The question is who should be appointed receiver of the estate. Now the learned Subordinate Judge has suggested that Rai Bahadur Nilamani De, who is a retired officer of the Government be appointed receiver upon his undertaking to find a creditor who will be in a position to advance Rs. 55,000. Since the order of the Subordinate Judge Mr. Nilamani De has written to him a letter, a copy of which has been given to us by Mr. Hasan Imam. This is a joint application by himself and one Surendra Nath Basu who is an advocate of Bhagalpur Court. Therein the two gentlemen intimate to the Court that they are willing to advance Rs. 55,000 as a loan to the estate at an interest of 15 per cent. per annum on condition that the said loan is made a first charge over all other charges on the whole estate of Maheshpur Raj and that Rai Bahadur Nilamani De is appointed receiver by the Court. The conditions put forward by Rai Bahadur Nilamani De are impossible. The loan proposed to be advanced by him cannot in law be made a first charge over the previously secured charges on the estate and it cannot be made a condition precedent that for the advance of the aforesaid loan he should be appointed as a receiver of the estate. It seems to us that in the circumstances of the case it is not desirable that a stranger should be appointed receiver of the estate.

This Court then ordered as follows:

We therefore direct that the defendants be appointed receivers of the estate in the administration suit. We further direct that the defendants

will arrange to pay the next instalment due under the mortgage decree within 31st March 1930 as undertaken by them when the former appeal in this Court by the plaintiff was disposed of. They should try to raise this amount by making collections from the estate, and if that be not possible, they should apply to the Court below in time to obtain the permission of that Court to raise a loan at a reasonable rate of interest

The defendants were unable to raise funds by the date fixed, and the time for making arrangements for the payment of money was extended till 12th April 1930. The instalment was due for payment on 13th April. But money could not be arranged even by that date and therefore on 12th April the learned Subordinate Judge discharged the defendants from the receivership of the estate and Rai Bahadur Nilamani De who was ready to arrange the payment of the instalment money was appointed receiver and was authorized to raise a loan on a handnote to be executed by him on behalf of the Court and then to execute a regular registered mortgage bond in favour of the creditor by hypothecating the entire estate. The loan to be raised by him was made a first charge on the estate. The facts were reported to this Court and on this the following order was passed:

Considered letter No. 194 dated the 12th April 1930 from the Subordinate Judge to the Deputy Registrar and letter dated 13th April 1930 from Rai Bahadur Nilamani De to the Registrar of this Court. The Court below intimates that the defendants have been discharged as receivers in view of the previous order of this Court Nos. 8 to 11. The Sub Judge further states that the new Receiver Rai Bahadur Nilamani De has raised Rs. 50,000 with interest at 15 per cent. per annum, making it a first charge on the estate to pay the instalment which falls due on the 13th. The question as to whether the loan raised by the Receiver Rai Bahadur Nilamani De will be a first charge or not depends upon whether there are prior mortgages or not and no direction in that behalf can be made by the Court at this stage.

By this time Rupees 50,000 had already been borrowed by the receiver from Rai Sahib Surendro Nath Basu and Dhirendra Nath Sen and paid to the decree-holder as the instalment due on 13th April 1930. Later on, on 8th May 1930 another Rupees 15,000 was required for the payment of Patni rent to the superior landlord. This was also advanced by the said two gentlemen in equal shares. The Court while sanctioning this loan of Rs. 15,000 directed that it would be a first charge if permissible under the law. Later on a mortgage bond for Rs. 65,000 was executed by the receiver on behalf of the Court in favour of Rai Sahib Surendro Nath Basu and Babu Dhirendra Nath Sen.

Next July Rai Bahadur Nilamani De resigned from the receivership and the defendants were again appointed receivers. They undertook before this Court to pay up the loans raised by the receiver by 31st January 1931, and it was ordered that on their default a third party would be appointed as receiver. They defaulted, and for some time Rai Bahadur Suresh Chander Chakervarty was appointed receiver: and when he was unable to raise a loan, Rai Sahib Surendro Nath Basu, the present Receiver, was appointed on 18th March 1932. The new receiver represented to the Court that Rs. 90,000 more was urgently required to meet the pressing demands on the estate, such as the payment of patni rent, settlement cost and arrears of cesses. He was authorized on 22nd March 1932 to raise the money by borrowing. The money was advanced by Babu Dhirendra Nath Sen (one of the creditors in whose favour the earlier mortgage was executed) Srimati Sarala Bala Dasi and Srimati Mangalmoyee Sarkar at 12 per cent. and the Subordinate Judge ordered that this loan was to be the first charge on the estate if permissible under the law. A mortgage bond for Rupees 90,000 was thus executed by the present receiver. It appears that the entire amount was utilized in the payment of the instalments of the decree-holders due on Chait 1337 (1931) and Chait 1338 (1932), but it is not necessary to examine this in detail for reasons which will appear later on. Suffice it to say that there are thus outstanding two mortgages executed by the receivers, one for Rs. 65,000 in favour of Rai Sahib Surendro Nath Basu, the present receiver and Dhirendra Nath Sen and a second for Rs. 90,000 in favour of Dhirendra Nath Sen and the two ladies named above. When the representatives of Rai Bahadur Suraj Narain Singh (hereinafter called the decree-holders) applied to the Court administering the estate for executing the compromise decree of the Alipur Court, three sets of objections were raised. One was by the receiver who was asked to and made a report, the second by the judgment-debtors of the decree who are defendants in the administration suit, and the third on behalf of the creditors who were holding the two mortgages from the receiver (hereinafter called creditors).

The substance of the receiver's objection was that leave to execute the decree could not be granted till the mortgages created by the receiver under the orders of the

Court were discharged. It was also urged that the debts due to the late Rai Bahadur Suraj Narain Singh and his heirs from the estate had not only been paid up but there had been excess payment as under the special regulation in force in the Santal Parganas interest could not exceed the principal and in fact 4 lacs of rupees in excess of the principal and interest equal to it, had already been paid. In the end it was urged that if permission to execute the decree be granted, it should be conditional on the payment of the receiver's lien by way of salaries, loans, management, cost, etc., either by the decree-holder or purchaser, whoever it might be, before the sale took place and in any case before he could be allowed to take possession of the estate.

The objection of the creditors, who held the two mortgages executed by the receiver, was also to the effect that leave to execute the decree could not be granted and, if granted, their mortgages should have priority over the decree sought to be executed. The objection of the judgment-debtors of the decree was that it was not executable on various grounds, the main ground being that the debts incurred by the estate from Rai Bahadur Suraj Narain Singh had already been overpaid in view of Sec. 6 of Regn. 3 of 1872. It may be mentioned here that the decree-holders before applying for leave to execute the decree had already made an application to the Alipur Court for its execution, but they explained that they had to do so as otherwise the decree would have become barred. The learned Subordinate Judge by his order dated 10th June 1938 gave conditional leave to the decree-holders to execute the decree. He held the first mortgage for Rs. 65,000 to be a first charge on the estate and directed that the decree-holders should pay up this encumbrance before proceeding against the mortgage properties or, in the alternative that they should proceed against them subject to the liability of paying Rs. 65,000 to the creditors. He was of the view that the Court in ignorance of the order of this Court had made the first loan of Rs. 50,000 a first charge on the estate and the remaining Rs. 15,000 was borrowed for the protection of the estate, i. e. the payment of patni rent and the creditors had a salvage lien for this amount.

As has been stated above, three applications in revision were filed against this order. Civil Revision No. 339 of 1938 is on

behalf of the decree-holders who ask that the condition imposed by the learned Subordinate Judge be withdrawn and the order modified accordingly. Civil Revision No. 442 of 1938 is on behalf of the creditors, Dhirendra Nath Sen and the two ladies. They ask that the second mortgage of Rs. 90,000 created by the receiver under the orders of the Court should also have priority over the decretal dues of the decree-holders. Civil Revision No. 443 of 1938 is on behalf of the judgment-debtors, who repeat their prayer that leave should be refused inasmuch as the debt has already been overpaid and in view of certain objections raised by them the decree was inexecutable.

Civil Revisions Nos. 339 and 442 of 1938.

These two applications, one by the decree-holders and the other by the creditors, are taken up together as the point involved in them is the same, namely whether the order giving the first charge to the mortgages created by the receiver under the orders of the Court is permissible under the law and, if so, to what extent. No law has been placed before us to show that a Court while administering an estate through a receiver has power to order that the priority of the mortgages already created on the estate should be altered in favour of a debt incurred by the receiver under its orders except in favour of salvees, viz. those who advance money for the protection of the estate itself so that the advances benefit the prior mortgagees as well, for instance money advanced for the payment of the Government revenue or the rent due to the superior landlord which, if not paid, will entail forfeiture of the property or its sale free from encumbrances of prior mortgagees or debts incurred for the preservation of the property from destruction or annihilation. If debts are incurred for these purposes, that is to say for the preservation of the property for the benefit of all, the priority is in the inverse order, viz. the person who advances money last has priority over the one who had advanced money before him, and so on. The principle of this rule of salvage liens which is applied in India as a rule of justice, equity and good conscience is obvious. If these debts are not given priority, the property itself is in danger of being destroyed and the mortgagee himself will suffer. As the man who advances money last benefits those who had advanced money before him, he saves the property for the benefit of them also

and, therefore, has priority over them. This is conceded by Mr. P. R. Das who frankly admitted that money advanced for saving the interest of the decree-holders should have priority over the decretal debt. But apart from this salvage lien, there is no right vested in the Courts to interfere with mortgages already created on the property which they are administering through a receiver, nor is there any authority for the proposition that a Court when administering an estate of mortgagors in a suit between them inter se has power to destroy or curtail the rights of the mortgagees in the exercise of its discretion to grant them leave to sue on the mortgage or execute a mortgage decree already obtained. The interest of the mortgagee is not really involved in any suit between the mortgagors. The paramount right of the mortgagee is outside the scope of a suit between the mortgagors.

A man's property is a bundle of rights in it vested in him. If the owner of a property creates a mortgage of it, he thereby transfers a part of his interest in it to the mortgagee. Under the Transfer of Property Act, a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan etc. etc. Therefore, after a mortgage has been created, what is left in the owner of the property is his original, full rights minus the right which he has already transferred in favour of the mortgagee, and if thereafter the property of the owner comes under the administration of a Court and the Court administers it through a receiver, what is being administered is not the entire interest of the owner but only what is left in him after his transfer in favour of the mortgagee. What has already been transferred is not the subject-matter of administration and is therefore not under the control of the Court.

There is a good deal of force in the argument of Mr. P. R. Das, appearing on behalf of the decree-holders that his clients had a paramount right in the property which was not in the least affected by the administration suit. The decree-holders were no parties to it and any order passed in the suit cannot in any way affect the rights which had already been created before the property came in *custodia legis*. It is unthinkable that, when the cosharers of a property who had already mortgaged it to third

persons fight among themselves and one of them institutes a suit and for the preservation of their rights the Court takes charge of the property and administers it, it can, by any order to which the mortgagee is not a party, destroy or diminish the mortgage lien either by giving the first charge to newly incurred loans or by imposing on the mortgagee conditions which will have this effect. The position is so clear that it need not be discussed in detail. The only exception as has been stated is in cases of salvage liens when the Court orders a receiver to borrow money for the preservation of the property itself. In such cases the mortgagee is also bound by this loan because if it be not incurred his own right will be destroyed. The learned Subordinate Judge has nevertheless allowed the first mortgage of Rs. 65,000 to have priority on the ground that the Court had however inadvertently ordered so in respect of Rs. 50,000 and the pledge given by the Court must be respected and Rs. 15,000 was borrowed for the protection of the property. Let us examine the two grounds separately.

Sir Sultan Ahmed has supported the order and has urged that however wrong the order of the Court in respect of Rupees 50,000 might have been, once it was passed and the creditors advanced money in reliance on the promise of the Court, that promise must be carried out at any cost and the Court must exercise all the powers which it possesses in order to see that nobody suffers on account of its wrong order. He relied upon the case in 34 Cal 427.¹ The learned Subordinate Judge has considered the case and rightly held that it does not help the creditors. The facts of the case are these. The head-note is in general terms which are rather misleading. During the pendency of a suit for partition of a family property on the original side of the Calcutta High Court, some members of the family borrowed money on an equitable mortgage for paying the patni rent due from the estate. Thereafter, a receiver was appointed in the suit, and the Court ordered the receiver to raise a loan of two lacs of rupees for the preservation of the estate. It was also ordered that the loan so raised would be a first charge on the estate. The equitable mortgagee from whom some of the members had borrowed money brought a suit in the Court of the Subordinate Judge

1. Girdhari Lal v. Dhirendra Kristo, (1907) 34 Cal 427=11 O W N 1=4 O L J 495.

of Hooghly to enforce the mortgage. The question arose whether the mortgage of the plaintiff of the suit or the mortgage created by the receiver should have priority. The learned Judge of the Court below gave the plaintiff a personal decree against defendants 1 to 5 and 9 but refused to pass a mortgage decree. There was an appeal where there was difference between Rampini and Woodroffe JJ. The former was of opinion that the plaintiff should have priority and that the mortgage created by the receiver in favour of defendant 8 being subsequent to it must give way. Woodroffe J. was however of opinion that the mortgage created by the receiver should have priority. The case was placed before Harington J. who upheld the view of Woodroffe J., and held that the mortgage of defendant 8 created by the receiver should have priority over the plaintiff's mortgage. The suit was therefore decreed accordingly.

It is to be observed that in the above case the mortgage created by the receiver under the orders of the Court was for preserving the property, and the money was advanced by the plaintiff during the pendency of the partition suit and therefore was subject to any decree which might be passed in it. In fact, the principle of salvage lien was applied, about which there is no controversy before us. Woodroffe J. observed as follows (page 437) :

On the other hand, the receiver's mortgage was ordered to be effected by the Court for the preservation of the property, and had it not been so effected there might have been no property against which the plaintiff might proceed in this suit.

Harington J. who agreed with Woodroffe J. distinctly relied upon the principle of salvage lien. His observations (page 441) are as follows :

The question resolves itself into a very short point, viz., had the Court power to order that the receiver's mortgage should be a first charge on the property ?

The loan, which the receiver was authorized to make, was for the purpose of preserving the property for the benefit of all the beneficiaries; it was to save the property.

As is pointed out in Fisher on Mortgages, Edition 4, para. 958, there is a notable exception to the general rule '*qui prior est tempore, potior est jure*' to be found in advances, made to save the encumbered property from loss or destruction. These advances, says the learned author, are payable in priority to all other charges of earlier date, and amongst themselves have precedence according to the inverse order of their respective dates.

This principle has already been referred to above and is well settled. The case is clearly no authority for the proposition that the Court can order any loan to have

priority over the previous encumbrances without regard to the circumstances of the previous encumbrances and the purpose for which the receiver was going to take the loan. Sir Sultan Ahmed however did not rely so much upon the decision of the case as on the observations of Woodroffe and Harington JJ. which are to be found at pp. 438 and 442 respectively of the report. Woodroffe J., while dealing with the principle of law that if a Court authorizes a receiver to take a loan for the preservation of a property and gives it a first charge the order of the Court must prevail, observed as follows :

It would be to me a matter of regret, if those who on the faith of assurances contained in orders by this Court, have advanced money to the receiver, were not entitled in all cases to see that those assurances are carried out.

Harington J. observed as follows :

I agree with Woodroffe J. that the consequences would be lamentable, if after money had been advanced on the strength of the order of the Court directing that the loan should be a first charge, that order is to be treated as a nullity, although it has never been set aside.

It is true that it will be a matter of extreme regret that those who advance money on the assurance of a Court are to suffer, but it will be much more regrettable if in order to carry out its promise to a creditor the Court robs a third person of his just rights when he was no party to the proceedings in which the assurance was given and could not have resisted it. In this case however, the question of the Court's promise does not in fact arise. It is true that the learned Subordinate Judge by his order dated 12th April 1930 authorized Rai Bahadur Nilamani De to raise loans and ordered that the loans would have priority over other mortgages, but this was in entire disregard of the orders of this Court dated 7th March. The learned Subordinate Judge whose order is under revision has observed that his predecessor who gave this assurance to Rai Bahadur Nilamani De did so perhaps in ignorance of the order of the High Court. This is inconceivable. It was by the order of this Court that the defendants were appointed receivers and a certain time given to them to make arrangements for the payment of the instalment of Rs. 50,000 payable to the decree-holders on 13th April 1930, and the order of the learned Subordinate Judge appointing Rai Bahadur Nilamani De, receiver was passed in continuation of the order of this Court when the defendant receivers were unable to make arrange-

ments for the payment of the instalment. It is therefore very difficult to imagine that the clear observations of the High Court escaped the attention of the learned Subordinate Judge. Moreover, when the matter came up here on a report from the learned Subordinate Judge, this Court observed that the question of giving priority to the loans raised by Rai Bahadur Nilamani De would be considered with due regard to the rights of those who held prior encumbrances upon the estate. One of the creditors who had advanced first Rs. 50,000 and later Rs. 15,000 is a lawyer. He is the present receiver of the estate. It cannot be imagined that he was unaware of the order of the High Court or of the law in this respect. It seems clear that the creditors deliberately took the risk for which this Court was in no way responsible. Further, whatever may be said about the first loan of Rs. 50,000, the additional loan of Rupees 15,000 was taken on the clear understanding that it was to have priority if permissible under the law, and the same is true in respect of the second mortgage of Rupees 90,000 also.

However regrettable it may be that the Subordinate Judge somehow accepted the condition that the loan of Rs. 50,000 was to be a first charge and later on approved of the mortgage bond making the sum of Rs. 65,000 a first charge, we are clear that the Court will not be justified in recouping these creditors at the cost of those who would seem to have a prior right to proceed against the estate which could not be properly touched in the administration suit. The next question for consideration is whether it makes any difference that the money was utilized towards the payment of the instalment of the decree-holders. It is clear that it does not. The decree-holders have credited the amount in the decree, which to that extent stands satisfied. Beyond this, the loan did not benefit them and cannot be said to have saved the mortgaged properties for them; the benefit they derived was no more than they were entitled to and has been allowed for. The learned Subordinate Judge does not seem to have realized the effect of his conditional leave to execute the decree, viz. that it would practically deprive the decree-holders of at least Rs. 50,000 for no fault of theirs; whether the additional sum of Rs. 15,000 can be given priority on the principle of a salvage lien will be considered later. But the order that Rs. 65,000 should

be paid by the decree-holders before they proceed against the mortgaged properties or that they may proceed against the properties provided they remain liable to pay this amount to the creditors overlooks the fact that the decree-holders will themselves have no means of realizing it from the judgment-debtors. There can only be two possibilities, either the security is sufficient for the satisfaction of the claims of both the decree-holders and the creditors, or it is not. In the former case, the creditors could realize their money (as the decree-holders could realize theirs) without the former being given the first charge. But if the decree-holders be called upon to pay the money as the lower Court has in effect done—it is difficult to see how they can recoup themselves. If, however, the security is not sufficient to satisfy both the claims and if a first charge is given to the creditors to the extent of Rs. 65,000 this means a practical reduction of the decretal dues to that extent by a proceeding which moreover gives the decree-holders no right of appeal. It amounts to calling upon the decree-holders to refund a part of what was paid to them in satisfaction of the decree, though the decree would still stand satisfied to the extent of the refund. This appears to us to be opposed to all canons of justice, equity and good conscience; our attention has not been drawn to any provision of the law under which a portion of the decree which stands satisfied could be revived upon the decree-holders making a refund as required in obtaining leave to proceed against properties in the hands of the receiver.

An attempt was made in the Court below to prove that the decree-holders had consented to the order of making Rs. 50,000 as a first charge. The attempt failed and the Court has not relied upon it. There is nothing to show that the decree-holders ever knew of this order. Even if they knew, it was not their duty to appear in the administration suit and object, nor could they refuse to accept the payment of the instalment for which the loan was incurred. Assuming, moreover, that the Court administering an estate for the benefit of the parties to the suit can create a first charge for loans incurred for purposes other than the preservation of the property for the benefit of all concerned (including prior creditors), the question still remains whether the creditor can enforce the charge on a decree-holder's application

for leave to execute his decree against properties in the hands of a receiver, when the order giving conditional leave is not appealable. This in substance is what will happen if the order of the lower Court were to stand. A summary proceeding for giving leave is not appropriate for settling disputed priorities and is even less so for enforcing them. The proper course would plainly be to allow the creditors to proceed with their execution and face proceedings in which the question of priority could in the ordinary course be decided by an order having the force of a decree and thus subject to appeal. The object of requiring leave to sue a receiver is that the Court which is administering an estate should know the claims which third persons are likely to make against it so that, if on a summary enquiry, it finds that the claims are just and unanswerable, it may order the receiver to satisfy them, and also to avoid frivolous and vexatious suits against a receiver who is an officer of the Court as they will needlessly hamper the administration of the estate by the Court. In 4 P L J 20² at p. 28 it was observed :

There is no statutory provision which requires a party to take the leave of the Court to sue a receiver. The rule has come down to us as a part of the rules of equity, binding upon all English Courts of justice in this country. It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interest of the litigants before it, the authority of that Court is not to be obstructed by suits designed to disturb the possession of the Court. The institution of such suits is in the eye of the law a contempt of the authority of the Court and therefore the party contemplating such a suit is required to take the leave of the Court so as to absolve himself from that charge. The grant of such leave is made not in exercise of any power conferred by statute but in exercise of the inherent power which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority.

Earlier in the same judgment Mullick J. said :

The general principle applying to cases of this kind, in which application is made to sue a receiver in respect of properties in charge of the Court is, that unless the Court is satisfied that there is no question at all to try, or there is no legal foundation to the claim, leave should as a matter of course be granted. The onus is therefore strongly on the Court to show that no foundation for any claim has been made out.

It cannot be said in this case that the decree-holders have no claim whatever to be tried in the ordinary course by a Court of competent jurisdiction. It is true that while giving leave to sue a receiver, the

Court can give directions, but we consider it very doubtful whether this power can be used to require an applicant for leave to give up a portion of his claim without any good reason on pain of finding himself unable to prosecute his claim, however substantial it may be, in the ordinary course of justice. It may also be doubted whether in this case leave was necessary only to execute the decree. As at present advised, we are inclined to share the view expressed in the following extract from Woodroffe's Tagore Law Lectures on Receivers (Edn. 4, pp. 81-82) :

That for a suit upon promissory notes and an equitable mortgage made by the executors of a deceased person whose estate (including the property subject to mortgage) was subsequently placed in the hands of a receiver, leave is not necessary. It might be urged that though the suit was not brought directly against the receiver, leave was necessary as the suit was against parties over whose property a receiver had been appointed, such receiver being in possession of the mortgage premises. But it is submitted (and the Court appeared to be of such opinion) that leave was unnecessary. Since the receiver's possession would not be affected until a decree for sale was made and the purchaser took possession which might never occur, for the executors might discharge the debt out of other assets in their hands. If however, a decree for sale was made, an application might subsequently be made for leave to take possession.

The reference is to the case in 5 C W N 15ⁿ.³ It is however not necessary to pronounce definitely on this aspect of the matter. For assuming that leave is necessary even to execute the decree, the Court is beyond question entitled to examine the facts before granting leave. The applicants have a decree in their favour and no Court has held that it is incapable of execution on the grounds which have been raised by the judgment-debtors, and which, we will deal with, later. In these circumstances it seems clear that leave to execute ought to have been granted as a matter of course and that the restriction imposed upon the decree-holders is improper. The question of priority, to say the least, is controversial and ought to be decided in the ordinary way and not in a summary proceeding for leave under the inherent powers of a Court. The next question for consideration is as to the sum of Rs. 15,000 which is a part of the first mortgage executed by Rai Bahadur Nilamani De under the orders of the Court. The lower Court has directed the payment

2. Braja Bhusan v. Sris Chandra, (1918) 5 A I R Pat 100=47 I O 719=4 P L J 20.

3. Chartered Bank of India, Australia and China v. Hurlish Chander Neogy, (1901) 5 C W N 15 (n).

of this amount by the decree-holders on the ground that the creditors have a salvage lien in respect of it. Mr. Das, on the other hand, has urged that it has not been established that the money was in fact used for saving the property from sale on account of default in the payment of the patni rents. The expenditure of Rs. 15,000 as given by the receiver in his report is as follows:

	Rs.	as.	p.
Advance made to Babu Surendra Nath for payment of patni rent of Kankjole in the "Asthani" procedure	6070	12	0
Advance made to Upendra Nath Roy to pay rents to Nashipur Raj ...	7240	6	3
Deposited with the Imperial Bank ...	1688	13	9
Total ...Rs.	15,000		

Mr. P. R. Das argued that the payment of patni rent of Kankjole was not for the preservation of the properties mortgaged to the decree-holders. It is conceded before us that the decree-holders were not at all interested in Kankjole nor can the amount deposited in the Imperial Bank be held to carry a salvage lien in any case. No priority can therefore be allowed in respect of the two items which amount to over Rs. 7700. Mr. Das, while conceding that the amount of Rs. 7240.6.3, if paid to the Nashipur Raj as rent, could legitimately carry a salvage lien on the mortgaged properties, has contended that the account books have not been produced to show that there was no money available in the hands of the receiver to pay this amount.

It is however not necessary to pursue this matter further as out of the mortgage bond of Rs. 65,000 a very large amount has been satisfied and therefore to the extent which the loan could properly be given priority on the principle of a salvage lien, it has already been satisfied, as will be presently shown. But it must be conceded that whatever the reason, the Subordinate Judge did give a first charge in respect of Rs. 50,000 and that the creditors may have believed that the remaining Rs. 15,000 was being taken for purposes which would entitle them to a salvage lien on the property. Though in respect of Rs. 90,000 these considerations do not arise, nevertheless, this amount also was borrowed under the orders of the Court. It is therefore the duty of the Court to see that, without causing harm to the decree-holders, the creditors are not put to loss, as far as it may be practicable to do so. At one time

we thought of ordering that certain properties be sold in order to satisfy the claim of the creditors, but an examination of the figures showed that this course is not really necessary. From the accounts given by the receiver it appears that the present position is as follows:

	Rupees.
Debt due to S. N. Basu and D. N. Sen on mortgage bond dated 21st June 1930 after part payment on 6th February 1931	52,600
Interest for six years and eight months due up to 6th October 1937 ...	52,800
	1,05,600
Less paid up to 5th December 1938 ...	25,000
Balance ...	80,600
Debt due to Sm. Sarala Sundri Debi and others on mortgage bond dated 23rd April 1932 at 12 per cent. ...	90,000
Interest due from 8th April 1932 to 8th August 1940	90,000
	1,80,000
Less paid up to 5th December 1938 (approximately)	38,000
Balance ...	1,47,000
GRAND TOTAL ...	2,27,600
Average payment per year	56,900

There is no question of any future interest as in each case the interest has already reached the amount of principal and under the Santal Parganas Regulation it cannot be more. Therefore, in about four years' time, the entire debt under the two mortgages can be wiped off and as, it will be presently shown, there is going to be strenuous opposition on behalf of the judgment-debtors against the execution of the decree, there is no chance of the properties being sold, and the auction-purchaser being in a position to obtain possession of the properties, in less than four years' time. There will thus be no harm in fact if the decree-holders are allowed to execute the decree unconditionally with a provision that the receiver should not be dispossessed of the mortgage properties before the end of four years or before the satisfaction of the two mortgages, whichever event happens earlier.

Civil Revision No. 443 of 1938.

As has been stated before, this is an application by the judgment-debtors, whose objection against giving leave to the decree-holders to execute the mortgage decree of the Alipur Court on the ground that the decree had already been satisfied, rather there had been over payment, was over-

ruled by the learned Subordinate Judge. It was also contended that the decree passed by the Alipur Court was void for various reasons. The details of the objection need not be stated. The learned Subordinate Judge has examined them and has overruled them. The question is, however, too elaborate to be considered in a summary proceeding for giving leave to the decree-holders to execute the decree. The matter can be gone into by the executing Court in the course of the execution proceeding or in such other proceeding as may be taken by the judgment-debtors. It has already been indicated that though at the time of giving leave to sue a receiver or to execute a decree against a receiver, the Court is entitled to examine the facts of the case and to give directions, when there is a controversial question of law and fact to be decided, the best course is to give the party who applies for leave to proceed in regular Courts of law. This is not a case in which it may be said that the decree-holders have no legal foundation for their claim to execute the decree. However strong the objections of the judgment-debtors may be, it is clear that those objections should not be gone into at this stage, and we therefore express no opinion in respect to them. The findings of the learned Subordinate Judge in this connexion which are somewhat against the judgment-debtors will have no binding effect and are set aside.

Sir Sultan Ahmed, however, asked us to direct the decree-holders to bring the decree to Pakaur for execution. It was conceded before us that the decree could not be executed by the Alipur Court as no portion of the mortgaged properties is situated within its jurisdiction. Mr. P. R. Das on behalf of the decree-holders intimated to us that steps would be taken to bring the decree for execution either to Murshidabad or to Suri (Birbhum) where some of the mortgage properties are situated. We however do not think fit to give any directions in connexion with a matter which is in the discretion of the Alipur Court subject to the revising power of the Calcutta High Court. When the decree-holders apply for transfer of the decree either to Suri (Birbhum) or to Murshidabad, it will be open to the judgment-debtors to represent the matter to the Alipur Court and if necessary take it to the Calcutta High Court. The judgment-debtors are anxious to have the execution proceeding in the Santal Parganas as Regn. 3 of 1872 is in force there. The

decree-holders want to avoid that District. It has however been settled by the Privy Council that all Courts exercising jurisdiction in Santal Parganas are bound by its provisions.

The revision applications are, therefore, allowed in these terms. The condition imposed by the learned Subordinate Judge in giving leave to the decree-holders for executing the decree is set aside, and in lieu thereof it is ordered that the decree-holders, when advertising the mortgage properties for sale, do indicate in the sale proclamation that the auction-purchaser will not be entitled to take delivery of possession of the properties purchased by him within four years from today or till the two mortgages executed by the receiver, one dated 21st June 1930 and the other dated 23rd April 1932, are satisfied, whichever event happens earlier, and that he will not be entitled to any compensation or mesne profits for being kept out of possession. The finding of the learned Subordinate Judge about the objections of the judgment-debtors is set aside, and the questions of the validity of the decree and of its executability are left open for determination by a proper Court either in the execution proceeding or in such other proceeding as the judgment-debtors may be advised to take. The learned Subordinate Judge is directed to give all facilities and help to the receiver to pay up the two mortgages, and the receiver should be impressed with the importance of such payment. There will be no order for costs.

S.G./R.K.

Applications allowed.

A. I. R. 1939 Patna 477

FAZL ALI AND CHATTERJI JJ.

*Raja Shiba Prasad Singh—Defendant
—Appellant.*

v.

Tincouri Banerji and another—

Plaintiffs—Respondents.

Appeal No. 194 of 1937, Decided on 30th March 1939, from original decree of Sub-Judge, Dhanbad, D/. 8th October 1937.

(a) Contract Act (1872), Sec. 16 — Person accepting terms of compromise as he had no other option—This cannot be test to determine undue influence.

The fact that a person accepted the terms of a compromise as he had no other option, cannot be the test to determine whether compromise is liable to be attacked as vitiated by undue influence.

(b) Contract Act (1872), S. 2 (d)—Consideration may move from third party. [P 482 C 1]

The consideration for a promise need not necessarily move from the promisee but may move from a third party. [P 485 C 1]

(c) Contract Act (1872), S. 62 — Suit on novated contract — What plaintiff must prove stated.

In a suit based on a novated contract the plaintiff must prove (1) the existence of liability under the original contract and (2) the extinguishment of that liability by the novated contract: (1824) 107 E R 853 and (1882) 7 A C 345, *Rel. on.*

[P 486 C 1]

(d) Pardanashin lady—Protection afforded to pardanashin ladies in respect of their transactions can be claimed only by them.

The protection afforded by the Courts to pardanashin ladies in respect of transactions entered into by them is their personal privilege which can be claimed only by them or persons claiming through their title to any property affected by the transaction and not by a third party. [P 487 C 1]

(e) Contract — Novation — Non-payment of mortgage money within stipulated period — Mortgage as long as not discharged can be substituted by new contract.

The effect of non-payment of the mortgage money within the stipulated period is merely to furnish a cause of action to the mortgagee to sue on the mortgage; the mortgage remains in force so long as it is not discharged and until this is done it can be substituted by a new contract.

[P 488 C 1]

P. R. Das, A. T. Sen, N. N. Roy and U. N. Sinha—for Appellant.

Sir Sultan Ahmad, S. C. Mazumdar, G. C. Das, B. C. Ghose, S. C. Ghose, Ram Anugraha Narain Singh and P. N. Sanyal—for Respondents.

Chatterji J. — This appeal arises out of a suit on a handnote executed on 22nd February 1934 by the defendant-appellant in favour of late Kedar Nath Banerji, father of the plaintiffs-respondents, for Rs. 2,90,000 carrying interest at Re. 1 per thousand per annum. The circumstances according to the plaintiffs, under which the handnote was executed are as follows: Raja Durga Prasad Singh, late proprietor of the impartible Jharia Raj, died in March 1916, leaving three widows: Rani Prayag Kumari Debi, Rani Subhadra Kumari Debi (since deceased) and Rani Hem Kumari Debi, and several agnatic relations including the defendant. According to the rule of lineal primogeniture by which the succession to the estate was governed the defendant succeeded Raja Durga Prasad Singh. On 6th March 1919, the three Ranis aforesaid filed a suit (Title Suit No. 48 of 1919) in the Court of the Subordinate Judge of Alipore against the defendant claiming the Jharia Estate and other properties left by their husband with mesne profits. The plaintiffs' father, late Kedar Nath Banerji, looked

after that litigation in its various stages on behalf of the Ranis. The trial Court decreed the suit in part and both parties appealed to the High Court at Calcutta. The appeals were disposed of by the High Court on 17th August 1925 and the suit was remanded to the trial Court. Against the decision of the High Court both parties preferred appeals to the Privy Council which were disposed of in April 1932. The suit was remitted to the High Court on certain matters and was finally disposed of by its decree dated the 11th August 1933. Under this decree, the defendant was liable to pay to the Ranis Rs. 20,04,526.5.0 for mesne profits etc. Both the parties then applied for leave to appeal to the Privy Council. In the meantime, the Ranis applied to the Alipore Court for transfer of the decree for Rs. 20,04,526.5.0 to the Subordinate Judge's Court at Dhanbad for execution. The parties however entered into compromise on 22nd February 1934 which terminated the litigation. In the course of that litigation the plaintiffs' father Kedar advanced to the Ranis various sums, from time to time, for litigation expenses for which they executed a mortgage bond in his favour on 5th June 1929 for three lacs of rupees. By the terms of the aforesaid compromise it was agreed between the two surviving widows Rani Prayag Kumari and Rani Hem Kumari on the one hand and the defendant on the other that the latter would pay to the former, in full satisfaction of their claims, eighteen lacs of rupees out of which he undertook to pay Rs. 4,40,000 to some of their creditors including Kedar who was entitled to get Rs. 2,90,000 from them under the said mortgage. In the compromise petition, the Ranis gave credit to the defendant for the said sum of Rs. 4,40,000 and for the remaining Rs. 13,60,000 payable by the defendant directly to the Ranis, provisions were made for payment by instalments. Accordingly, the defendant, in consideration of credit having been given to him by the Ranis in the compromise petition, executed in favour of Kedar the handnote in question for Rs. 2,90,000.

The defendant is said to have paid on repeated demands Rs. 7,100 only in several instalments towards the dues on the handnote. The claim has been laid at Rupees 2,83,550. The defendant contested the suit on the grounds inter alia that the handnote in suit was without consideration and obtained by undue influence. It is alleged that it was at the instigation of Kedar that

the Ranis brought the Title Suit No. 48 of 1919, that the Ranis who were pardanashin ladies were completely under the influence of Kedar, that he had never advanced any money to them for the litigation expenses, that the mortgage bond executed by them in his favour on 5th June 1929 was without consideration and was obtained by undue influence, that at the time of the compromise the defendant had to agree to have the names of Kedar and two others entered as creditors as they created a situation in which the negotiations for the compromise would have fallen through, if their names were not so entered, and the amounts of their dues were not so entered, and the amounts of their dues were mentioned in the compromise on their mere allegation which the defendant was compelled to accept for the time being as correct and that the defendant in order to persuade Kedar not to dissuade the Ranis from entering into compromise had also to pay him Rs. 60,000 in cash at the time of the compromise.

The learned Subordinate Judge who heard the suit has decreed it, overruling the various defences raised. Hence this appeal by the defendant. Mr. P. R. Das, the learned counsel for the appellant, has urged the following points: (1) That the handnote was executed under undue influence exercised by Kedar. (2) That the handnote was without consideration. (3) That the suit as framed being based on a novated contract, the plaintiff must establish, firstly, that the original debt in fact existed, or in other words that the mortgage bond dated 5th June 1929 executed by the Ranis in favour of Kedar was for consideration, and Rupees 2,90,000 was due on that mortgage at the time of the novation; and secondly, that Kedar extinguished that debt. (4) That the novated contract, having been entered into after breach of the terms of the original contract, was bad in law and is therefore unenforceable. I shall deal with these points in the order in which they have been mentioned.

Point No. (1).—Undue influence has been defined in S. 16, Contract Act, as follows:

A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

The onus of proving that the handnote in suit (Ex. 1) was executed under undue influence undoubtedly lay upon the defendant. He must therefore establish that his

case comes within the purview of S. 16 just quoted. Here I should do well to reproduce the handnote (Ex. 1) which runs as follows:

On demand I, Shiba Prasad Singha of Jharia, District Manbhum, promise to pay to Babu Kedar Nath Banerjee of Jharia or order the sum of rupees two lacs ninety thousand (Rs. 2,90,000) only with interest thereon at Re. 1 (one rupee) per one thousand per annum for value received as per memo below :

Rupees 2,90,000 being the amount due to the said Babu Kedar Nath Banerjee from Rani Prayag Kumari Debi and Rani Hem Kumari Debi of Jharia which upon my undertaking to pay off has been credited by them in the decree obtained by them against me in T. S. No. 48 of 1919 in the First Court of Subordinate Judge at Alipore, as per compromise petition of even date filed in the said Court.

(Sd.) Shiba Prasad Singha. 22.2.34.

The handnote thus specifically refers to the compromise petition (Ex. 2) of the same date, that is 22nd February 1934. The petition was filed in Court on 25th February. The compromise was duly recorded by the Court and admittedly it has been acted upon. The arguments addressed by Mr. Das on the question of undue influence may be summarized as follows. Kedar was the Private Secretary of the previous Raja Durga Prasad Singh and after his death became the Private Secretary of the defendant. While he was in the defendant's service in that capacity he, with selfish motives of his own, instigated the Ranis to bring the Title suit of 1919 against the defendant. It was a frivolous suit because the defendant had succeeded to the estate and came into possession of it in 1916 without any opposition from the Ranis. Kedar was dismissed from the defendant's service in or about August 1919 and then he openly took the side of the Ranis and carried on the litigation on their behalf. Throughout the course of that litigation the defendant was always anxious to meet the Ranis face to face with a view to bring about a settlement. The Ranis were then living in Calcutta and Kedar, who had complete control over them, persistently thwarted all attempts at compromise and did not allow the defendant even a chance of meeting the Ranis. The suit was eventually dismissed so far as the claim to the impartible Jharia Raj was concerned; but it was decreed with regard to some other properties including some moveables which were found to be the separate acquisitions of the deceased Raja. While the appeals to the High Court were pending, the Ranis executed the trial Court's decree and got possession of the properties decreed. After the decision of the Privy Council by

which the decrees of the trial Court and the High Court were varied in some respects the defendant applied in the Alipore Court for restitution claiming by way of mesne profits about four lacs of rupees. On the other hand the Ranis' claim for mesne profits in the original suit itself having been decreed for Rs. 20,04,526.5.0 by the High Court on 11th August 1933 after remand from the Privy Council, both parties applied for leave again to appeal to the Privy Council.

In the meantime the Ranis applied to the Alipore Court for transfer of the decree for Rs. 20,04,526.5.0 for execution to the Subordinate Judge's Court at Dhanbad. When the defendant's application for restitution and the Ranis' application for transfer of the decree were pending in the Alipore Court and also the application for leave to appeal to the Privy Council with regard to mesne profits were pending, the defendant was obliged to agree to a compromise on the terms dictated by Kedar. The defendant apprehended that if the Ranis' decree for over twenty lacs of rupees was transferred to Dhanbad and was executed there his whole estate was likely to be sold up. So then on the evening of 21st February 1934 it was proposed on behalf of Kedar who was then lying ill in Calcutta that the defendant would have to pay Rupees 60,000 in cash immediately and would have to execute a handnote for Rs. 2,90,000 in favour of Kedar failing which there could be no possibility of any compromise; the defendant had to agree to the proposal. Accordingly he paid Rs. 60,000 in cash on the night of 21st February 1934 and on the following day he executed the handnote (Ex. 1) in favour of Kedar and also signed the compromise petition (Ex. 2). If the defendant could be allowed to meet the Ranis he could have obtained far more favourable terms. By virtue of the position which Kedar acquired in relation to the Ranis he was in a position to dominate the will of the defendant and by using that position he obtained from the defendant not only the handnote in suit but also Rs. 60,000 in cash. As regards the handnote, the consideration of Rs. 2,90,000 was no doubt credited by the Ranis; but if this sum of Rs. 2,90,000 had to be paid directly to the Ranis it would have formed part of the stipulated instalments and in that case, would have been payable after a long time. The facts involved in these arguments refer partly to the period before the

final decree in the suit was passed by the High Court on 11th August 1933 and partly to the period following that date and ending with 22nd February 1934 when the handnote in suit was executed. In this suit we are concerned with the latter period and particularly with the events that immediately preceded the execution of the handnote in question.

In support of his argument that the Ranis were entirely under the influence of Kedar, Mr. Das has referred mainly to a series of letters (Ex. C series) written by Kedar between 20th July 1919 and 29th August 1921 to his elder brother Ramkalpa Mahatha, now dead. To have an idea of these letters it will suffice to refer to two of them, namely Ex. C and Ex. C (3). Ex. C which is dated 20th July 1919 contains the following passage :

Please tender my blessings to Baneswar and showing this letter to him please tell him that he will not only get expenses for a year but besides that in case the case succeeds he will get one hundred bighas of coal land. If he loses his service, we shall pay him his wages. I am responsible for this.

Baneswar referred to herein was the Raja's record keeper. Ex. C (3) which is dated 9th April 1920 runs as follows :
Respects,

I have received your letters by post and through Mohan Singh and the telegrams as well and submitted the same to the Rani Sahebas. Raman has come here, but he has not been able to do anything. Day before yesterday the Raja was standing before the door of the lodge of the Ranis from 7-30 to 8-30 P. M. and tried his best to enter inside. None of the sepoys allowed him to go and the Rani Sahebas did not at all take any information. Srikantha Babu wanted to see him. But the Ranis having forbidden him he too could not come down-stairs or see him (Raja). As I was not well I was not in the house of the Ranis at that time. But already I have made all the arrangements . . . Raja was insulted in such a manner that feelings are estranged to the extreme. Now God is the only hope. I shall inform from Court the result of the case tomorrow. I hear that some people have given some hope that the Raja will try once more. Let me see what happens

Respectfully yours,
(Sd.) Kedar.

Raman Babaji is trying his utmost but he won't be able to do anything. You rest assured that I have already made arrangements regarding it. I have written a letter to Ashu Babaji. What will Raman do with demi papers? In the long run he will be imprisoned for forgery. The signature of a pardanashin lady is nothing. After I finished this letter I received your letter of yesterday. Maharani has not come. Raman has come no doubt. But seeing the attitude of (torn) Srikantha Babu and the Ranis he is unable to join him.

A perusal of all the letters no doubt leaves an impression that Kedar who was

admittedly looking after the litigation on behalf of the Ranis at least since after he left the defendant's service, had great influence over the Ranis and wanted to frustrate all attempts on the part of the defendant to bring about a compromise. On the question whether Kedar actually instigated the suit these letters throw no light. On this point, Mr. Das however relied upon the evidence of Harakali Bose (D. W. 6) which is said to be supported by the accounts (Ex. P series). The learned Subordinate Judge has not accepted Harakali's evidence and we do not find any sufficient reasons to take a different view. But even assuming that what Harakali Bose said is true, namely that Kedar went to him and asked for his help in the Jharia succession suit, to be filed by the Ranis, all that can be said is that Kedar was helping the Ranis from the very commencement of the suit. It does not follow that Kedar actually instigated that suit. But to my mind the questions whether Kedar instigated the institution of the suit and whether he exerted his influence over the Ranis so as to prevent any compromise between them and the defendant before the decree dated 11th August 1933 are not at all relevant for the purpose of this suit. Let us consider how matters stood when the handnote in suit was executed. At that time the Ranis' application for transfer of the decree for over twenty lacs of rupees was pending in the Alipore Court. This application had been filed on 30th October 1933 (*vide* Ex. 3c). In November 1933 there was a talk of compromise and the terms were practically settled and embodied in a draft petition (Ex. F) which was approved by the defendant's pleader, Mr. H. K. Banerji, on 29th November 1933. But this compromise fell through as the defendant backed out under the advice of his Calcutta counsel, as he says. Under the draft compromise (Ex. F) the defendant was to pay to the Ranis nineteen lacs of rupees and the terms, as set forth therein, were more onerous than those of the subsequent compromise dated 22nd February 1934. He was also to give some coal lands to Kedar as a condition of the compromise under Ex. F. The defendant says in his evidence that one and half month after that compromise fell through talks were revived. He further says:

Kedar's demand was Rs. 60,000 and a handnote for Rs. three lacs as due from Ranis The Ranis were to get Rs. eighteen lacs. When so told,

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I said I would consider ; 20-25 days after, Ambica Babu sent word that Jagat had come and that I should go with Rs. 60,000; I then came with this sum to Ambica's house.

Again he says :

I was considering the terms myself, so did not seek legal advice in Calcutta; the matter I consider to be important; for 10-15 days I was seriously thinking over the matter; I concluded that it would be good if compromise could be effected on terms offered to me.

He also says :

On 21-2, Jagat and later (Ambica) told me so ; i.e., about the 3 handnote moneys being so credited ; I agreed ; I did not object to execute handnote in suit; nor that I was executing it, in days before the lawyers; none forced me to do so; I willingly (*khusite*) executed it. Jagat read over the compromise; I willingly executed it; Ranis are being regularly paid under it ; I am ready to act under it in its entirety.

It should be noted here that Jagat referred to in the evidence was the Ranis pleader and also represented Kedar who was then lying in Calcutta, and Ambica was the pleader of the defendant at Dhanbad. This Ambica Babu has been examined as D. W. 4. He says :

At that time he (defendant) was under no influence or compulsion, i.e. at execution of the handnote and the compromise. Raja agreed to pay Rs. eighteen lacs to the Ranis.

He further says:

Draft was being prepared by his pleaders of their own accord; between 2 to 9 days after information to Raja (defendant) the draft formed basis of Ex. 2, with additions and alterations.

Exhibit 2, it should be remembered, is the compromise petition dated 22nd February 1934. From all these statements, it is obvious that the defendant was anxious for a compromise and when the terms were offered to him he was considering them himself and also took the advice of his legal advisers in regard to them. He rejected the terms of the draft compromise (Ex. F) and when he was offered better terms he accepted them and ultimately agreed to the compromise as embodied in the petition (Ex. 2). This petition was signed by three of his pleaders at Dhanbad, namely Hrishikesh Banerji, Ambica Charan Mullick and Charu Chandra Biswas. It was also signed by Jatindra Nath Mullick, pleader, and Gunendra Nath Roy, advocate, both of Dhanbad. In these circumstances, I fail to see how Kedar could be said to be in a position to dominate the will of the defendant. The parties, viz. Kedar on the one hand, and the defendant on the other, were at arms' length. Kedar offered certain terms which were considered by the defendant and accepted by him. Mr. Das has argued with great vehemence

that the defendant accepted the terms as he had no other option. If this be the test, then almost every compromise in a litigation is liable to be attacked as vitiated by undue influence. The defendant being his own master thought over the matter seriously for 10-15 days and then decided to accept the terms offered. Mr. Das had laid much stress upon the fact that the defendant had to pay Rs. 60,000 in cash to Kedar for effecting the compromise. But this Rs. 60,000 is outside the terms of the compromise petition (Ex. 2). Ambica Babu (D. W. 4) himself says that Rs. 60,000 was not mentioned in Ex. 2 as it had no concern with it. We must consider the compromise petition with reference to its own terms. If we find that the defendant willingly agreed to the terms of the compromise, as set forth in the petition (Ex. 2), it does not matter whether willingly or unwillingly he agreed to pay Rs. 60,000 to Kedar or whether that payment was legal or illegal. We are informed that the defendant has already instituted a separate suit against the plaintiffs for refund of this sum of Rs. 60,000, and we must therefore, refrain from expressing any opinion with regard to the payment of that sum which may prejudice the trial of that suit. It will suffice for our present purpose to say that, so far as the terms of the compromise as embodied in the petition (Ex. 2) are concerned, the defendant voluntarily accepted them and he also voluntarily executed the handnote in suit (Ex. 1). As regards the compromise, the defendant himself admits that he is ready to act under it in its entirety. It has been contended by Mr. Das that the defendant might have voluntarily accepted the compromise and signed the petition (Ex. 2), but he did not voluntarily execute the handnote in suit. This is a distinction which I am utterly unable to appreciate. The handnote forms a part of the compromise and is specifically referred to in the petition (Ex. 2) and the amount of its consideration was credited against the total amount of 18 lacs of rupees which was payable by the defendant to the Ranis under the compromise.

Further, the matter is clinched by the defendant's own admission that he willingly (*khusite*) executed a handnote. The vernacular word *khusite* is very expressive and excludes the idea of any outside influence. To explain away this admission, Mr. Das has very ingenuously argued that when on the evening of 21st February 1934 the

defendant was told by way of an ultimatum that compromise was possible only if he immediately paid Rs. 60,000 to Kedar, his will was overcome and he had to accept the terms in a state of utter helplessness and once having done so, his freedom of consent was gone and therefore, when on 22nd February 1934, he signed the compromise petition and executed the handnote, he did so while he was still under the stupor of the influence already caused and not as a free consenting party, though he voluntarily set his hand on those documents. But, it must be remembered that the compromise which was concluded on 22nd February 1934 was preceded by negotiations which were going on since the previous January and terms had already been offered by Kedar which were being considered by the defendant. In this connexion I may refer to the following statements of Ambica Babu, (D. W. 4) :

The negotiations of 1933 November fell through as defendant's counsel advised him, not to accept the terms Talks were revived in January 1934, Jagat came again and spoke to me of compromise; I saw Raja about it; in result, I went to Calcutta and saw Kedar at end of January or beginning of February; I knew that unless he agreed to the terms, no compromise was possible, he had absolute control over the litigation; Jagat was there, when I talked with Kedar; Jagat opened the subject of compromise. Kedar said it was no use, as his terms were not accepted, i. e. of November 1933; after discussions, he agreed to compromise, if Raja paid him Rs. one lac, in place of proposed lands, finally he agreed at Rs. 60,000, he spoke about his dues under a mortgage, from Ranis and also of claims of Jagat and Nagen, i. e. if Raja paid up dues of these three persons, he would see that Raja got credit for the same. He said that if Raja refused to pay these three lacs, Rs. 50,000 and Rs. 100,000 were stated to be dues of other two respectively; I said that I would inform Raja I came away and informed defendant, of the terms. Raja said that he would consider, some drafts were being prepared, meanwhile; on 21st February Jagat came to my house, while I was talking over the compromise with Beni Tewari, between 6 and 7 P. M. Jagat wanted the matter to be finished, just then, if not, compromise would never be effected; he said that Rs. 60,000 must have to be deposited that very night and that as cash payment was not possible, the Raja must execute handnotes in favour of said three creditors, by the next day, before the compromise was signed; he also said that Ranis were to be paid rupees eighteen lacs minus these three sums; and that unless these terms were immediately accepted, there would be no compromise.

Thus, it appears that the terms including the payment of Rs. 60,000 that were offered to the defendant on the evening of 21st February 1934 were not at all new to him and he had already sufficient time to consider them. Under the terms of the

draft compromise (Ex. F) of 1933, the defendant was to pay nineteen lacs of rupees to the Ranis. Under the present compromise the amount was reduced to eighteen lacs, payable in more easy instalments, out of which credit was to be given to the defendant to the extent of the sums which he was required to pay to Kedar, Nagen and Jagat as demanded by Kedar. As it was not possible for the defendant to pay the sums to these three persons in cash which were settled at Rs. 4,40,000 he was given the option to execute three handnotes in favour of those persons. As against the additional sum of Rs. 60,000, which had to be paid to Kedar for effecting the compromise his original demand at the time of the previous negotiations in November 1933 was 100 bighas of coal lands. In January 1934, when negotiations were revived, Kedar had first wanted one lac of rupees and eventually he came down to Rs. 60,000. The defendant had sufficient time to think over the matter and when on the evening of 21st February 1934 he found that the terms that were offered to him were more favourable to him he readily agreed to them. A draft of the compromise petition had already been made, and it was completed and executed on 22nd February 1934, and at the same time the handnote in suit was executed. Under these circumstances I find it extremely difficult to hold that the defendant executed the handnote in suit under undue influence.

On these findings of fact no question of law arises, but, in deference to the argument of Mr. Das, I should here deal with a case cited and most strongly relied upon by him, *viz.* 1 I A 241.¹ According to his contention this case lays down certain principles which may appropriately be applied to the present case. The facts of that case were briefly these. The zamindar of an estate called Marungapuri, died leaving three childless widows and a minor undivided half-brother. Immediately upon his death his brother was recognized by the authorities as zamindar in September 1864 and the Collector took charge of the zamindari under the Court of Wards Act, the widows accepting some allowance from the Collector for their maintenance. In the year 1866 however, they discontinued their receipt of maintenance and set up a claim to the zamindari on the ground that the half-

brother was of illegitimate birth, and that they were entitled to it by inheritance; and, on 21st December 1866, notwithstanding a prohibition of dealings with them issued by the Collector under the Court of Wards Regulation, 1804, they entered into an agreement with a certain banker who was to finance them in the intended litigation and also to meet their maintenance expenses. On 6th May 1867 the widows executed in favour of that banker, a bond for Rs. 20,000 payable with interest at one per cent. per annum. In September 1868, the banker instituted a suit in the name of Lekhamani, the senior widow, against the Collector as the agent of the Court of Wards and representative of the minor zamindari's estate, for the recovery of the zamindari and other properties. The zamindar, who had then just come of age, was put in possession of the zamindari by the Collector on 23rd July 1869. Lekhamani immediately, on 28th July 1869, applied to the Court to make the zamindar a party to the suit, and he was made a defendant on 2nd August 1869. On the application of Lekhamani commission was issued to take the evidence of the three widows and the late zamindar's sister in their palace. The Commissioners arrived at Marungapuri on 11th August 1869. Immediately after the arrival of the Commissioners, Lekhamani proposed to the defendant that the suit should be settled, whereupon he executed a razeenamah by which he assigned certain villages to the widows for their maintenance, and he also at the instance of the banker, executed in his favour a bond for Rs. 67,000 the material part of which was as follows:

With reference to the dealings which you had heretofore held with Lekhamani and others, widows of my elder brother Tirumalai Poochal Naiker, the late zamindar, on account of their maintenance and Court costs, as per a loan bond for Rs. 20,000, and an agreement for Rs. 1,00,000, the accounts being adjusted up to date, the sum which was found due by them, and which alone was assigned to be paid by me is Rs. 67,000. As I have undertaken to pay you the same, I hereby bind myself to pay you the said sum of Rs. 67,000 within 30th September of the current year, and get back this bond, and the bond and agreement above referred to on failure to pay the money within the above prescribed time, I bind myself to pay you on demand the said sum of Rs. 67,000 with interest at one-half per cent. per mensem, and receive back this and the aforesaid bonds.

The razeenamah was presented to the Court, but on the objection of the counsel, who had at first appeared for the Collector acting as guardian and then for the zamin-

1. Chidambara Chetty v. Renga Krishna Muthuvira Puchaiya Naikar, (1878-74) 1 I A 241=22 W R 148=13 Beng L R 509 (P O).

dar (defendant), it was rejected by the Court and the litigation proceeded through all the usual stages irrespective of the razeenamah. The banker then sued the zamindar to enforce the bond for Rs. 67,000. The latter resisted the suit on the ground that the bond had been obtained from him by threats and fraud and without consideration, just upon his attaining majority, and in the absence of any legal advice. The trial Judge dismissed the suit holding that the bond was obtained from defendant under undue influence and threats and was without consideration. There was an appeal to the High Court which was dismissed and a further appeal to the Privy Council was also dismissed. The following passages, from the judgment of their Lordships of the Judicial Committee, were relied upon by Mr. Das:

What was really the position of the parties? Here was a man who had originally nothing at all to do with this family. All the members of the family appear at first to have been agreed that this young boy was the true heir to the zamindari. The widows afterwards, then, either of their own mere motion, or at the instigation of the plaintiff or his agents, determined to dispute that title. They next deprived themselves of all freedom of action with respect to the suit which they thought fit to bring, by giving the interest and the powers which are given by the agreement B to the plaintiff It is sufficient for them to say that they are dealing with a person who had got up, or at all events intervened, in a suit with which he had no necessary concern; who had made himself dominus litis in that suit, and had acquired over the plaintiffs in it the power of preventing them from doing what they felt to be right and just; and from interested and corrupt motives was exercising that power. The zamindar must be taken to have been the legitimate heir; and even if the widows had bona fide entered into the litigation to dispute that legitimacy, it is perfectly clear that at the time when this transaction took place they had come to a better mind, and had satisfied themselves that the right thing as regarded the boy and as regarded the family was to acquiesce in his title, to admit his legitimacy, and to allow him to remain zamindar.

Their Lordships think it would be contrary to every sound principle of justice and of policy to permit a person who had acquired this sort of irregular interest in a suit, and a power which cannot be safely conceded to any speculator, to make his power of preventing a family arrangement so just and proper from being carried into effect, the means of extorting a large sum of money from the person whose title had been unjustly challenged. The case however does not rest here. The transaction was not one entered into between two persons each of whom was capable of taking care of himself. Here was a boy of eighteen without proper counsel or assistance, for such of his servants as gave him any advice thought with him, that he should do nothing until he could see the Collector; and his vakeel, who is represented as his legal adviser in the matter, disowns having

given him any counsel, and has been treated as having failed in his duty in refusing that counsel. There is moreover clear evidence that he was threatened with the consequences of not immediately acquiescing in the plaintiff's demand; that these threats were addressed by a powerful man to a boy, and were therefore likely to disturb his mind and render him incapable of acting as a free agent. Whoever has had to do with litigation in India must know that such threats are of far greater weight there than they would be in this country. This suit was one in which the legitimacy of the respondent was called in question; and the person threatening was a person conversant with law-suits, a person of great wealth and great power; and we all know how easy it is in India, upon such an issue as that, to get up any amount of false evidence, and that it is not because a man has a true case that he is sure to bring it to a successful issue. Their Lordships think the Judges of the High Court have rather understated the case when they treated the threats as threats only of consequences perfectly legal; for (putting aside the threat as to suing on the note for Rupees 62,000, which is not so satisfactorily proved as the others) they think that the threats proved may well be taken to be threats of carrying on the litigation against the respondent *per fas aut nefas*. In any case they were threats which overcame his free will, and induced him, contrary to his own judgment and his own sense of right, and without any evidence that any such sum as was claimed was due, to execute the bond extorted from him.

To my mind, the facts of the above case are easily distinguishable from those of the present. There the razeenamah was repudiated by the defendant and was not accepted by the Court and all the Courts found as a fact that the defendant was a boy of eighteen and the bond in question was extorted from him by threats which overcame his free will. In the present case, as I have already pointed out, the defendant was his own master and exercised his own judgment in considering the propriety or otherwise of the terms of the compromise that were offered to him by or on behalf of Kedar. The compromise was recorded by the Court and the defendant frankly admits that he is ready to act under it.

Point No. (2).—It has been contended by Mr. Das that the real consideration for execution of the promissory note in question was the satisfaction of the debt of Rs. 2,90,000 said to be due by the Ranis to Kedar and therefore it was for the plaintiffs to establish that this alleged debt of Rs. 2,90,000 was actually due from the Ranis to Kedar. On the other hand, it has been argued by Sir Sultan Ahmad that under S. 118, Negotiable Instruments Act, (Act 26 of 1881) the promissory note must be presumed to have been executed for consideration, unless the contrary is proved, and that the fact that the defendant got

credit for Rupees 2,90,000 from the Ranis under the compromise (Ex. 2) was sufficient consideration for the promissory note. The execution of the promissory note being admitted, S. 118, Negotiable Instruments Act, undoubtedly raises a presumption that it was for consideration and it was for the defendant to prove that it was not so. The promissory note itself recites that Rupees 2,90,000 was due to Kedar from the Ranis and this recital is also supported by the compromise (Ex. 2) by which the Ranis themselves admitted that that amount was due from them to Kedar under the registered mortgage bond dated 5th June 1929 (this date being the date of registration). The compromise, as I have already stated, was recorded by the Court and it was never challenged by the Ranis. We must therefore for the purpose of this case, take it for granted that the Ranis did in fact owe Rs. 2,90,000 to Kedar. Admittedly, by the terms of the compromise (Ex. 2) the Ranis gave credit to the defendant for Rs. 2,90,000 and it was really in consideration of this credit having been given that the defendant executed the promissory note in question in favour of Kedar. Consideration has been defined in Sec. 2, cl. (d), Contract Act, as follows :

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

It is therefore clear that the consideration for a promise need not necessarily move from the promisee but may move from a third party. In the present case, the consideration for which the defendant executed the promissory note moved from the Ranis inasmuch as they gave credit to him for Rs. 2,90,000. It has however been argued by Mr. Das that the definition requires that the consideration must have moved "at the desire of the promisor." This element, it is said, is wholly absent in the present case, because the evidence on the record shows that the defendant never had any talk with the Ranis and it was far from his desire to execute the promissory note in favour of Kedar who was his enemy and ruined him, as he thought. It is to be remembered that the compromise was effected at Pargha, the residence of the Ranis, but even assuming that the defendant never met the Ranis and that the negotiations were carried on entirely through Kedar as representing the Ranis,

we must consider the whole transaction in its broad aspect. The facts which are clearly established are that the defendant was most anxious for a compromise in order to save his Raj from a threatened execution sale, and that Kedar on behalf of the Ranis had offered certain terms which were accepted by the defendant. One of the terms was that the defendant should pay Rupees 2,90,000 to Kedar ; but as he had no cash in hand to pay it, he executed the promissory note in question. Considering all these facts together, there is hardly any room for the contention that it was not at the desire of the defendant that the Ranis gave credit for Rs. 2,90,000 in consideration of which he executed the promissory note in favour of Kedar. The promissory note also clearly recites that it was upon the defendant's undertaking to pay off the debt of Rupees 2,90,000 due to Kedar from the Ranis that the latter gave credit to the defendant for that amount. This suggests that the credit was given by the Ranis not gratuitously or voluntarily but at the desire of the defendant who undertook to pay off their debt to Kedar. To my mind, the conditions laid down in the definition of consideration in S. 2, cl. (d), Contract Act, are satisfied and it must be held that the promissory note (Ex. 1) was for consideration. On the question of consideration however the main argument advanced by Mr. Das is that the promissory note being a novated contract, the case comes directly under S. 62 of that Act under which the discharge of the old debt is the consideration. This forms the subject of the next point which I shall now deal with.

Point No. (3).—Mr. Das's argument on this point is based on the following allegations in paras. 11 and 12 of the plaint :

11. The plaintiff's father, the late Kedar Nath Banerjee was, as one of the said creditors, entitled to Rs. 2,90,000 from the widows and the defendant with the mutual consent of the said widows and the plaintiff's father agreed to repay the same as stated in the said petition of compromise whereby he was given credit for the said sum of Rupees 4,40,000 being the amount of debts including the said debt due to the plaintiff's father which the defendant undertook to repay. 12. Accordingly, on 22nd February 1934 the defendant in consideration of credit having been given to him as stated in the said petition of compromise executed in favour of plaintiff's father, Kedar Nath Banerjee, since deceased, a promissory note for Rs. 2,90,000 agreeing to pay the same on demand with interest at the rate of Re. 1 per thousand per annum. The said promissory note is filed herewith.

It has been argued that the plaintiff's case, as thus made out in the plaint, is that

there was a tripartite agreement between Kedar, the Ranis and the defendant, as a result of which the promissory note (Ex. 1) was executed by the defendant in favour of Kedar as a novated contract whereby the previous contract, namely the mortgage in favour of Kedar was discharged, the mortgage being specifically referred to in para. 9 of the plaint. It has then been argued that the plaintiff, having thus sued upon a novated contract, must establish, firstly, that the previous mortgage debt in fact existed and, secondly, that Kedar extinguished that debt. To accede to this argument will be, to my mind, putting a narrow construction upon the plaint. The suit is based purely on a promissory note and sets out the circumstances which led to its execution. The consideration for its execution however is clearly stated to be that the Ranis gave credit to the defendant for the sum of Rs. 2,90,000 under the terms of the compromise. This consideration is also recited in the promissory note. The execution of the promissory note being admitted the only relevant question for determination, apart from the plea of undue influence already discussed, is whether there was consideration for it. The necessary considerations relating to a novated contract do not therefore properly arise in this case. However, as the matter has been argued at some length, I propose to deal with it. Mr. Das, in support of his contention that in a suit based on a novated contract the plaintiff must prove: (1) the existence of liability under the original contract and (2) the extinguishment of that liability by the novated contract, referred among other cases to (1824) 107 E R 853² and (1882) 7 A C 345³ at page 351.

This proposition need not be disputed and is also recognized in Sec. 62, Contract Act. To appreciate Mr. Das's argument, it is necessary to mention certain facts. The previous mortgage bond (Ex. 12) was executed on 29th May 1929 by the three Ranis in favour of Kedar for three lacs of rupees. The mortgage bond recites that Kedar had advanced large sums to the Ranis from time to time in the course of the litigation which was started by them in 1919, that after taking account it was found that Rs. 2,24,719 was the total amount advanced from 1921 up to the end

of 1927, that the interest on this amount after remission came to Rs. 75,281 and that thus the total amount of principal and interest came up to three lacs of rupees for which the mortgage was executed. The sum of Rs. 2,24,719 had been previously acknowledged on 25th July 1928 by the eldest Rani, Srimati Prayag Kumari Debi, in the account book of Kedar which she signed, Ex. 17 (a). The amount said to have been advanced by Kedar to the Ranis and the expenses incurred in the litigation were entered in two account books, one containing Exs. 16 and 16 (a) and the other containing Exhibits 17 and 17 (a). These account books were produced in Court on behalf of the Ranis on being summoned by the plaintiffs. With reference to these accounts, Mr. Das attempted to show that the Ranis were in possession of sufficient funds and no money was ever actually advanced to them by Kedar and that the acknowledgment, Ex. 17 (a) and the mortgage bond, Ex. 12 were wholly without consideration and were obtained by Kedar from the Ranis who were pardanashin ladies under his absolute control. Admittedly Kedar was looking after the litigation on behalf of the Ranis and he was undoubtedly accountable to them for the moneys which he received or spent on their behalf in that litigation. But that is a matter between him and the Ranis. In this suit in which the Ranis are no parties nor have come forward to repudiate the transactions it seems unnecessary to undertake the examination of the accounts, Exs. 16-16 (a) and 17-17 (a). The fact remains that the Ranis did execute the mortgage bond Ex. 12 for three lacs of rupees and they (the surviving two of them) admitted their liability under that mortgage to the extent of Rs. 2,90,000 in their compromise (Ex. 2) which was recorded by the Court. So long as that compromise stands it must be treated as binding on the parties. That being so, it is futile for the defendant to contend that the mortgage was without consideration or that nothing was due on it.

Mr. Das has argued that the Ranis being pardanashin ladies completely under Kedar's control it was for the plaintiffs, who wanted to rely upon the mortgage executed by the Ranis, to establish that they fully knew and understood the contents thereof and had independent advice. This argument might have been perfectly valid if the suit had been brought to enforce the mortgage against the Ranis. The pro-

2. *Cuxon v. James Chadley*, (1824) 3 B & C 591 = 107 E R 853.

3. *Scarf v. Jardine*, (1882) 7 A C 345 = 51 L J Q B 612 = 47 L T 258 = 30 W R 898.

tection afforded by the Courts to pardanashin ladies in respect of transactions entered into by them is their personal privilege which can be claimed only by them or persons claiming through them title to any property affected by the transaction. Upon the facts of the present case, it is a matter of no concern to the defendant whether the Ranis owed any money to Kedar on the mortgage. The defendant was to pay eighteen lacs of rupees to the Ranis and out of that amount they gave him a credit for Rs. 2,90,000 on his undertaking to pay that amount to Kedar which but for the arrangement would have gone to them. Whether in fact Rs. 2,90,000 was due to Kedar on the mortgage was a matter which could arise only between him and the Ranis. The defendant is not at all affected by the mortgage transaction and it does not lie in his mouth to challenge the passing of its consideration. Mr. Das has referred to certain decisions in which it has been held that it is open to a third party to impugn a mortgage which is sought to be enforced against him. Those decisions have no application because in the first place this is not a suit to enforce the mortgage and in the second place the defendant is not affected by the mortgage. In my view, it must be assumed for the purpose of the present suit that the Ranis owed Rs. 2,90,000 to Kedar at the time of the compromise (Ex. 2).

On the question whether Kedar extinguished the mortgage debt, Mr. Das's contention is that there is no proof of this having been done. Admittedly no endorsement of satisfaction was made on the back of the mortgage bond. The plaintiffs however have adduced evidence to show that the mortgage bond was returned to the Ranis after the execution of the promissory note (Ex. 1). This evidence is no doubt open to criticism as pointed out by Mr. Das, because, in the circumstances, it was not likely for a shrewd man like Kedar to part with the mortgage bond which would be regarded as good evidence in support of the compromise in so far as it related to his dues in case it was ever challenged by the Ranis on the ground of fraud or undue influence practised by him. But the fact that neither the bond was returned nor an endorsement of satisfaction was made is hardly of any consequence because the promissory note taken along with the compromise petition (Ex. 2) leaves no room for doubt that the arrangement between Kedar, the Ranis and the defendant was that Kedar would

accept the promissory note in satisfaction of his mortgage dues from the Ranis. In this connexion para. 2 of the compromise petition (Ex. 2) is relevant; it is as follows:

That out of the said eighteen lacs of rupees the defendant has paid this day to the plaintiffs, rupees two lacs (Rs. 2,00,000) in cash, and hereby the plaintiffs acknowledge receipt of the said two lacs of rupees. Besides this, out of the personal debt of the plaintiffs, the defendant has settled only four lacs forty thousand rupees (Rs. 4,40,000) confronting the creditors, described in Sch. (ka) below, and taken upon himself the liability therefor to them; and the creditors too having got a deed (handnote) from the defendant have absolved the plaintiffs from the liability and the debt of the said amount. Therefore, the plaintiffs have received from the defendant the aforesaid four lacs forty thousand rupees and hereby acknowledge to have received the said amount from the defendant. Hence out of the said eighteen lacs of rupees (Rs. 18,00,000), the plaintiffs have received rupees six lacs forty thousand and the sum of rupees eleven lacs and sixty thousand remain due to the plaintiffs from the defendant.

There is thus a definite recital in the compromise petition that the Ranis' creditors, one of them being Kedar, had absolved the Ranis from their liability to them. It has however been argued by Mr. Das that the compromise petition which was signed on 22nd February 1934 must have been written some time earlier and was not actually filed in Court till 25th February 1934 and that therefore the recital that "the creditors too having got a deed (handnote) from the defendant have absolved the plaintiffs from the liability and the debt of the said amount" means nothing more than that the creditors had agreed to absolve. In support of this contention, reference was made to 35 L T 811⁴ in which the question for consideration was whether when in a deed of conveyance there was a recital that the consideration money was paid though in fact it was not paid, a covenant for payment of the consideration would be implied. This question has no bearing on the present case. It has also been argued by Mr. Das that Kedar was not a party to the compromise and that when the terms were settled at Dhanbad on the evening of 21st February 1934 he was lying ill in Calcutta and therefore he cannot be said to be a party to the arrangement. This argument loses sight of the fact that the negotiations for the compromise were already being carried on with Kedar and the terms had to be settled with his consent. Indeed, he was not physically present at the time when the final settlement took place on the

4. *Morgan's Patent Anchor Co. Ltd. v. Morgan* (1877) 85 L T 811.

evening of 21st February 1934; but he was represented by Jagat at the time. The compromise petition was signed as a witness by Kedar's eldest son Tincori, plaintiff 1 in this suit. In the promissory note there is a specific reference to the compromise and Kedar by accepting the note must have accepted the compromise. Besides, the plaintiffs by filing this suit have accepted the position that the mortgage debt was extinguished by the execution of the promissory note. It is therefore now idle to contend that the mortgage was not discharged.

Point No. (4).—The contention is that when the period for payment of the mortgage money stipulated in the mortgage bond (Ex. 12) expired in Chait 1336 Fs. (April 1929) there was a breach of the terms of the mortgage and the promissory note (Ex. 1) which was executed long after the breach could not be regarded as a validly novated contract. There is no substance in this contention. The effect of non-payment of the mortgage money within the stipulated period was merely to furnish a cause of action to the mortgagee to sue on the mortgage: the mortgage remained in force so long as it was not discharged and until this was done it could be substituted by a new contract.

Thus, all the contentions raised by the appellant fail and the appeal is liable to be dismissed. It appears that after the presentation of this appeal, the defendant on 31st March 1938 obtained from this Court an order directing the execution of the decree under appeal to be stayed. The material portion of the order runs as follows:

Having regard to the circumstances of the case and to the fact that the decretal amount is a large one we direct that the execution of the decree be stayed on the following terms:

1. The appellant shall pay into the Court of the Subordinate Judge a sum of Rs. 50,000 on or before 1st June 1938; another sum of Rs. 25,000 on or before 30th September 1938 and a further sum of Rs. 25,000 on or before 30th November 1938. The respondent will be allowed to withdraw these sums on furnishing security to the satisfaction of the Subordinate Judge. If there is default in the payment of any of these sums by the dates specified above, the respondent will be at liberty to proceed with the execution.

2. The appellant agrees that in the event of his appeal being dismissed he shall pay interest pendente lite at the rate of six per cent. per annum on the amount decreed by the learned Subordinate Judge except on such money as may be deposited from time to time as specified above.

It is conceded on behalf of the appellant that by virtue of the agreement recorded in cl. (2) of the above order he is liable to pay interest for the period between 31st

March 1938, the date of the order, and the date of the decree of this Court at six per cent. per annum on such amount as has remained unpaid. The decree of the Court below should be varied accordingly, and subject to this variation the appeal must be dismissed with costs.

Fazl Ali J.—I agree.

D.S./R.K.

Decree varied.

A. I. R. 1939 Patna 488

FAZL ALI AND VARMA JJ.

Baldeo Singh and another — Plaintiffs
— Appellants.

v.

Sheikh Muhammad Akhtar and another
— Defendants — Respondents.

Second Appeal No. 653 of 1936, Decided on 24th January 1939, from decree of Sub-Judge, Monghyr, D/- 30th April 1936.

(a) Transfer of Property Act (1882), S. 53-A — Retrospective effect.

Section 53-A has no retrospective effect: *A I R 1938 Pat 479, Foll.* [P 489 C 2]

(b) Registration Act (1908), S. 49—Unregistered sale deed can be referred to for explaining character of possession (*Obiter*).

Although an unregistered sale deed of property cannot be taken into evidence for the purpose of proving title to the property, it can nevertheless be referred to as explaining the nature and character of possession thenceforth held by the party: *A I R 1919 P C 44, Rel. on.* [P 489 C 2]

(c) Evidence Act (1872), S. 157 — Unregistered sale deed admitted in evidence—Finding as to adverse possession based on other facts and circumstances—Date in sale deed not taken as starting point of adverse possession—Finding held in accordance with law.

Where apart from the unregistered sale deed admitted in evidence, there were other circumstances and facts on the basis of which the Court came to the conclusion that the party in whose favour the sale deed was effected had matured his title by adverse possession but did not take the date of the sale deed as the starting point of the adverse possession:

Held that the finding of the Court on the question of adverse possession was quite in accordance with law and was not vitiated by reason of the Court taking into evidence the unregistered sale deed. [P 490 C 1]

(d) Adverse possession—Mortgagor and mortgagee—Mortgagee can prescribe against mortgagor in certain circumstances.

Although generally speaking a mortgagee in possession cannot prescribe against the mortgagor, he can do so in certain exceptional circumstances: *A I R 1925 All 133, Ref.; A I R 1916 Mad 811, Rel. on.* [P 490 C 2]

(e) Adverse possession—Mortgagor and mortgagee — Suit for redemption — Defence of adverse possession when can be pleaded.

No possession short of the statutory period of sixty years nor acquiescence of the mortgagors not amounting to a release of the equity of redemption would be a bar or defence to a suit for redemption, if the parties are otherwise entitled to redeem : 32 Cal 296 (P C), Foll. [P 490 C 2]

S. N. Bose and K. Dayal

— for Appellants.

Md. Hasan Jan and Syed Hasan

— for Respondents.

Varma J. — The plaintiffs are the appellants in this second appeal. They filed the suit for redemption of a mortgage bond dated 8th March 1913, which was executed by the father of defendant second party for Rs. 100 in favour of defendant first party. On 21st May 1932, the plaintiffs purchased the equity of redemption of these lands which were formerly bhaoli and were subsequently converted into nagdi. A sum of Rs. 100 was left in deposit with the plaintiffs for redemption of the suddharna bond. As the defendant first party refused to accept the money, under S. 83, T. P. Act, Rs. 100 was deposited in Court and a notice of the deposit was served on the defendant first party. There was an objection by the defendant first party alleging that the property had been sold to him by an unregistered sale deed dated 12th September 1914 by Bhairo, the original mortgagor, father of the defendant second party. His brother alleged that after the sale he had his name mutated in the landlord's sarishta and had been getting receipts on payment of the rent. The plaintiffs' case further was that the unregistered sale deed was not a genuine document, and even if it was executed by Bhairo, it could not bind the defendant second party or the plaintiffs, as the possession of defendant first party was wrongful when the suit was filed on 27th August 1932. The case of the defendant first party was that the plaintiffs' document was not genuine, that after executing the suddharna bond Bhairo sold the land to the defendant first party for Rs. 200 in September 1914, and that since his purchase the defendant had been in possession as purchaser and malik to the knowledge of Bhairo and got his name mutated in the landlord's sarishta. He further raised the question of limitation. Originally after the judgment of the trial Court there was an appeal before the lower Appellate Court and the case was remanded to the trial Court, which had not taken the unregistered sale deed in evidence, with the instruction that the sale deed should be taken into evidence and an opportunity

should be given to the plaintiffs to adduce evidence in its rebuttal, to consider whether the receipts filed by the defendant were genuine or forged, and whether having regard to the unregistered kabala defendant 1 had acquired title by adverse possession so as to non-suit the plaintiffs. After remand the trial Court took the unregistered sale deed into evidence and dismissed the suit of the plaintiffs. On appeal the judgment of the trial Court has been upheld by the learned Subordinate Judge.

Mr. Siva Narayan Bose, appearing on behalf of the appellants, urges, firstly, that the unregistered sale deed should not have been taken into evidence, and secondly, that a man who is in possession as a usufructuary mortgagee cannot prescribe as owner against the mortgagor. He incidentally also mentioned that the contents of the sale deed could not be utilized under S. 53-A, T. P. Act, because that provision has no retrospective effect. I may at once say that S. 53-A has no retrospective effect, as was held by this Court in 19 P L T 489.¹ As regards the contention that the unregistered sale deed should not have been admitted in evidence, S. 17, Registration Act, gives a list of documents which must be registered, and S. 49 of the Act, provides :

No document required by S. 17 to be registered shall (a) affect any immovable property comprised therein, or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property, or conferring such power, unless it has been registered.

The question therefore is whether an unregistered sale deed like the present one can be received as evidence of any transaction affecting the property in suit. On the language of the Section, it is clear that it cannot be taken in evidence for the purposes of proving title to such property. In 43 Mad 244² the Privy Council has held that although some unregistered documents were not admissible in evidence to prove title they could nevertheless be referred to as explaining the nature and character of the possession thenceforth held by the party. One has to see therefore whether the finding of the Court below, that defendant 1 has acquired title by adverse possession, is vitiated in any manner by its having taken into evidence the unregistered

1. Bhukhan Mian v. Radhika Kumar Debi, (1938) 25 A I R Pat 479=176 I O 35=19 P L T 489.

2. Varada Pillai v. Jeevarathnammal, (1919) 6 A I R P O 44 = 53 I O 901=46 I A 285=49 Mad 244 (P O).

sale deed. The learned Subordinate Judge says :

After going through the records my opinion is that the unregistered kabala, Ex. 1 was really executed by Bhairo, and that it was executed with the intention of giving effect to it, although it was unregistered and so legally it would not pass title. In support of my observation that sale deed cannot legally pass any title I would refer to the ruling reported in A I R 1921 Pat 150,³ which has been cited by the learned pleader for the appellants.

This view of the learned Subordinate Judge is quite correct. He has, after referring to the other facts on record, come to the conclusion that the defendant first party has not been in adverse possession of the lands from the date of the kabala (Ex. 1) but in view of the receipts and the counterfoils, taken along with the testimony of D. W. 3 it seems to me that he has been in such possession openly and to the knowledge of Bhairo and Munshi at least since 1322.

The facts to which reference has been made in the earlier portion of the judgment are, that according to the terms of the sudbharna bond, which was admittedly executed in favour of defendant 1, before the commutation of rent, the sudbharnadar was to divide the produce with the landlord, and after commutation of the rent into nagdi, the mortgagor was to pay the rent and the sudbharnadar was to divide the produce with him, but it is clear from the statements made by the plaintiffs themselves (P. W. 2) and of Munshi Raut (P. W. 6) that Bhairo or Munshi never paid rent after the rent was commuted. These are the circumstances and some other facts on the basis of which the Court below has come to the conclusion that the defendant first party had matured title by adverse possession. Had the Court below taken the date of the unregistered sale deed as the starting point of the adverse possession, there might have been something to be said on behalf of the plaintiffs. As it is, I am of opinion that the finding of the Court below on the question of adverse possession of defendant 1, is quite in accordance with law on the point. As to the argument that a mortgagee in possession cannot prescribe against the mortgagor, reliance has been placed by the learned Advocate on behalf of the appellants on the decision in 47 All 73.⁴ Generally speaking,

that is so, but in 31 I C 678⁵ it has been pointed out that in certain circumstances a mortgagee in possession can prescribe against the mortgagor, and I respectfully agree with the view taken in that case. In this view of the law I see no reason to differ from the decision of the Courts below, and I would dismiss the appeal with costs.

Fazl Ali J. — I agree. Mr. S. N. Bose appearing for the appellants relied on the observation of the Judicial Committee in 32 Cal 296⁶ to the effect that no possession short of the statutory period of sixty years nor acquiescence of the mortgagors not amounting to a release of the equity of redemption would be a bar or defence to a suit for redemption, if the parties were otherwise entitled to redeem. In my opinion the facts found by the Courts below in this case show that there was an acquiescence on the part of the mortgagor amounting to a release of the equity of redemption.

N.S./R.K.

Appeal dismissed.

5. Thottakur Govinda v. Pepakayala Mallaya, (1916) 3 A I R Mad 811=31 I C 678.

6. Khirajmal v. Daim, (1905) 32 Cal 296 = 32 I A 23=9 C W N 201=1 O L J 584=8 Sar 734 (P C).

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DHAVLE AND ROWLAND JJ.

Thakur Prasad and others — Plaintiffs
— Appellants.

v.

Ajodhya Prasad Chaudhury and others
— Defendants — Respondents.

Appeal No. 176 of 1936, Decided on 27th September 1938, from original decree of Sub-Judge, Monghyr, D/- 9th June 1936.

(a) Promissory note—Suit on—Note executed by karta of Hindu family for debts taken for family — Debts repeatedly referred to in plaint — Suit can be maintained even against minors whose liability is kept alive by promissory note.

A suit on a promissory note executed by karta of a joint Hindu family for goods and cash advances taken by him from time to time for the family, for which he executed several "hatchitthis" and handnotes of which repeated reference is made in the plaint is a suit based on the debts with the pro-note as proof of it, and can be maintained even against minors against whom the effect of the handnotes is to keep alive their liability as debtors and not to impose any new liability : A I R 1937 Pat 455 and A I R 1939 Pat 97, Rel. on ; A I R 1934 Pat 629 and A I R 1933 Pat 687, Expl. ; A I R 1918 P C 146; 7 Cal 256; A I R 1934 P C 4 and A I R 1937 Pat 572, Ref. [P 492 C 2]

(b) Bihar Money-Lenders Act (3 of 1938), S. 12 — Interest at 12 per cent. simple does not

3. Tilakdhari Singh v. Gour Narain, (1921) 8 A I R Pat 150=59 I C 290=5 Pat L J 715=2 P L T 95.

4. Bakha Singh v. Ram Narain Singh, (1925) 12 A I R All 133=80 I C 935=47 All 73=22 A L J 905.

contravene Act—If lender behaves reasonably and forbearingly towards debtor, Court is not bound to reopen old transactions.

Where the rate of interest charged is 12 per cent. per annum simple and the lender behaves reasonably and forbearingly towards his debtor, though S. 12 empowers the Court to reopen the old transactions, it is not bound to do this as the rate does not contravene the Act. [P 492 C 2; P 493 C 1]

L. K. Jha and K. N. Lal —

for Appellants.

Dhyan Chander and M. Rahman —

for Respondents.

Rowland J.—This appeal arises out of a suit for recovery of money from the defendants who are members of a Hindu Mitakshara joint family. It is alleged in the plaint that for the necessities of the family, defendant 2 who was its karta from time to time took goods on credit or advances of cash from the firm of the plaintiffs. Account was adjusted on 16th Chaith 1327 Fasli and a hathchitha taken. Account was again adjusted on 3rd Chaith 1330 Fasli and a hathchitha taken. Accounts were again adjusted on 5th Aswin 1333 and the adjustment was signed by defendant 2 as karta. Account was again adjusted on 11th Sraban 1335, and defendant 2 executed a handnote for the balance due. A similar adjustment was made on 1st Asarh 1338, and defendant 2 executed a handnote for the amount due. The last adjustment was made on 1st Jeth 1341, when Rs. 5754 was found due, in proof of which defendant 2 as head of the family, executed a handnote dated 1st Jeth 1341. The suit is to recover the amount entered in the handnote with interest.

It is alleged that all the defendants have been benefited by the money which is previous debt due from the joint family and spent for meeting the family expenses and for the benefit of the joint family of the defendants. Hence all the defendants are liable to repay it. The cause of action is said to have arisen on the day when the handnote was executed and also on 25th Aghan 1343 Fasli, when the demand was made. Interest is claimed at one per cent. per mensem as entered in the handnote. Defendant 2 did not contest the suit; he appeared and admitted the claim but prayed for an instalment decree. Contest was not entered on behalf of other major defendants. The suit was contested only for the minor defendants through the guardian ad litem. The written statement substantially puts the plaintiffs to the proof of all the allegations in the plaint, denies that the

suit is maintainable and denies that the minor defendants were benefited.

The plaintiffs gave evidence of the previous indebtedness and of the benefit to all the defendants as well as of the execution of the handnotes. The Subordinate Judge held that the entire family of the defendants was benefited by the loans and transactions, the debts being incurred for the expenses of the family, but he held that the suit was a suit on a negotiable instrument, and as such was not maintainable against the minor defendants or against any of the other defendants besides defendant 2, the executant. He rested this conclusion on a decision of a Single Judge of this Court in 16 P L T 117¹ which follows a Division Bench decision, 15 P L T 100,² and proceeds on the principle that in a suit based on a handnote no person other than the signatory of the handnote can be made liable. He gave the plaintiffs an instalment decree against defendant 2 only.

In appeal by the plaintiff it is contended that the handnote was executed by defendant 2 in his capacity as karta of the family and was enforceable against the whole family. It is also contended that the suit is based not entirely upon the handnote, but also on the transactions and indebtedness of the family which themselves gave the plaintiffs a good cause of action against the defendants other than defendant 2. In support of the first contention, he relies on 16 Pat 441³ in which Fazl Ali J. was inclined to think that the rule laid down by the Privy Council in 46 Cal 663⁴ was not applicable to a Hindu family. Fazl Ali J. however rested his decision in that case on another ground namely :

That the suit was in essence a suit for debt and therefore all the members of the family would be liable to repay the debts if they were contracted for legitimate family necessity.

The same learned Judge repeated this opinion and based his decision on it in (F. A. No. 113 of 1935 decided on 31st March 1938⁵) and came to the conclusion

1. Birkeswar Raut v. Ram Lochan, (1934) 21 A I R Pat 629=154 I C 95=16 P L T 117.
2. Jibach Mahton v. Shib Shankar, (1933) 20 A I R Pat 687=147 I C 1065=15 P L T 100.
3. Sri Kant Lal v. Sidheswari Prasad, (1937) 24 A I R Pat 455=170 I C 357=16 Pat 441=18 P L T 527.
4. Sadasuk Janki Das v. Kishen Prasad, (1918) 5 A I R P C 146=50 I C 216=46 I A 33=46 Cal 663 (P C).
5. Baljnath Prasad v. Bindu Prasad Singh, (1939) 26 A I R Pat 97=180 I C 147=17 Pat 549=19 P L T 919.

that in a suit based on a promissory note the plaintiff may prove that the maker of the instrument borrowed money to meet a family necessity and on proving that, may get a decree against all members of the family, but the decree against members other than the karta will be limited to their interest in the joint family property. No doubt that result will follow if the pleadings are so framed as to entitle the plaintiff to rely on the fact of borrowing and to use the negotiable instrument as proof of it. If the learned Judges meant more than that, the decision would be in conflict with 15 P L T 100² and perhaps difficult to reconcile with the Privy Council decision in 46 Cal 663.⁴ In the former case, Kulwant Sahay J. said :

The suit as framed being based entirely on the handnote, no person other than the signatory of the handnote can be made liable, and in the latter case, Lord Buckmaster said :

It would of course have been open to the plaintiffs had they thought fit to have framed their case in an alternative form and to have sued both on the hundis and alternatively upon the consideration. It is indeed urged by the appellants that the plaint in fact embraced both these forms of relief but their Lordships are unable to accept this contention.

Assuming that in order to get the relief he asks for, the plaintiff must sue as a creditor to recover a debt and not as the holder of a negotiable instrument to enforce the instrument; it does not follow that it is the policy of the Legislature to defeat just claims on a technical ground. On the contrary the Courts will, in proper cases, and on such terms as may be just, allow "all such amendments to be made as are necessary for the purpose of determining the real questions in controversy between the parties," and it is unnecessary to cite cases in which such amendment has been allowed. But it is contended that in this suit the plaintiffs are not suing exclusively on the handnote as its holders; they are claiming also on the debt as creditors, and are entitled to succeed without any amendment of the plaint.

For the respondents, stress is laid on para. 8 of the plaint and on the form of the account claimed. In para. 8, it is said that the cause of action arose on the date on which the handnote was executed as also on Aghan 25, 1343 Fasli, when demand was made. The items of account are "handnote of Rs. 5754" and interest from the date of execution. But the body of the plaint recites a long series of transactions—the purchase

of goods on credit, the borrowing of money in cash and so on. It is said that so much was found due and "as proof thereof" defendants signed the account and "as proof" of the amount due, defendant executed a hath. chitha. The words "as proof thereof" appear repeatedly in paras. 3, 4 and 5 of the plaint. In my opinion it would be taking too narrow a view to hold that the cause of action relied on by the plaintiffs in their pleading is exclusively the handnote. The action appears to be based on the debt with the handnote as proof of it. The words in para. 8 of the plaint can be explained as intended to give a date from which limitation is to run. With regard to the effect of such an acknowledgment, it is enacted in S. 21 (3), Limitation Act, that

where a liability has been incurred by or on behalf of a Hindu undivided family as such an acknowledgment or payment made by or by duly authorized agent or the manager of the family for the time being shall be deemed to have been made on behalf of the whole family

for the purposes of Ss. 19 and 20, that is to say for the purposes of saving limitation against them: in effect it keeps alive their liability, as debtors, to be sued for the debt, which is not the same as imposing on each of them a new liability as a drawer of a negotiable instrument. In my opinion the plaint can and ought to be read as claiming repayment of a debt evidenced and acknowledged by the handnote. In that view it is maintainable against all the defendants. We have only to see whether all the defendants were benefited by the transactions. The plaintiffs' witness has asserted this in his evidence and it is not controverted by any evidence. I would accept the finding of the learned Subordinate Judge that the entire family of the defendants including the minors were benefited by the transactions. That being so, the suit should have been decreed against all the defendants with the reservation that except defendant 2 the other defendants are liable only to the extent of their share in the joint family property.

In conclusion, we were asked to take into consideration the provisions of the Bihar Money-lenders Act, 1938, and to reduce the amount of interest. But the rate of interest which is 12 per cent. simple does not contravene the Act. It is said that successive renewals of handnotes have had the effect of charging compound interest and that in such a case S. 12 empowers the Court to re-open the transactions. The Court is not however bound to do this, and

we are not disposed to do so in this case in which the lender firm appears to have behaved reasonably and forbearingly towards their debtors. I would therefore allow the appeal with costs and decree the claim in full against all the defendants subject to the reservation that except defendant 2 the others are not personally liable and I would allow the plaintiffs their costs of the appeal.

Dhavlé J.—The view of the lower Court that the suit is based on the last handnote and not on the original loans does not attach sufficient weight to the allegations in paras. 3 and 7 of the plaint that defendant 2, as head of his family, used to take cloth and borrow money "according to necessity for meeting the necessities and for the benefit of his joint family" and that all the defendants have been benefited by the money sued for

which is previous debt due from the joint family, and the same debt has been spent for meeting the expenses and for the benefit of the joint family of the defendants.

The succession of hathchithas and hand notes is also repeatedly referred to in the plaint as "proof of the amount due," "proof of the sued amount," "proof of the amount remaining due" or "proof thereof". It is true that in stating in para. 8 when the cause of action arose, reference is made to the last handnote and to the last demand; but this, it is obvious, was merely intended to state the *terminus a quo* for the limitation applicable, and cannot be taken to mean that the suit was intended to be merely a suit on the handnote. If it is the handnote that is referred to in the account at the end of the plaint, this also cannot be taken as an indication that the suit was intended to be a suit on the handnote alone; a suit for the recovery of the debt may quite easily have contained the same account. Nor was the suit in fact tried as a suit on the handnote alone, for in a suit of that kind issue 3, "whether the minors were benefited by the loan," would not have been required to be framed. It therefore seems quite clear that the suit was both on the handnote and on the debt — the latter especially as regards defendants other than defendant 2 who alone executed the handnote. The liability of the maker of the handnote is undoubtedly more extensive than that of the other members of the family, but would not be affected by the circumstance that the suit was alternatively a suit on the debt.

As regards the Money-lenders Act, the maximum rate of interest in the case of unsecured loans, namely 12 per cent. per annum in the case of an unsecured loan, prescribed in Sec. 9 of the Act, expressly applies to loans advanced after the commencement of the Act, while the loan and the handnote in suit are dated 1934 and carry interest at no more than the maximum rate already referred to. If S. 12 of the Act be taken to apply the Court would be at liberty to reopen the transaction; but the circumstances of the case are not such as to warrant the exercise of that power. I therefore agree in the order proposed by my learned brother.

In the view that we have taken of the character of the suit before us, it does not seem to me very necessary to deal with the question whether a decree may be passed in a suit on a promissory note (upon the plaintiff proving that the note had been executed by the karta for a loan for the purposes of the joint family) not only against the karta personally, but also against the other members of the joint family, limited to their interests in the property of the joint family. In F. A. No. 113 of 1935⁵ Fazl Ali J. (with the concurrence of the late Chief Justice) answered the question in the affirmative. He had previously expressed the same opinion, without however basing his decision on it, in 16 Pat 441.³ The learned Subordinate Judge decided the present case before the ruling in 16 Pat 441.³ He was referred to 15 P L T 100,² but thought that this did not help the plaintiffs. Now, in 15 P L T 100,² the lower Court had passed a decree on a handnote not only against the executant but also against his younger brother on the ground that they were members of a joint Hindu family. Kulwant Sahay J., (with the concurrence of the late Chief Justice) reversed this for two reasons :

In the first place the suit as framed being based entirely upon the handnote no person other than the signatory of the handnote can be made liable. In the second place, assuming that the suit was framed on the original transaction and not on the handnote, even then no decree could have been made against defendant 2 without a finding that the loan was for the benefit of the family.

It will be observed that this was not a decision on the liability of the joint family when the karta executes a handnote for the purposes of the family. The first of the reasons given by Kulwant Sahay J. was followed by Wort J. (as he then was) sitting singly in 16 P L T 117¹ on the

authority of which the lower Court has held that no decree can be passed against members of the joint family other than defendant 2, the executant. It seems however that in 16 P L T 117,¹ there was a finding that the handnote had been executed for the joint family necessity, such as there was not in 15 P L T 100.² The decision was rested on the fact that the action was based on the handnote alone, and it is not stated that the case was of that rare kind in which there is no cause of action apart from the handnote itself: *see* 7 Cal 256⁶ which was discussed last year in 16 Pat 527⁷ by Varma J. and myself. The decision of the Judicial Committee in 61 I A 90⁸ on which Fazl Ali J. relies was distinguished by Wort J. as an action against the surviving members of the family after the person who has executed the promissory note was dead, and therefore in substance an action for the original consideration. Speaking with all respect, it is difficult to accept the distinction, for, Lord Thankerton began his judgment in 61 I A 90⁸ by describing the appellants as plaintiffs in "an action on two promissory notes." As Fazl Ali J. pointed out in 16 Pat 441³ the distinction between suits based on promissory notes and suits for the recovery of debts

becomes highly artificial in many cases, first because, except in a few mercantile towns, a promissory note is not popularly regarded as a negotiable instrument, and secondly, because the distinction depends largely on the view one takes of the pleadings and the pleadings in the mufassil Courts are generally defective and badly drafted.

When we come to apply the distinction to a joint Hindu family, it has to be remembered in the first place that all debts raised by the karta of such a family for family purposes bind the family property, and secondly, that suits for the recovery of debts borrowed by the karta of a joint family can be resisted by other members of the family on the ground that they were not supported by family necessity. The latter of these rules will certainly apply whether or not the debts were raised on handnotes. While the other members of the family cannot be made liable without proof of family necessity, they cannot, if such neces-

sity is made out, escape liability to the extent of their interests in the joint family property—in the execution proceedings, if not in the suit itself.

Moreover, if the whole family is sued on the karta's handnote alone but coupled with the allegation that the loan was taken for family necessity, the majority of the reported decisions show a disinclination on the part of the Courts to dismiss the suit as against the other members of the family in case the family necessity (or benefit) is made out. Neither the Negotiable Instruments Act nor justice would seem in such cases to require anything more than at the most a formal amendment of the plaint setting up the debt as an alternative cause of action: *see* 25 Bom L R 151.⁹ With or without such a formal amendment, the suit would, in substance, be a suit of a composite character. The liability of the karta as the executant of the handnote would be irrespective of whether or not the loan was binding on the family and would be a personal liability; the liability of the other members would be grounded if not on the objection of the handnote as such, then on other considerations, and would be limited to their interests in the family property. As in 44 All 393,¹⁰ Fazl Ali J.'s view is based on the consideration that the karta of a joint family is not a mere agent (to whom the rule in 46 Cal 663⁴ will apply) when he executes a handnote for the purposes of the family; and no reference has been made in any of the reported decisions to anything in Hindu law to prevent the karta from borrowing on handnotes for the purposes of the joint family. And as the learned Judge has pointed out, if it had really been the view of the Judicial Committee that the principle laid down in 46 Cal 663⁴ applies to the karta of a joint Hindu family, the appeal in 61 I A 90⁸ would hardly have been disposed of on the very different ground that the borrowing by the karta could not be presumed, and was not proved, to have been for the purpose of the joint family business.

S.G./R.K.

Appeal allowed.

6. Sheikh Akbar v. Sheikh Khan, (1881) 7 Cal 256=8 C L R 528.

7. Laduram Marwari v. Bansidhar Marwari, (1937) 24 A I R Pat 572 = 171 I C 881 = 16 Pat 527=18 P L T 640.

8. Abdul Majid Khan v. Saraswatibai (1934) 21 A I R P C 4 = 147 I C 1 = 61 I A 90 = 30 N L R 60 (P C).

9. Vithalrao Shesgirirao v. Vithalrao Sondekar, (1929) 10 A I R Bom 244 = 72 I C 242 = 25 Bom L R 151.

10. Krishnanand Nath Khare v. Raja Ram Singh, (1922) 9 A I R All 116 = 66 I C 150 = 44 All 393=20 A L J 293.

A. I. R. 1939 Patna 495

DHAVLE J.

Umrao Singh — Petitioner.

v.

Raunak Singh — Opposite Party.

Civil Revn. Appln. No. 326 of 1938,
Decided on 7th February 1939, against
order of Small Cause Court Judge, Chapra,
D/. 30th March 1938.

(a) Evidence Act (1872), S. 92, Proviso (3)—
Oral evidence can be adduced to prove agree-
ment suspending the coming into force of con-
tract contained in a promissory note.

In a suit on a promissory note where the defence
was that the note was executed by the defendant
as agent of his principal for consideration which
was earnest money of another transaction by
which the plaintiff had agreed to purchase certain
properties, of the latter and the note was to be
acted upon in case of failure of the principal to
complete the transaction :

Held that the defendant was entitled to adduce
oral evidence in support of his plea : *A I R 1938*
P C 198 and A I R 1936 P C 70, Rel. on ; A I R
1924 Bom 44 ; A I R 1921 Bom 449 ; A I R 1928
All 289 ; A I R 1922 All 213 and A I R 1925 Lah
576, Ref. [P 495 C 2; P 496 C 2]

(b) Negotiable Instruments Act (1881), S. 28
— Executant of pronote can prove that there
was not presently operative contract as embo-
died in the note.

Though it is not open to the executant of a pro-
note to escape liability on the ground that in sign-
ing the note he was merely acting as agent of his
principal, he is not prevented from saying that
there was not presently an operative contract be-
tween the parties as is embodied in the note : *A I R*
1918 P C 146, Ref. [P 496 C 2]

R. S. Chatterji — *for Petitioner.*M. N. Pal — *for Opposite Party.*

Order. — This application under S. 25,
Small Cause Courts Act, is made by the
defendant in a suit on a hand-note which
was admittedly executed by him. Receipt
of the consideration was also admitted, but
the defence was taken that he had executed
the hand-note as an agent on behalf of one
Mt. Ramsawari Kuer from whom the plain-
tiff had agreed to buy certain properties,
that the plaintiff had paid the amount
mentioned in the hand-note as earnest
money for his purchase, that the sale had
fallen through on account of the plaintiff's
default and that the earnest money was
therefore forfeited, while the hand-note was
only a "nominal document" executed by the
defendant in proof of plaintiff's payment.
The learned Judge below held that S. 92,
Evidence Act, "bars any oral evidence in
support of the defence" and as the execu-
tion of the handnote and the passing of
consideration thereunder were admitted,

he decreed the suit without any further
evidence.

It has been contended on behalf of the
defendant-applicant that evidence in sup-
port of his plea was wrongly excluded by
the lower Court. S. 92, Evidence Act, no
doubt excludes oral evidence to contradict,
vary, add to, or subtract from, the terms
of any contract which have been reduced
to the form of a document. But Proviso 3
to the Section lays down that the existence
of any separate oral agreement constituting
a condition precedent to the attaching of
any obligation under such contract, grant
or disposition of property may be proved.
This has been considered in a recent deci-
sion of the Judicial Committee, 19 P L T
749,¹ where Lord Wright pointed out a
distinction relevant to the application of
Proviso 3. A collateral agreement which
alters the legal effect of a written instru-
ment must be excluded, but an agreement
that the instrument should not be an effec-
tive instrument until some condition is
fulfilled, e. g. an agreement suspending the
coming into force of the contract contained
in the promissory note (then under con-
sideration) constitutes a condition precedent
within the terms of the proviso and may
therefore be proved.

The written statement of the defendant
has been placed before me and may be
summarized as amounting to this, that the
handnote is only a receipt for the earnest
money, that the purpose for which the
money was received has been wrongly
stated in the handnote and that it was not
intended to attach any obligation to the
handnote as such at all or (as seems to be
implied) at any rate until Mt. Ramsawari
Kuer failed to complete the sale to the
plaintiff unjustifiably. Handnotes given in
somewhat similar circumstances are not
unknown; see for example, 25 Bom L R
867,² one of the cases cited in the lower
Court, in which the note was given by way
of indemnity for a contingent liability, and
Shah and Kemp JJ. held that evidence of
the separate agreement was admissible and
that the decision in 45 Bom 1155³ (also

1. Rowland Addy v. Administrator-General of
Burma, (1938) 25 A I R P O 198=175 I O 449
=1938 R L R 417=19 P L T 749=32 S L R
810 (P O).

2. Ahmed Saheb Bapu Saheb v. Ubhaiya Harsi,
(1924) 11 A I R Bom 44 = 87 I O 97 = 25
Bom L R 867.

3. Vishnu Ramohandra v. Ganesh Krishna,
(1921) 8 A I R Bom 449=68 I O 673=45 Bom
1155=28 Bom L R 488.

referred to below) was distinguishable on the facts. In 19 P L T 749¹ the view taken in Calcutta* was approved that the proper meaning of prov. (3) to S. 92 is that the contemporaneous oral agreement to be admissible must be to the effect that a written contract was to be of no force at all and was to constitute no obligation until the happening of a certain event, which in this case would apparently be an unjustifiable failure on the part of the lady to do her part in the projected sale.

It was pointed out in 49 All 464,⁴ that in a suit on a promissory note it is open to the defendant to prove that

the promissory note was not the substantive liability such as it would be if given for a loan or for the payment of the price of goods sold and delivered but was a collateral undertaking or recognition of liability arising out of another contract

altogether, and this, not only under proviso (3) to S. 92, Evidence Act, but also under S. 46, Negotiable Instruments Act, which provides that as between the maker and the payee (inter alia) it may be shown that the instrument was delivered conditionally or for a special purpose only and not for the purpose of transferring absolutely the property therein. The same point was further elaborated in 50 All 754⁵ whereas in 49 All 464,⁴ 44 All 521,⁶ referred to below, was dissented from. The only other ruling referred to by the lower Court that need be noticed is 6 Lah 411⁷ which followed the not unquestioned decisions in 44 All 521⁶ and 45 Bom 1155³ already dealt with. The learned advocate for the petitioner has cited 59 Mad 446⁸ a recent decision of the Judicial Committee, in which Secs. 91 and 92, Evidence Act, were considered, and it was held that there is nothing in either Section to exclude oral evidence that (notwithstanding a written instrument which purports to embody a contract) there was no agreement between the parties and therefore no contract, and oral evidence showing that the document though signed by the party impugning it, was not intended to be acted upon, but

was intended to be used solely for another purpose, was held to have been rightly admitted. It is thus clear that the defendant was entitled to adduce oral evidence in support of what appears to have been his substantial plea.

On behalf of the plaintiff opposite party reference has been made to S. 28, Negotiable Instruments Act, and 46 Cal 663,⁹ in support of the contention that it is not open to the defendant to escape liability on the ground that in signing the hand-note he was really acting for Mt. Ramsawari Kuer. The contention may be accepted, but does not meet the substantial plea that there was no such presently operative contract between the parties as is embodied in the hand-note, that the hand-note was delivered conditionally or for a special purpose only and not for the purpose of transferring absolutely property therein, or that there was a separate oral agreement constituting a condition precedent to the attaching of any obligation under the handnote.

The defence evidence has yet to be adduced, and the written statement does not precisely formulate the substantial plea, either in the terms of Sec. 46, Negotiable Instruments Act, or in the terms of any of the provisos to Sec. 92, Evidence Act. I have therefore dealt with the substantial plea in an alternative form; but, as in 49 All 464,⁴ I must ask the lower Court in admitting the evidence, which has been excluded on an erroneous view of the law, to do so with great care and be careful to see that in substance advantage is not taken of this decision by the defendant and his witnesses to trim their case according to what they now understand to be the admissible aspect of it in the view of the law. The decision of the lower Court is set aside and the case remanded for trial in accordance with the law. The costs of this hearing, including a hearing fee of one gold mohur, will abide the event.

S.G./R.K.

Case remanded.

4. Sheo Prasad v. Gobind Prasad, (1927) 14 A I R All 292=100 I C 832=49 All 464=25 A L J 305.

5. Bogi Ram v. Kishori Lal, (1928) 15 A I R All 289=115 I C 771=50 All 754=26 A L J 696.

6. Sri Ram v. Sobha Ram Gopal Rai, (1922) 9 A I R All 213=67 I C 513=44 All 521=20 A L J 315.

7. Hira Lal v. Benarsi Das, (1925) 12 A I R Lah 576=90 I C 982=6 Lah 411=26 P L R 612.

8. Tyagaraja Mudalliar v. Vedathanni, (1936) 23 A I R P O 70=160 I C 384=59 Mad 446=63 I A 126 (P O).

*[Vide A I R 1925 Cal 1007—Ed.]

9. Sadasuk Janki Das v. Sri Kishen Pershad, (1918) 5 A I R P O 146=50 I C 216=46 Cal 663=46 I A 33 (P O).

A. I. R. 1939 Patna 497

HARRIES C. J. AND WORT J.

*Harihar Dora and others —**Defendants 1 to 3 — Appellants.*

v.

*Upendra Pati, Plaintiff and another,**Defendant 4 — Respondents.*

Letters Patent Appeal No. 11 of 1938,
Decided on 27th April 1939, from decision
of Mohammad Noor J., D/- 4th May 1938.

(a) Land Tenures—Zabti bhogra—Assessment
of—Validity cannot be challenged in civil suit.

Once the assessment is made and left unchal-
lenged it becomes binding on the cosharergaontias.
If no steps are taken to contest the same in settle-
ment it cannot be challenged in a civil suit and
any partition among the cosharer gaontias does
not put an end to the liability of zabti bhogra.

[P 498 C 1]

(b) C. P. Land Revenue Act (18 of 1881),
Ss. 33 and 152—Jurisdiction of Civil Court —
Suit by lambardar for recovery of amount of
revenue paid by him on behalf of cosharers as
zabti bhogra is not one for collection of reve-
nue, nor one connected therewith but one for
payment of money made and falls under S. 69,
Contract Act—S. 152 is not applicable and Civil
Court has jurisdiction to entertain such suit.

Clause (10), S. 152 deals with claims arising
from actual collections or from the processes to
enforce the realization of arrears of revenue or
arrears of sums realizable as revenue. To come
within this clause, the matter complained of and
which gives rise to the suit must actually be con-
nected with or arise out of an actual collection or
some process for the recovery of arrears of revenue.
The cause of action must be intimately connected
with the collection or with the process for the
recovery of revenue.

[P 498 C 2; P 499 C 1]

Where a lambardar pays the whole revenue and
then sues the cosharers for amount paid by him on
their behalf as zabti bhogra, his claim is not one
connected with or arising out of actual collection
or anything connected with collection but rather
from payment made by him to cosharers' use; and
in view of S. 93 which presupposes that Civil Courts
have jurisdiction to try suits by lambardars for
arrears of revenue payable through them by the
proprietors whom they represent, S. 152 is not
applicable. Such a suit falls under S. 69, Contract
Act, and can be entertained by Civil Courts.

[P 499 C 1, 2]

P. Misra — *for Appellants.*

S. C. Mazumdar and G. C. Das —

for Respondents.

Harries C. J.—This is a Letters Patent
appeal from a decision of Mohammad Noor J.
in second appeal. The plaintiff brought the
suit out of which this appeal arises against
his cosharer gaontias for a sum said to be
due as arrears of zabti bhogra. The plain-
tiff was a cosharer gaontia and lambardar
of village Kharmunda, whereas the defen-
dants were his cosharer gaontias. In Gov.

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ernment khalsa villages in the Sambalpur
District there are gaontias who are village
managers having proprietary rights in their
homefarm lands. These lands are called
the goantia's bhogra or sir lands. The co-
sharer gaontias are allowed 25 per cent. of
the collections of the village as payment for
their duties as managers of the village, and
they are bound to make over the balance
of the collections through the lambardar to
the Government. The bhogra lands of each
gaontia are assessed to revenue, and if the
revenue payable on a particular gaontia's
bhogra lands is equal to that particular
gaontia's share in the 25 per cent. of the
total village collections, then the gaontia
has to pay over the whole of the collections
made to the lambardar. If the assessment
on the bhogra lands is more than that par-
ticular gaontia's share in the 25 per cent.
of the collections, the gaontia has to pay
the lambardar not only the whole of the
collections made but the difference between
the amount assessed on his bhogra lands
and his share of the 25 per cent. of the
total village collections. On the other hand,
if the assessment on the bhogra lands is
less than his share of the 25 per cent. of
the village collections, the gaontia is entitled
to deduct from the collections made the
difference between his share of the 25 per
cent. of the village collections and the as-
sessment on his bhogra lands. He, of course,
has to pay the balance over to the lambar-
dar. In cases where the assessment on the
bhogra lands is greater than the gaontia's
share of the 25 per cent. of the total col-
lections, the difference is known as zabti
bhogra. Where the gaontia is entitled to
keep back money out of his collections to
make up the difference between his share
in 25 per cent. of the collections and the
assessment on his bhogra lands, the amount
which he is entitled to keep back is known
as puraskar.

In the present case the defendants' share
in the village was five annas four pies, and
in lieu of this share, they were admittedly
holding a hamlet of the village Kharmunda
known as Darangapali. Zabti bhogra pay-
able by the defendants was assessed at
Rs. 52 per annum. According to the plain-
tiff's case, he as lambardar had paid the
whole of the revenue due from the gaontias
to the Government, and, according to him,
the defendants had refused to pay the
amount claimed in this suit as zabti
bhogra. The learned Munsif who heard the
case at first instance, dismissed the plain-

tiff's claim for zabti bhogra but on appeal this decree was reversed, and the plaintiff's claim decreed. In second appeal Mohammad Noor J. affirmed the decree of the lower Appellate Court and dismissed the appeal. It has been argued before us that the amount of zabti bhogra alleged to be payable by the defendants was not satisfactorily proved in this case. The lower Courts relied upon a document (Ex. 1) which is a table showing the zabti and puraskar lands of village Kharmunda. It is said that this document is not part of the Record of Rights, and accordingly it does not prove the amount payable by the defendants as zabti bhogra. This point does not appear to have been made in any previous hearing, and from a perusal of the judgment of the learned Munsif and of the learned Subordinate Judge it is clear that the defendants never challenged the fact that zabti bhogra at the rate of Rs. 52 per annum was assessed on the defendants' lands. The defendants contended that they had never paid this sum and that the assessment was excessive, but that those contentions are very different from the contention now put forward, namely that the amount assessed on these lands was never proved. It is clear that in the Courts below it was admitted that the assessment amounted to Rs. 52 per annum, and that what was challenged was the legality of the assessment.

In my judgment it is not open to the defendants to challenge the validity of the assessment of zabti bhogra in the Civil Court. Such was assessed at the time of settlement and steps should then have been taken to contest the assessment. Once the assessment was made and left unchallenged, it became binding upon the defendants, and they cannot in a suit, such as the present one, challenge the validity of that assessment. The defendants also alleged that this village had been partitioned in the year 1885 and that this partition put an end to any liability which may have existed for the payment of zabti bhogra. I entirely fail to appreciate how a partition could put an end to such a liability; in any event the zabti bhogra of Rs. 52 per annum was assessed on the defendants' bhogra lands as late as the year 1927, that is 42 years after the partition. In those circumstances, it cannot possibly be said that the partition has in any way affected the defendants' liability to pay zabti bhogra. It was contended before Mohammad Noor J., and has again been contended before us that the

Civil Courts had no jurisdiction to entertain this suit. Reliance is placed on Section 152 (b) (10), Central Provinces Land Revenue Act, (Act 18 of 1881). The relevant portion of that Section is in these terms:

Except as otherwise hereinbefore provided, (a) no Civil Court shall entertain any suit instituted, or application made, to obtain a decision or order on any matter which the Governor-General in Council, the Chief Commissioner or a Revenue or a Settlement Officer is, by this Act, empowered to determine or dispose of; and in particular (b) no Civil Court shall exercise jurisdiction over any of the following matters :

(10) claims connected with, or arising out of the collection of revenue, or any process enforced on account of an arrear of revenue, or on account of any sum which is under this or any other Act realizable as revenue;

According to the appellants, this is a claim connected with or arising out of the collection of revenue and hence no Civil Court has jurisdiction to decide it. The claim, it is said, is a claim for zabti bhogra, that is a claim for a form of revenue. It must be remembered that in this case the plaintiff-respondent as lambardar had paid the whole of the revenue due, and this claim was for the amount which the defendants should have paid the plaintiff as zabti bhogra. The plaintiff had in fact paid this sum to the Government on the defendants' behalf, and in this suit he was claiming from the defendants money which he had paid to their use. The defendant-appellants have to concede that this claim is not a claim to recover an amount due as revenue, but they urge it is a claim connected with or arising out of the collection of revenue. Claims connected with or arising out of the collection of revenue must be claims which have arisen through actual collection. It is to be observed that cl. (10) deals not only with claims connected with or arising out of the collection of revenue but also with claims connected with or arising out of any process enforced on account of arrear of revenue, or on account of any sum which is under this or any other Act realizable as revenue. It appears to me that this clause deals with claims arising from actual collections or from the processes to enforce the realization of arrears of revenue or arrears of sums realizable as revenue. To come within this clause, the matter complained of and which gives rise to the suit must actually be connected with or arise out of an actual collection or some process for the recovery of arrears of revenue. The cause of action must be intimately connected with the col-

lection or with the process for the recovery of revenue. In the present case this zabti bhogra was not collected by the lambardar from the defendants. The amount was actually paid by the lambardar to the Government though he had never received it from the defendants. The present suit is a suit to recover a sum which the plaintiff has paid on behalf of the defendants, and in my view the present claim is not a claim connected with or arising out of actual collection. In fact it was the failure to collect the revenue before actual payment by the lambardar which gives rise to this suit. The cause of action does not arise out of the collection or anything connected with the collection but rather from a payment made to the defendants' use. It appears to me that S. 33, C. P. Land Revenue Act, makes it clear that a suit such as the one now before the Court does not fall within S. 152 (b)(10) of that Act. S. 33 provides that

when any local area is under settlement, the Chief Commissioner may invest any Subordinate Settlement Officer with the powers of any of (the last five classes) of Courts described in S. 4 of (the Central Provinces Civil Courts Act, 1885), and the Chief Settlement Officer with the powers of a Court of a Deputy Commissioner described in the same Act, (S. 7), for the trial, in the first instance, of any of the following classes of suits instituted within such area :

(b) suits by lambardars for arrears of revenue payable through them by the proprietors whom they represent;

This Section gives revenue officers during a settlement powers to hear certain suits, which clearly would otherwise be heard by the Civil Courts. The Section pre-supposes that the Civil Courts have jurisdiction to hear suits by lambardars for arrears of revenue payable through them by the proprietors whom they represent. It is to be observed that by reason of S. 4 (8a) "proprietor" includes a gaontia of a Government village in the Sambalpur District. The defendants, who are gaontias in a Government village, are, therefore, within the purview of S. 33, C. P. Land Revenue Act. After the settlement is completed, the powers given to the settlement officers to hear these claims is terminated; and S. 39 of the Act provides :

When the settlement of any local area has been notified as completed, all the powers exercised by the Settlement Officers in such area shall cease, and all suits and applications pending before such officer shall be transferred to such of the Courts ordinarily having jurisdiction in such cases as the Commissioner of the Division directs, or, if there

are no such Courts, shall be disposed of in such manner as the Chief Commissioner directs.

These Sections clearly show that during the pendency of settlement operations claims otherwise cognizable by the Civil Courts may be dealt with by settlement officers but when the settlement has been completed, the powers of the settlement officers are terminated and all pending suits are transferred back to appropriate Civil Courts. Unless claims by a lambardar against co-sharers for arrears of revenue paid on their behalf are cognizable by the Civil Courts, then S. 33 and the following Sections of the C. P. Land Revenue Act, are unintelligible. In my view the present claim is a claim under S. 69, Contract Act, and is not a claim connected with or arising out of the collection of revenue, and the Civil Courts had jurisdiction to entertain the claim. In my view the decision of Mohammad Noor J. is right and should be affirmed. I would, therefore, dismiss this appeal with costs.

Wort J.—I agree.

S.G./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 499

WORT J.

Kamakhya Narayan Singh —

Defendant — Appellant.

v.

Chairman, Hazaribagh Municipality —
Plaintiff — Respondent.

Appeal No. 303 of 1938, Decided on 8th February 1939, from appellate decree of Addl. Sub-Judge, Hazaribagh, D/. 16th December 1937.

(a) Bihar and Orissa Municipal Act (7 of 1922), S. 12 — Word "may" interpreted — Action brought by Chairman of Municipality is not maintainable.

The use of the word "may" must be construed in the sense that the body of Commissioners shall by that name sue and be sued, and by no other. The Chairman of the Municipality, a position although recognized by the Municipal Act, is not a legal entity nor a Corporation sole and therefore he is not entitled to sue. [P 500 C 1]

(b) Landlord and Tenant—Tenancy — Existence of — Law of tenancy when applies stated — Payment of rent to landlord who is not proprietor of land does not create tenancy.

A tenancy either exists or does not exist and a tenancy cannot exist between a person and another person neither of whom has title to the land, the subject-matter of the so-called tenancy. It is only when estoppel comes in and the defendant is prevented from saying that there is no tenancy that the law of tenancy would apply. Payment of rent is evidence of tenancy, but it is prima facie evidence which apart from question of estoppel can be

rebutted. Where landlord is not a proprietor of the land, payment of rent for a considerable period to the landlord does not create a tenancy: *A I R 1934 Pat 555 and A I R 1937 P C 251, Rel. on.*

[P 500 C 2]

B. P. Sinha — *for Appellant.*

Mahabir Prasad and Rajani Kanta Sinha
— *for Respondent.*

Judgment.—This appeal can be disposed of on one short ground, but I propose to deal with both the points which have been raised. The first point arises by reason of S. 12, Bihar and Orissa Municipal Act of 1922, which provides:

There shall be established for each Municipality a body of Commissioners, who shall be a body corporate by the name of the Municipal Commissioners of the place by reference to which the Municipality is known, having perpetual succession and a common seal, and may by that name sue and be sued.

The use of the word "may" must be construed in the sense that they shall by that name sue and be sued, and by no other. In this case, as is very common in this Province, the party suing is the Chairman of the Municipality, a position although recognized by the Municipal Act is not a legal entity nor a Corporation sole and therefore he is not entitled to sue. The action in the present form is therefore not maintainable. The sooner the Municipalities of this Province realize this position the better. Two cases have failed owing to this form being used in actions either by the Municipality or against them. The other point for consideration is whether in the circumstances the Raj was estopped from denying that the Municipal Commissioners were their landlords. It appears that about 1400 bighas of land was granted by the Raj in 1864 for the purpose of building the town of Hazaribagh or extending it—the exact purpose it is unnecessary to state. It has been found by both the Judges in the Courts below that the land upon which these bungalows stood and with regard to which rent was claimed was not a part of the 1400 bighas. I would be more accurate in saying that the finding of the trial Court was that, and not appealed against and therefore accepted in the lower Appellate Court. Now, the Judge finds as a fact that the Municipal authorities are not the landlords of this piece of land, that is to say, they have no title to it. The learned Judge has also decided that in the circumstances the parties are not estopped from applying the principles laid down by their Lordships of the Judicial Committee of the Privy Council and by a decision of this Court to which I

was a party. But the learned Judge appears to have considered that the payment by the defendant to the Municipal authorities of rent for a considerable period created the tenancy.

The case can be very shortly stated thus as soon as it is found that the defendant is not estopped, the other finding becomes impossible. A tenancy either exists or does not exist. In fact, we know it does not exist in this case because the landlord was not the proprietor of the land; and a tenancy cannot exist between a person and another person neither of whom has title to the land the subject-matter of the so-called tenancy. It is only when estoppel comes in and the defendant is prevented from saying that there is no tenancy that the law of tenancy would apply. Payment of rent, it has been decided on many occasions, is evidence of tenancy, but it is *prima facie* evidence of tenancy which, apart from questions of estoppel, can be rebutted, and on the facts of this case, whether the Raja paid under a mistake or misrepresentation, it seems to me not to matter. But it cannot be said that they (the Municipality) were the tenants of the Raja or that they were liable for payment of rent sued for in this case. I refer to my decision in 15 P L T 519¹ and to the decision of their Lordships of the Judicial Committee of the Privy Council in 64 I A 311.² I would allow the appeal and dismiss the suit with costs throughout.

N.S./R.K.

Appeal allowed.

1. Badruddin Khan v. Bhaglo Koeri, (1934) 21 A I R Pat 555=153 I O 759=15 P L T 519.

2. Krishna Prasad Lal v. Baraboni Coal Concern, Ltd., (1937) 24 A I R P C 251=169 I O 556=64 I A 311=ILR (1938) 1 Cal 1=31 S L R 625 (P O).

A. I. R. 1939 Patna 500

FAZL ALI AND VARMA JJ.

Sheosaran Singh and others —

Plaintiffs — Appellants.

v.

Gaya Amla Co-operative Society and others — Defendants — Respondents.

Appeal No. 410 of 1937, Decided on 13th February 1939, from appellate decree of Dist. Judge, Gaya, D/- 11th December 1936.

(a) Bihar and Orissa Co-operative Credit Societies Act (6 of 1935), S. 49 — Dispute referred to Registrar for award—Registrar functions as Civil Court and does not act without jurisdiction in deciding whether dispute is time-barred or not.

Where a dispute has been referred to the Registrar, Co-operative Societies for an award under the Co-operative Societies Act, the Registrar acts as a Civil Court and has jurisdiction to decide whether the dispute before him is time-barred or not. Once he has decided that rightly or wrongly it cannot be said that he acted without jurisdiction.

[P 501 C 2]

(b) Civil P. C. (1908), Ss. 52, 53 — Award for debts of father passed against son as legal representative — Ancestral property in son's hands can be attached and sold in execution.

Where the debt in respect of which an award under the Co-operative Societies Act has been granted is the debt of the deceased father and the award is passed against the son as the legal representative of the father, the ancestral property in the hands of the son and his sons can be attached and sold in execution of the award : 13 Cal 21 (P O), *Rel. on.*

[P 502 C 1]

Sarjoo Prasad — *for Appellants.*

Mahabir Prasad and Rajani Kanta Sinha
— *for Respondents.*

Varma J.—This is an appeal on behalf of the plaintiffs who filed a suit challenging a sale of property in execution of an award made by the Assistant Registrar of the Co-operative Societies of the Gaya Circle, against the appellant Sheosaran Singh on 13th March 1930. It appears that Muralidhar, father of Sheosaran, borrowed a sum of Rs. 500 from the society. Muralidhar died on 25th February 1925, and on that date a sum of Rs. 213 was found due to the society. It appears, on 27th August 1925, Sheosaran paid Rs. 25 to the society, Rs. 4.6.0 as principal and Rs. 20.10.0 as interest. It appears that Sheosaran was entitled to Rs. 12.8.0 as dividend of shares purchased by Muralidhar on 20th July 1927. On 2nd September 1929 reference was made to the Assistant Registrar for an award and the award was given on 13th March 1930. Execution under the award commenced in the Civil Court on 22nd July 1931. On 25th July 1932, the joint family properties were sold. It is alleged that on 18th November 1932 Sheosaran and his family separated and Sheosaran got a small share of the family property. The present suit was filed on 6th April 1935, and was dismissed on 28th March 1936. Against that an appeal was filed before the lower Appellate Court, which was filed after the period of limitation but time was extended under S. 5, Limitation Act. It was ultimately dismissed on 11th December 1936.

The lower Appellate Court has found in concurrence with the findings of the learned Munsif that there was no fraud in obtaining the award. It held further that the Civil Court had no jurisdiction to entertain

a suit questioning the award of the Assistant Registrar. On the question whether plaintiffs 2 to 5 were bound by the award the Court came to the conclusion that they were bound, holding that the ancestral property in the hands of the plaintiffs is liable to be attached and sold in execution of the award. It held further that the sale affected the 4 annas of tauzi No. 10334 and 2 annas 13 dams odd of tauzi No. 5902 and that the whole of this property passed on the sale. The Court held further that the purchaser was not bound by the result of the partition suit. On the question of res judicata, it was held that the plaintiffs were not barred by the principles of res judicata; and so far as the last point, whether the suit was barred under O. 22, R. 92, Civil P. C., the lower Court was of opinion that Sheosaran was not entitled to challenge the sale in a separate suit.

Mr. Khurshaid Husnain, followed by Mr. Sarjoo Prasad, on behalf of the appellants, urged the following points; that the Registrar had no jurisdiction to pass the award because there was no dispute and because he had no jurisdiction over Sheosaran Singh. His line of argument is that as the debt was time-barred, there was no dispute to be referred to the Registrar and that as it was Muralidhar and not Sheosaran who was the member of the society, the dispute was not one as contemplated by the Co-operative Societies Act. Now, it has been held that the Registrar, Co-operative Societies is acting as a Court and he had jurisdiction to decide whether a dispute before him was time-barred or not. Once he has decided that rightly or wrongly, it cannot be said that he acted without jurisdiction. Mr. Mahabir Prasad deals with the question of limitation in another way and urges that no question of limitation arises. He says that the sum of Rs. 500 was borrowed on 5th July 1923, and the monthly instalments were of Rs. 23. Therefore he urges that before July 1925, no suit could be instituted, and the contract did not show that on failure of payment of one instalment, the whole amount could be sued for. The last payment was on 2nd December 1924, and Muralidhar died on 25th February 1925. Therefore he urges that on this date, i. e. at the date of Muralidhar's death, there was no cause of action and therefore six years limitation would apply. There is a good deal of force in this argument. But we are faced with the provisions of S. 63, Bihar and Orissa Co-operative Societies

Act (Bihar and Orissa Act 6 of 1935), which says that notwithstanding any of the provisions of the Indian Limitation Act, 1908, the period of limitation for debt including interest due to a registered society by a member thereof shall be computed from the date on which member dies or ceases to be a member of the society.

It is not necessary for me to give a definite opinion on this point in view of the line of reasoning followed by the Court below which I accept. So this point of Mr. Khurshaid Husnain fails. The next point that has been urged is that even assuming that the award could be passed, it was only in a representative capacity as an heir of Muralidhar and therefore the interest of Sheosaran could not be sold, or, in any case, the interest of Sheosaran's son could not be sold. So far as these two points are concerned, they go together. From the award it is clear that the award is not against Sheosaran personally, but as against him as representing the estate of his father, and the debt in respect of which the award has been granted was a debt of the father. Ss. 52 and 53, Civil P. C., lay down that where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property, and for this purpose, property in the hands of a son or other descendant which is liable under Hindu law for payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

It therefore follows that the ancestral property in the hands of Sheosaran Singh and his sons is liable to be attached and sold in execution of the award. In support of this I rely upon the case reported in 13 Cal 21,¹ where their Lordships of the Judicial Committee held

if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings.

Mr. Mahabir Prasad relying upon this case has referred to the fact that the purchaser is now in possession of the property. In the result the story of fraud having failed, the Registrar not having acted without jurisdiction in giving the award, and the ancestral property in the hands of the plaintiffs being liable to be attached, all the points urged on behalf of the appellants

fail. I would therefore uphold the judgment and decree of the lower Appellate Court and dismiss the appeal with costs.

Fazl Ali J.—I agree.

N.S./R.K.

Appeal dismissed.

* A. I. R. 1939 Patna 502

JAMES AND ROWLAND JJ.

*Inderdeo Singh and another —
Plaintiffs — Appellants.*

v.

*Ramlal Singh and others — Defendants
— Respondents.*

Second Appeal No. 510 of 1937, Decided on 16th February 1939, from decision of Sub-Judge, Gaya, D/. 31st May 1937.

(a) Registration Act (1908), Ss. 28, 29—Person desiring to obtain registration of document containing personal covenant and also affecting immovable property—He is bound by provisions of S. 28 for whole of document.

If a party desires registration of a document containing a personal covenant he is entitled to obtain registration of it wherever he pleases, provided that the document does not affect immovable property; but if he desires to obtain registration of a document containing a personal covenant which also affects immovable property, he is bound by the provisions of S. 28 and he is bound by those provisions for the whole of the document from beginning to end, and those provisions apply to the whole of the document. [P 503 C 2]

* (b) Limitation Act (1908), Art. 116 — Registration of mortgage bond obtained by fraud on law of registration — Mortgagor and mortgagee parties to fraud—Document cannot be regarded as registered, for suit on personal covenant.

If the registration of a mortgage bond has been obtained by a fraud on the law of registration to which the mortgagor and mortgagee were parties, the document cannot be treated as a registered document for the purpose of applying the provisions of Art. 116 to a suit on a personal covenant: *A I R 1923 Mad 447, Dissent.; A I R 1937 Cal 347 and A I R 1939 Nag 57 (F B), Rel. on; A I R 1921 P C 8, Expl.* [P 503 C 1]

Sarjoo Prasad — *for Appellants.*

B. K. Prasad Sinha — *for Respondents.*

James J. — This second appeal arises out of a suit based on a mortgage bond. The bond was registered at Tikari, but the Sub-Registrar at Tikari could not have accepted it for registration unless it had contained a description of land within the jurisdiction of the Tikari Sub-Registry Office. Both Courts have found that this entry was fictitious, and that registration was obtained by fraud to which mortgagor and mortgagee were parties, so that the deed cannot be treated as a registered mortgage deed, and therefore the mortgage debt cannot be regarded as secured on the mort-

1. Nanoni Babuasin v. Modhun Mohun, (1886) 13 Cal 21=13 I A 1=4 Sar 682 (P C).

gaged property described in the bond. The Munsif considered that he could give effect to the personal covenant as contained in a registered document, and he gave money decree for the amount of money due under the covenant. The Subordinate Judge on appeal held that the document could not be regarded as a registered document at all. If the document could be treated as a registered document under Art. 116 of the Schedule to the Limitation Act, the mortgagee would have six years during which he might sue on the personal covenant; but if the document were regarded as an unregistered document he would have been obliged to institute a suit within three years, and the suit in the present case would have been barred by limitation.

The plaintiff has come up in second appeal from that decision. The only question for decision in this appeal is whether, if the registration of a mortgage bond has been obtained by a fraud on the law of registration, the document can be treated as a registered document for the purpose of applying the provisions of Art. 116, Limitation Act, to a suit on a personal covenant. The question precisely in this form came before the Madras High Court in 46 Mad 435¹ wherein it was held that in similar circumstances the registration was good so far as it was registration of the personal covenant to re-pay the mortgage money, and the mortgagee was entitled to take advantage of the provisions of Art. 116 of the Schedule to the Limitation Act. In 41 C W N 783² a Bench of the Calcutta High Court considering the same question expressly differed from the view of the Judges of the Madras High Court, and in a case recently decided, a Full Bench of the Nagpur High Court has adopted the view taken by the Calcutta High Court: A I R 1939 Nag 57.³

Mr. Sarjoo Prasad for the plaintiff-appellant argues in favour of the view taken by the learned Judges of the Madras High Court. He suggests that it should be considered that there was no fraud in obtaining registration of the bond so far as the personal covenant was concerned, because if the bond had contained nothing but the

personal covenant, the provisions of S. 29, Registration Act, would have applied and the document could have been registered at any Registry Office. The argument appears to be that if the document registered had been something other than what it was, no fraud would have been committed, and we are asked to call the document something other than what it was for the benefit of one of the parties who actually did commit the fraud. I think that it would be more correct to say that if a party desires registration of a document containing a personal covenant he is entitled to obtain registration of it wherever he pleases, provided that the document does not affect immovable property; but if he desires to obtain registration of a document containing a personal covenant which also affects immovable property, he is bound by the provisions of S. 28, Registration Act, and he is bound by those provisions for the whole of the document from beginning to end, and those provisions apply to the whole of the document.

Mr. Sarjoo Prasad also suggests that the decision of their Lordships of the Judicial Committee in 48 Cal 509⁴ implies that in that case, although there was a fraud in registration which rendered the mortgage bond invalid, their Lordships considered that it might be valid as a registered contract to repay, because they left it open to the plaintiff of that case to apply to the High Court for a personal judgment on the mortgage debt. But there is nothing in that decision which implies that their Lordships considered that the plaintiff should be entitled to any advantage arising from the registration of the document, or that Art. 116 of the Schedule would apply to the case. Lord Finlay expressly said that if the High Court should think it right to enter upon the consideration of this claim, all defences arising out of the lapse of time must be open to the defendants, and there is nothing in the decision which suggests that Art. 116 of the Schedule would be applicable to the case. Mr. Sarjoo Prasad also suggests that to deny to the mortgagee, seeking a decree on the personal covenant, the benefit of the provisions of Art. 116 is to permit a mortgagor to benefit by his own fraud. This is of course to some extent true of a judgment refusing a mortgage decree; but the finding of the Courts below

1. Rama Rao v. Vedayya, (1928) 10 A I R Mad 447=79 I O 188=46 Mad 435=44 M L J 878.

2. Sailendra Nath v. Keshab Chandra, (1937) 24 A I R Cal 347=171 I O 965=41 C W N 783.

3. Jageshwar Prasad v. Mul Chand, (1939) 26 A I R Nag 57=179 I O 938=I L R (1939) Nag 64 (F B).

4. Biswanath Prasad v. Chandra Narayan, (1921) 8 A I R P O 8=63 I O 770=48 Cal 509=48 I A 127 (P O).

is that the mortgagor and the mortgagee are in this matter *in pari delicto*: and in those circumstances the position of the defendant is the better, and if one or the other is to profit by the fraud, it cannot be the plaintiff in a suit. I do not consider that any grounds have been made out which would warrant our declining to follow the decision of the Calcutta High Court and the decision of the Full Bench of the Nagpur High Court. The view of the law taken by the learned Subordinate Judge is correct; and I would dismiss this appeal with costs.

Rowland J.—I entirely agree. In my view the jurisdiction conferred on the Sub-Registrar by S. 29 is limited to receiving and registering "every document other than a document referred to in S. 28" and once it is found that the document was a document referred to in S. 28 then the result is that if a Registrar had been aware of the facts he would have refused registration. The same consequences must follow as if registration had in fact been refused, that is to say the entire document is on the footing of an unregistered document. Not only does it not affect any immovable property—S. 49, but it must be considered unregistered for the purposes of limitation—Art. 116 of the Schedule to the Limitation Act.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1939 Patna 504**

HARRIES C. J. AND WORT J.

*Mt. Haliman Bibi and another —**Defendants—Appellants.*

v.

*Muhammad Tajamul Hussain, Plaintiff and others, Defendants—**Respondents.*

Letters Patent Appeal No. 14 of 1938, Decided on 25th April 1939, from decision of Mohammad Noor, J., D/- 26.4.1938.

(a) Landlord and Tenant — Abandonment — Transfer of holding by chandnadar—Transferor remaining in possession of one room of house on holding with leave and license of transferee —There is abandonment by chandnadar and landlord is entitled to recover holding.

Where a chandnadar has executed a kobala transferring his holding to another person and the transferor has remained in possession of a room in a house standing on the holding with leave and license of the transferee it cannot be said that the relationship between the transferor and the landlord continues. There is an abandonment of the holding by the chandnadar and the landlord therefore is entitled to recover the holding : *A I R 1935 Pat 269, Disting.* [P 505 C 1]

(b) Civil P. C. (1908), O. 41, R. 33—Action by person dismissed—No appeal by him but

cross-objection—Appellate Court still can grant him relief.

Where an action by a person is dismissed the Appellate Court has under O. 41, R. 33 power to grant him relief even if he has not appealed but has filed cross-objection. Hence an objection regarding competency of cross-objection by him has no substance. [P 505 C 2]

G. C. Das—for Appellants.

P. Misra—for Respondents.

Wort J.—This is an appeal from the decision of Mohammad Noor J. arising out of an action for the recovery of .04 acre of land with a house thereon which at one time was in possession of one Bhajani Mahalik, who was chandnadar. The appellant before my brother, Mohammad Noor, was defendant 2. One of the questions of fact decided by the Courts below was whether the son of Bhajani Mahalik predeceased him or whether he survived him and in his turn became the chandnadar. It was originally recorded in the Provincial Survey, as I have already indicated, in the name of Bhajani Mahalik. In the current settlement it was recorded in the name of defendant 1, Sunai Bewa, in other words, widow of one Rama Mahalik, the son. On 19th December 1932, defendant 1, the widow, executed a kobala in favour of defendant 2. There were two other transactions a few days later, that is, on 11th January 1933, which have been held to be merely transactions to cover up the true nature of the transaction of 19th December. In other words, as I understand the judgments of the Courts below, they were transactions one of mortgage and the other of sale of a lesser area of the land, which, if taken at their face value, would lead one to suppose that the whole of the land, the subject-matter of the tenancy, had not been transferred, and having regard to the events which happened, this is explicable on the grounds that one of the contentions put forward by the defendant was that the holding had not been abandoned. One of the arguments on behalf of the parties in the Courts below was that this tenancy was a mere tenancy-at-will. There has been a finding against that based upon a decision of this Court in 16 P L T 864¹ where it was held that the tenancy was not a tenancy-at-will. Sub-s. (2) of Sec. 236, Orissa Tenancy Act, provides:

Save as otherwise expressly provided in this Act, the incidents of the tenancy of a chandnadar

1. Jahabaj Khan v. Srikrishna Dey, (1936) 23 A I R Pat 29=160 I O 437=15 Pat 187=16 P L T 864 (FB).

shall be regulated by local custom or usage and his rent shall be liable to re-assessment on each revision of land revenue settlement.

The character of such tenancy can be gathered from the definition in S. 3, sub-section (3):

"Chandnadar" means a person holding land which has been recorded as chandna in the course of a settlement of land revenue, and for which rent has been fixed for the term of that settlement, and includes also the successors in interest of such a person.

It is not too much to say from the definition in the Section, to which I have already referred, that it is indicated that a tenancy of the character with which we are dealing in this case, at least subsists during the currency of a settlement. In the result, apart from the question which was argued before Mohammad Noor J. as to the competency of the appeal before the first Appellate Court, the question which arose was whether defendant 1 could be held to have abandoned the holding.

The contention of defendant 2, the transferee, relying, as I have already indicated, upon the other two transactions of 11th January 1933, was that the holding had not been abandoned, and apart from the transactions to which I have just made reference, reliance was placed upon the fact that the chandnadar, defendant 1, after the transfer of December 1932 remained in possession. In my judgment it is a contention that cannot be supported, because it has been found as a fact that the possession of the defendant was merely the occupation of one room in the house, which stood on the land with the leave and license of the transferee, defendant 2. Even supposing if something more than a mere license is meant, it could, in the circumstances, be no more than a sub-tenancy and it would be impossible to contend that the relationship between the transferor, that is defendant 1, and the plaintiff, the landlord, continued. The learned advocate for the appellants has failed to state what other circumstances would be necessary for the purpose of holding that an abandonment has taken place. In my judgment, it is impossible to contend that the decision of the Court below that the holding or tenancy had been abandoned is wrong. If the holding was abandoned, there is no doubt and it is not seriously disputed that the plaintiff is entitled to recover.

One other question was raised which is not very strenuously pressed, is the question of competency of the appeal by defen-

dant 2 in the first Appellate Court. The action in that Court had been dismissed for reasons which need not be stated. Defendant 2 appealed, and there was a cross-appeal or cross-objection by the plaintiff. Obviously the contention could not be that defendant 2 should not have appealed, but that the cross-objection of plaintiff 1 was incompetent and that there should have been a properly constituted appeal by him. Whether described as a cross-objection or as an appeal, it seems to me not to matter. The only question that could possibly have arisen would be whether coming with his cross-objection the plaintiff had paid the proper court-fees. No question arose as regards that and apart from the considerations which have been stated by the learned Judge in the Court below and those to which I have referred, it must be remembered that the Court had the widest powers under O. 41, R. 33, Civil P. C. In my judgment, there is no substance in the objection as to the competency of the cross-objection by the plaintiff. For the reasons which I have stated, in my opinion the decision of Mohammad Noor J. is right.

There is reference to one authority on the question of abandonment: A I R 1935 Pat 269.² The head-note says that ordinarily execution of an effective sale deed by the raiyat in favour of a stranger will constitute an abandonment of the holding by the raiyat. If afterwards the raiyat continues cultivating the land and has made arrangement for the payment of rent, he is not liable to be ejected, provided that he has not repudiated the relationship with his landlord.

Mohammad Noor J. decided that where the raiyat who has executed a sale cultivates the land under the purchaser as an under raiyat, the landlord is entitled to a decree for ejectment against the purchaser. This was a case under the Bengal Tenancy Act. One of the contentions upon which the three appeals were decided, was that where provision has been made for the payment of the rent, it could not be held that there had been an abandonment. There can be no possible application of that decision to the facts of the present case for the reasons which I have sufficiently stated. In my judgment the appeal fails and must be dismissed with costs. The stay order is discharged.

Harries C. J.—I agree.

D.S./R.K.

Appeal dismissed.

2. Laley Dharnidhar v. Jugeshwar Mahton, (1935) 22 A I R Pat 269=156 I O 917.

A. I. R. 1939 Patna 506

WORT J.

Bibi Haliman — Defendant 1 —

Appellant.

v.

Bibi Umadatunnissa, Plaintiff and another, Defendant 2—Respondents.

Appeal No. 909 of 1937, Decided on 24th January 1939, from appellate decree of Additional Sub-Judge, Gaya, D/- 8th July 1937.

(a) Evidence Act (1872), S. 92 — Recital of consideration is not term of document (*Obiter*).

The recital of the consideration is not one of the terms of a document : *A I R 1932 Cal 25, Approved.* [P 507 C 2]

(b) Equity — There is no such thing in India as rules of Common law or equity *eo nomine*.

There is no such thing in India as the rules of the Common law or equity *eo nomine*. The rules of the Common law and the rules of equity are administered in India in the absence of express rules, statutory or otherwise, as the rules of justice, equity and good conscience : *11 Bom 551 (P C), Rel. on.* [P 508 C 1]

(c) Transfer of Property Act (1882), S. 130 — Part of debt is not assignable (*Obiter*).

Section 130 is a mixture of the rules of law and equity in England, but the validity of the assignment depends upon its compliance with the Section. A part of debt or part of the chose in action is not assignable. [P 508 C 1]

(d) Transfer of Property Act (1882), Sec. 6 (dd) — Sec. 6 (dd) intends sum which in fact is maintenance and not one which is used as maintenance—Mahomedan transferring whole of his property to daughter for certain consideration — Daughter agreeing to pay certain amount annually to father as long as he lived—Sum held came within mischief of Sec. 6 (dd) and right to receive it was not assignable.

What is intended by Section 6 (dd) is not a sum which is used as maintenance, but which in fact is maintenance. There is nothing in the Section to prevent an assignment of arrears of maintenance, that is to say, a sum which has already become due. The Section means a right, under the personal law of the parties concerned, to maintenance. The sum does not come within the Section merely by reason of the fact that it is used as maintenance. [P 508 C 2]

A Mahomedan transferred whole of his property to his daughter for certain sum. The daughter entered into an agreement undertaking to pay certain sum annually to father as long as he lived :

Held that the obligation arising under the Mahomedan law to maintain parents arose in this case; and by reason of the transaction the daughter was obliged to pay, under the personal law by which she was governed, the sum by way of maintenance. The sum came within the mischief of Sec. 6 (dd) and right to receive it was not assignable. [P 509 C 1]

Hasan Jan and G. Mohammad —

for Appellant.

Nawal Kishore Prasad II —

for Respondents.

Judgment. — The question to be determined in this appeal is, whether the plaintiff is entitled to recover the sum of Rupees 542.10.8 to which she claimed to be entitled by reason of an assignment under a bond dated 7th September 1933. Defendant 1, who is the appellant, contends that the claim is not maintainable, as the assignment was an assignment of a right to future maintenance and therefore unassignable under Sec. 6 (dd), T. P. Act. The circumstances giving rise to this case are as follows. By a kabala dated 3rd November 1921, Hafiz Syed Fazal Haq, the father of Bibi Haliman (defendant 1 in the suit and appellant before me), transferred the whole of his property to his daughter, the appellant before me, for a sum of Rs. 10,000. There was another document which is undated but which was registered on 5th December 1929, by which the defendant-appellant entered into a transaction undertaking to make "a fixed monthly cash payment amounting in all to Rs. 400 per annum" to her father so long as he lived. The learned Judge in the Court below has stated that the two last transactions were one, and, as one of the grounds for coming to this conclusion, has said that those documents were presented on the same day for registration. There were some other transactions entered into being releases of mukarrari leases which were for the purpose of carrying out the transactions to which I have made specific reference. Apart from that statement, it is unnecessary to go into further details with regard to them. Now, the document by which the defendant-appellant undertook to pay her father the sum of Rs. 400 annually recites that it was intended to allow the father, after the deed of transfer of 1921, to remain in possession of the property on the basis of the mukarrari, and, if that intention had been carried out, the father would have got a net profit (under the mukarrari) of Rs. 400 a year ; therefore, as an easier method of carrying out the same transaction, the daughter (appellant before me) going into possession of the property purchased, agreed to pay a sum of Rs. 400 annually to her father making the said sum a charge on the property which was the subject-matter of the sale deed of November 1921. By a deed of 7th September 1933, the right to this annual sum was assigned to the plaintiff.

As I have already said, the learned Judge in the Court below has held that the document executed by the appellant, a document

which is undated and the sale deed of November 1921, were one and the same transaction. In support of this decision the learned advocate appearing on behalf of the plaintiff-respondents contends that the payment of Rs. 400 annually to the father was a part of the consideration for the sale which *prima facie* was effected for a consideration of Rs. 10,000. I have mentioned that fact at the commencement of my observations, as the real point for determination is whether this transaction of September 1933, under which the plaintiff claimed the sum in suit was an assignment of future maintenance. It seems to have been thought by the learned advocate for the plaintiff-respondent that if it was established that the payment by the daughter (defendant 1) of Rs. 400 annually to the father was a part of the consideration of the sale of 1921, then *ipso facto* it ceases to be an assignment of future maintenance, or, perhaps to be more accurate, it cannot be treated to be 'future maintenance.' Before proceeding further, I propose to read the words of S. 6 (dd), T. P. Act. Those words are :

A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.

This sub-section appeared for the first time in 1929 as a result apparently of a number of decisions in India by which it was held that although a right to maintenance was not assignable, yet, if the right was secured by a deed or determined by a judgment of the Court, the matter was otherwise. The new sub-section as regards certain aspects of the matter has determined the point once and for all, the point being that the fact that the maintenance is secured by a deed does not exclude it (if it be determined to be future maintenance) from coming within the mischief of the Section. A number of authorities have been quoted and there are some to which I propose to refer but which have not been mentioned at the Bar.

As regards the first contention that this was a part of the consideration for the sale and therefore there was no right to maintenance, I would only say that, if I came to the conclusion that it was a part of the consideration, that would not necessarily determine the matter. Indeed, the argument that it was a part of the consideration is entirely beside the point. Regarding the matter from one point of view, the transactions were entirely different, although as

pointed out by the learned Judge in the Court below, they might form parts of a series of transactions one depending upon another. And although I do not accept the argument that the conclusion at which the Judge has arrived as a conclusion of fact is binding upon me, I am rather inclined to the view that these transactions were dependent one upon another: I refer of course to the sale deed and the document by which the daughter granted what is alleged to be 'maintenance' to her father. This is obvious from the recitals in the documents themselves. If the father had not sold the property, the occasion would not have arisen to have allowed him to remain in possession for the purpose of his maintenance. It was by reason of the fact that the father divested himself of the whole of the property by the sale of 1921 that some sort of arrangement was necessary such as is recited in the grant by the daughter Bibi Haliman. To that extent I agree with the learned Judge in the Court below that the transactions were one and the same, or perhaps to be more accurate, they were two of a series. The argument therefore that this was a part of the consideration of the sale deed is, in my judgment, irrelevant. But if I were forced to determine the question whether the consideration for the sale of 3rd November 1921 was Rs. 10,000 or something more, I would be precluded from going into the matter by reason of S. 92, Evidence Act. Certain authorities were relied upon for this proposition, and I shall briefly refer to them. The first relied upon by the learned advocate for the respondents is the decision in 35 CWN 279¹ the head-note of which correctly states the decision as follows :

It is permissible to prove that the real consideration was not that mentioned in the document but something else. S. 92, Evidence Act, is no way barring that course inasmuch as the recital of the consideration is not one of the terms of a document but the recital of a fact.

This, apart perhaps from the particular facts upon which the case was determined, was decided in total disregard of the earlier decision of the same Court in 37 CLJ 552² where an attempt was made to prove that the consideration was something other than what the document showed. I prefer

1. Nabin Chandra v. Sm. Shuna Mala Ghose, (1932) 19 AIR Cal 25=133 IC 568=35 CWN 279.

2. Annada Charan v. Hargobinda, (1923) 10 AIR Cal 570=75 IC 557=37 CLJ 552=27 CWN 496.

to follow the later decision to the effect 'that the recital of the consideration is not one of the terms of a document'; but, as in my judgment, the matter does not arise in the present case, I propose to say no more about it. If I had accepted the argument of the learned advocate for the respondents that Rs. 400 was a part of the consideration of the sale of November 1921, many, and I think, insuperable difficulties would have been in his way amongst which would be that the plaintiff in the case was relying upon an assignment of a part of the consideration or part of the debt. The mere fact that the original debtor had already paid a part of it would not, in any way, help the plaintiff-respondent in the contention which was made at the suggestion of the Court that a part of the debt or a part of the chose in action is not assignable. To meet that, the learned advocate for the respondents contended, relying upon the decision of the Madras High Court in 52 Mad 465³ that

though a transfer of a part of a debt was not good at English common law, it was good at equity and in India law.

With that decision I do not agree as there is no such thing in India as the rules of the Common law or equity *eo nomine*. The rules of the Common law and the rules of equity are administered in India in the absence of express rules statutory or otherwise as the rules of justice, equity and good conscience : see 14 I A 89⁴ at p. 96. We are bound with regard to this matter by S. 130, T. P. Act, which as the late Chief Justice of the Calcutta High Court pointed out, is a mixture of the rules of law and equity in England. But the validity of the assignment depends upon its compliance with the Section to which I have referred. I propose to leave the point there as, for the purpose of this decision, it is irrelevant. But I would refer to the decision in (1910) 2 K B 636⁵ where Bray J. came to the conclusion that part of a debt could not be assigned under S. 25, sub.s. (6), Judicature Act, not by reason of any construction to be placed upon that Section but by reason of the difficulties which would arise in the event of the Court holding that such a debt could be

assigned. This decision was followed by P. O. Lawrence J. as he then was in (1921) 1 Ch 349.⁶ I dealt with these points because they were raised, but in my judgment they are irrelevant.

The real point is whether this is maintenance; and even accepting the argument of the learned advocate for the respondents that the sum claimed was a part of the consideration of the sale, it would not, by reason of that fact, cease to be maintenance; it seems to me that the proposition is obvious. Now, what is intended by S. 6 (dd), T. P. Act, is not a sum which is used as maintenance, but which in fact is maintenance. There is nothing, I would observe in passing, in the Section to prevent an assignment of arrears of maintenance, that is to say a sum which has already become due. But in that connexion I would refer to the document of 7th September 1933. What was assigned was a right to future maintenance. That document recites :

I made dar-mukarrari settlement of the right to realize the said fixed monthly allowance of Rupees 83-5-4, the annual amount whereof comes to Rs. 400 together with the right of realizing the damage in default of instalment.

I would find none myself and it is agreed that there was no reference to arrears. Therefore we must take the transfer of September 1933 as the transfer of the whole right, and it either stands or falls depending upon whether it comes or not within the mischief of S. 6 (dd) to which I have made more than one reference. I understand the Section to mean a right, under the personal law of the parties concerned to maintenance. The sum does not come within the Section merely by reason of the fact that it is used as maintenance. In this case undoubtedly the sum was to be used as maintenance and it is so stated. In these circumstances a rather nice question falls to be determined, namely whether the father had right to maintenance in the circumstances. Para. 270 of Mulla's Principles of Mahomedan Law, Edn. 11, says :

Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.

The text-book which is an authority on the matter, namely the late Ameer Ali's Mahomedan Law, Vol. II (Edn. 5), lays down at page 430 as follows :

When children have means they are bound to maintain their parents if in straitened circum-

3. Raja of Ramnad v. Subramaniam Chettiar, (1928) 15 A I R Mad 1201=116 I O 827 = 52 Mad 465.

4. Waghela Rajsanji v. Shekh Masludin, (1887) 11 Bom 551=14 I A 89=5 Sar 16 (P O).

5. Forster v. Baker, (1910) 2 K B 636=79 LJKB 664=102 L T 522=26 T L R 421.

6. In re Steel Wing Co. Ltd., (1921) 1 Ch 349=90 L J Ch 116 = (1920) B & C R 160 = 124 L T 664=65 S J 240.

stances, and it makes no difference in their liability whether the parents are Moslems or non-Moslems.

It is contended by the learned advocate for the respondents that if in fact the father in this case was in straitened circumstances such as would give rise to the liability of the children to maintain him, such straitened circumstances were due to the transaction entered into by him with his daughter; I refer to the transaction of sale; and that circumstances of that kind were not contemplated by the rule of Mahomedan law. At first I was of the opinion, that the mere fact that he received Rs. 10,000 as consideration for the sale was a reason for coming to the conclusion that he was not in such circumstances as would give rise to the obligation he was referred to. It is pointed out by Mr. Hasan Jan on behalf of the appellant that the consideration of Rs. 10,000, according to the deed itself, was used as to Rs. 8049.1.0 for the payment off of the bond of 12th August 1920 and as to Rs. 1950.15.0 for the payment off of another bond dated 21st March 1920. That would dispose of the whole of Rs. 10,000. Now, it is true that there appears to be no finding of the Judge in the Court below as to the condition in life of the father after this transaction. But in my judgment I am entitled to look at the recitals of this bond (Ex. A) and determine the question of fact if indeed it be a question of fact for the purposes of this case under S. 103, Civil P. C. It seems to me that the obligation arising under the Mahomedan law arose in this case; and by reason of the transaction the defendant-appellant was obliged to pay under the personal law by which she was governed the sum of Rs. 400 by way of maintenance; and that undoubtedly in the circumstances on the recitals contained in the document itself, there was a right to future maintenance, I am not deciding this question by reason of the fact that there are references to the fact that the sums are to be used for maintaining the father, but I am deciding the case on the facts as they appear to me to be established and by reason of the obligation which arises in those circumstances under the Mahomedan law. I would hold that it comes within the mischief of S. 6 (dd), T. P. Act, and is not assignable. As I have already held that the deed of assignment is a deed of assignment of the future amounts, therefore the plaintiff, the mother of the appellant, was not entitled to bring her action on that document.

I would set aside the judgment of the learned Judge in the Court below, allow the appeal and dismiss the suit with costs throughout. There will be leave to appeal.

D.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 509

DHAVLÉ J.

Smt. Raj Rani Devi — Petitioner.

v.

Sham Manohar Missir and others —
Opposite Party.

Civil Revn. No. 668 of 1938, Decided on 23rd January 1939, for confirming order of Munsif, Second Court, Gaya, D/- 23rd May 1938.

Land Tenure—Mokarrari tenure—Certificate sale of mokarrari tenure — Balance of convenience — No injunction can lie against a dakhil dehani which has already been effected—Balance of convenience lies in favour of auction-purchaser incurring liability to pay large amount as yearly rent to superior landlord.

A mokarrari tenure carrying annual rent of Rs. 2000 was sold in certificate proceedings. On the sale being confirmed the auction-purchaser applied for sale certificate and dakhil dehani which were accordingly issued. In the meantime certain members of certificate debtors' family filed a suit for permanent injunction restraining the purchaser from taking possession and a temporary injunction to that effect was issued by the Court which was received by the certificate officer after the issue of dakhil dehani which was duly effected :

Held that no injunction temporary or permanent, could lie against a dakhil dehani that had already been effected; and that in face of the liability of the auction-purchaser or his successor to pay to the superior landlord much in excess of the figure at which the plaintiffs valued their suit the balance of convenience lay in favour of the purchaser.

[P 511 C 2; P 512 C 1]

P. R. Das and Girijanandan Prasad—

for Petitioner.

Sarjoo Prasad and G. C. Das —

for Opposite Party.

Order.—This Rule must be made absolute. It is directed against the issue of a temporary injunction pending the disposal of a suit for a permanent injunction to restrain the defendants from "dispossessing the plaintiffs from their legitimate interests" in a certain mokarrari tenure and from taking out the dakhil dehani in the certificate case in which that mokarrari tenure was brought to sale and purchased by the original defendant 1. The certificate sale, I am told, took place on 15th March 1937, the mokarrari which carries an annual rent of over Rs. 2000 being sold for Rs. 5300. On 11th May 1937, there was an application under S. 20, Public Demands

Recovery Act, by some of the sons of some of the judgment-debtors that some minors had not been properly impleaded in those certificate proceedings. This application ended in a compromise, so I am informed, according to which the sale was to be set aside if the judgment-debtors paid a certain sum by 31st August 1937, but was otherwise to stand and no objection was to be made by the judgment-debtors. The money was not paid as promised, and on 1st September 1937, the sale was confirmed. On 3rd September, the auction-purchaser applied for the delivery of the sale certificate to him and for *dakhal dehani*. Next day the sale certificate was signed and *dakhal dehani* issued. On the same date a letter was received, later on, from the Munsif of the Second Court of Gaya saying that a temporary injunction had issued against defendant 1 in respect of his taking possession of the interest of the plaintiffs in the suit. The certificate officer thereupon informed the Munsif of the Second Court of Gaya that *dakhal dehani* had already issued and that the Sub-Divisional Officer of Jehanabad, in whose jurisdiction the *mokarrari* lay, was being written to.

The case of the petitioner before me is that possession was actually delivered on 5th September, under this *dakhal dehani*, and the Sub-Divisional Officer of Jehanabad replied on 8th September that *dakhal dehani* had already been effected. Two days after this the original defendant 1 sold this property to the present defendant 1, the petitioner before me. The suit in which the temporary injunction had been issued was a suit, as I have already stated, for the issue of a permanent injunction, and it was brought by some members of the family of the certificate debtors on the footing that the minor plaintiffs had been impleaded in the certificate proceedings as majors, so that the certificate sale could not affect their shares, and that the other plaintiffs being younger sons were not represented in the certificate proceedings at all, so that their shares were also not affected by those proceedings. The learned Munsif held on a perusal of the pleadings that there was a substantial question to be decided in the case. He held further that if the temporary injunction applied for were refused, the ultimate prayer for a permanent injunction would become nugatory. He held thirdly that a refusal to grant a temporary injunction may lead to a multiplicity of proceedings as in the event of the plaintiffs' success

they would have to start proceedings for delivery of possession and for recovery of mesne profits, etc. He therefore held that the balance of convenience was in the plaintiffs' favour and that the status quo ought to be maintained until the disposal of the suit. The lower Appellate Court upheld the order after dealing with two points only. The learned District Judge was of opinion that in respect of the minor plaintiffs the certificate proceeding was not vitiated by the defect that they were originally described as majors, since a correction was made and the parties in question properly dealt with as minors in the course of the proceedings and before the sale. But as regards the other plaintiffs he held on the authority in 13 C W N 750,¹ that the principle of representation does not apply to certificate proceedings, and that therefore the interest of these plaintiffs was not affected by the certificate proceedings. This point has been contested before me on the authority in A I R 1937 Pat 517.² And the learned District Judge went on to observe that at any rate there was a *prima facie* case in favour of the plaintiff which would be gone into in detail at the trial, and that therefore it was necessary that the disputed property should remain in status quo till the disposal of the suit. It has been contended on behalf of the applicant in revision that the issue of a temporary injunction was entirely unwarranted if only because delivery of possession had already been effected. Mr. Sarjoo Prasad for the opposite party has endeavoured to meet this by pointing out that the certificate officer himself was suspicious regarding the actual service of the writ of *dakhal dehani* and that the learned Munsif took the same view. The view of the certificate officer was, it appears, not adopted by the Revenue Court to which an appeal was preferred against the order of the certificate officer on the application under S. 29, Public Demands Recovery Act. The learned Munsif speaks of the defendants having "in the meantime taken out *dakhal dehani* through the certificate Court and also got it served in hot haste." After referring to the opinion of the certificate officer doubting the correctness of the report of the peon about the service of the writ of delivery of possession, the learned Munsif

1. *Raja Koer v. Ganga Singh*, (1909) 13 C W N 750=1 I C 197=10 C L J 201.

2. *Mahadeo Ram v. Ganesh Prasad*, (1937) 24 A I R Pat 517=171 I C 232.

observes that the defendant "made this haste presumably upon knowing about the plaintiffs' suit and prayer for temporary injunction;" and he adds that in the circumstances the Court will not allow itself to be

circumvented by the suspicious service of delivery of possession. Hence defendants are restrained from taking actual possession of the mokarrari interest of the plaintiffs until further orders.

What the learned Munsif means by 'actual possession' in the circumstances of this case it is not very easy to see. The *dakhal dehani*, so far as it was effected, must have been effected, having regard to the nature of the property, in the manner laid down in O. 21, R. 96. When the learned Munsif speaks of the Court not allowing itself to be circumvented by the suspicious service of delivery of possession, he is employing language which seems to be rather inconsistent with itself. If the Court is circumvented, there must have been actual service; and if there was actual service, the position is not improved by speaking of the service as suspicious. He gives a reason for the defendant making haste, namely that he must have known of the plaintiffs' suit and prayer for temporary injunction; but he does not notice the haste displayed by the plaintiffs in bringing a suit for a permanent injunction at Gaya while the property obviously and admittedly lay in the jurisdiction of the Jehanabad Munsif. Mr. Sarjoo Prasad has urged that as the suit was for the issue of a permanent injunction, the plaintiffs were within their rights in bringing the suit in Gaya in which jurisdiction the defendant resided. But the suit was a suit for a permanent injunction which could only be of use if *dakhal dehani* had not already been effected. The learned Munsif certainly has not found that *dakhal dehani* had not been effected. On the contrary, he speaks of the defendant getting the *dakhal dehani* served in hot haste and circumventing the Court in which the suit was brought.

It has been suggested that the learned Munsif was probably thinking of the provisional order passed by him in respect of the temporary injunction when he spoke of the Court being circumvented. But in any case we know that the defendant took out *dakhal dehani* from the certificate officer before the latter received any communication from the learned Munsif at all. The lower Appellate Court also has not arrived at the conclusion on the materials at present

available that there was no *dakhal dehani* served in fact. If in these circumstances the prayer for a permanent injunction will become nugatory on the refusal of a temporary injunction, that is not a point in favour of the plaintiffs. They need not have brought the suit in this form, and it may still be open to them to amend their plaint and ask for recovery of possession, though it may be that this is what they wished to avoid if only because that would have meant some delay as the suit (if within the pecuniary jurisdiction of a Munsif) would have had to be instituted in Jehanabad. As to the multiplicity of proceedings which the learned Munsif spoke of, while it is true that on the one hand in the event of the plaintiffs' success, there will have to be proceedings for delivery of possession and recovery of mesne profits, we must not on the other hand lose sight of the fact that defendant 1 as auction-purchaser is presently liable to pay the annual rent of over Rs. 2000 to the superior landlord as against the relief of a permanent injunction which the plaintiffs themselves have valued at about Rs. 1100.

There was also a question of jurisdiction raised which the lower Appellate Court referred to and disposed of on the ground that it involved questions of fact and did not appear to have been raised in the trial Court. But here again *prima facie* the suit related to immovable property in Jehanabad and it may be doubted whether the plaintiffs' share of the property, on the facts stated by Mr. Sarjoo Prasad, was within the competence of any Munsif to try however much it may be open to a plaintiff to value the relief he asks for, especially a relief in the nature of a permanent injunction, as he chooses, subject only to the power of the Court to prevent an arbitrary under-valuation or over-valuation. I cannot fully deal with the question of pecuniary or local jurisdiction in the absence of definite findings on the questions of fact involved but I am quite clear that there were no materials placed before the lower Courts on which they could hold, or did in fact hold, that *dakhal dehani* had not yet been effected, so as to make it competent to them to issue a temporary injunction against the defendant. No injunction, temporary or permanent, can lie, it need hardly be said, against a *dakhal dehani* that has already been effected; nor would the balance of convenience in a case like the present seem by any means to lie in the plaintiffs' favour.

in the face of the liability of the auction-purchaser or his successor to pay to the superior landlord a yearly rent much in excess of the figure at which the plaintiffs have valued their suit. The application is accordingly allowed with costs, and the temporary injunction allowed by the trial Court and upheld by the lower Appellate Court set aside. Hearing fee three gold mohurs.

S.G./R.K.

*Application allowed.***A. I. R. 1939 Patna 512**

DHAVLE J.

F. E. Chrestien — Petitioner.

v.

Carter — Opposite Party.

Criminal Revn. No. 144 of 1938, Decided on 5th April 1938, against order of Dist. Magistrate, Monghyr, D/- 22nd February 1938.

Criminal P. C. (1898), S. 144 — Magistrate cannot by passing repeated orders under S. 144 avoid decision of dispute which may be dealt with under S. 145 or S. 107, Criminal P. C.

An order passed under S. 144 decides nothing about the respective rights of the parties and may be no more than an interference with private rights required in a temporary emergency. To repeat such an order on the ground of maintaining the status quo is to compel the unsuccessful party to resort to the Civil Court even though the Criminal Court may have done nothing to look into the rights of the parties, and further, indirectly to prolong the effect of the original order beyond the period of two months fixed in sub-sec. (6) of the Section. Such a use of the Section is altogether unwarrantable. It is not open to a Magistrate by passing repeated orders under S. 144 to avoid the decision of a dispute which may be appropriately dealt with under S. 145 or S. 107, Criminal P. C. The power given by S. 144 is essentially an emergent power which has sometimes to be passed in disregard of private rights. An order of that kind cannot possibly be allowed by repetition to spell a more or less permanent interference with private rights : *A I R 1925 Pat 514 and A I R 1925 Pat 17, Rel. on.* [P 513 C 2; P 514 C 1]

A. K. Roy and S. K. Roy —

for Petitioner.

P. R. Das and B. P. Sinha —

for Opposite Party.

Order. — This is an application in revision against an order passed against the petitioner, as first party in a proceeding under S. 144, Criminal P. C., requiring him to abstain from going to a certain plot of land which he purchased in November last and from altering its present condition by building, as he proposed to do, a mica godown on it. The petitioner, Mr. F. E. Chrestien, is a mica trader with whose name one is familiar from the law reports. The opposite

party is a manager or servant of the Maharaja Bahadur of Gidhour. Mr. Chrestien appears to have purchased and taken a Court dakhil dehani of the Chakia estate in 1934. The Maharaja Bahadur of Gidhour had purchased widow's estate in this property, but that estate came to an end in 1907. He claims however to have had a mukarrari interest in the estate since 1888 and his contention was that by reason of the mukarrari Mr. Chrestien is not entitled to recover any rents from the raiyats of the village Batia which is a part of the Chakia estate and in which the land in dispute lies. When Mr. Chrestien, by his manager Blong, proceeded to build on the plot in question ('41 out of '71 of plot No. 1362) Mr. Carter, the opposite party, as the learned Magistrate puts it, "saw in this move the seed of a serious trouble between the Maharaja Bahadur and Mr. Chrestien." There had been previous litigation between the parties, in which the question of the mukarrari claimed by the Maharaja was left open by mutual consent of the parties; and the learned Magistrate says that "there has been no decision of a competent Court between the Maharaja and Mr. Chrestien" on the validity of the Maharaja Bahadur's claim as a mukarraridar. On the strength of his alleged possession however, the Maharaja Bahadur suspected the move of Mr. Chrestien in the making of what he calls a mica godown, and apprehended that Mr. Chrestien was simply trying to enter the village on some pretext with the real intention of taking possession of the village. This position of the Maharaja Bahadur was accepted by the trying Magistrate who said in his judgment that if Mr. Chrestien had stated that he had no other intention but to start a mica godown, the matter would have been clear and no order under S. 144, Criminal P. C., would have been necessary. But on the ground that the mica godown was only a pretext, "certainly a very doubtful move" in consequence of which the Maharaja Bahadur "naturally smells some trouble," the learned Magistrate considered it best to "maintain the status quo and leave the real issue to be fought out in Court," adding that the best way of avoiding a real clash between the rival claimants is to stop the doing of a new thing which might occasion a trouble.

In the reply to the grounds taken in the application in revision, the learned Magistrate states that if no action had been taken either by the police or by the Magistrate

"the men of Maharaja Bahadur would have actually opposed the construction giving rise to serious trouble." He also says that the assertion of a mukarrari right by the Maharaja Bahadur and its denial by Mr. Chrestien "had led to trouble admittedly in 1935" and that the present action of Mr. Chrestien was obviously a new approach to the old question. It thus seems clear that the Magistrate passed an order against the petitioner under S. 144 not because he held that Mr. Chrestien had no right to build a mica godown on the land recently purchased by him but because he thought that if Mr. Chrestien went on with the building, the Maharaja Bahadur would naturally oppose it under the apprehension that Mr. Chrestien's real intention was to take possession of the village notwithstanding the Maharaja Bahadur's mukarrari. There could not, of course, be any question that S. 144 does not authorize interference with private rights in proper circumstances. Mr. Das who appears on behalf of the Maharaja Bahadur has urged that the land purchased by Mr. Chrestien is agricultural land and that Mr. Chrestien would not be doing a lawful act in erecting a mica godown on it. It seems to me however that the act of Mr. Chrestien in building a mica godown on the land though it may possibly be assailable in the Civil Court is not an act of the kind which the Maharaja Bahadur would be justified in opposing by force. The learned Magistrate thought of maintaining the status quo, as he called it because three years ago there was a similar order passed against Mr. Blong under S. 144 at the instance of the Maharaja Bahadur; and the vice of this reasoning is that it involves a definite abuse of S. 144. As long ago as 1879, it was pointed out in 5 Cal 132¹ that

an order made under S. 518 (corresponding I find to the present S. 144) is not bad simply because it interferes with the legal rights of individuals; but when such interference is necessary, it is the duty of the Magistrate to limit it as much as possible; and for the purpose he should afterwards hold an enquiry into the circumstances, and determine whether as a matter of fact the act prohibited as likely to lead to a breach of the peace is within or in excess of the legal right of the person forbidden to do it. If it is found that a man is doing that which he is legally entitled to do and that his neighbour chooses to take offence thereat, and to create a disturbance in consequence, it is clear that the duty of the Magistrate is not to continue to deprive the first of the exercise of his legal right but to restrain the second from it legally interfering with that exercise of legal rights.

1. *Abdul v. Lucky Narain Mandal*, (1880) 5 Cal 132.
1939 P/65 & 66

Mr. Blong was subjected to an order under S. 144, three years ago, I understand, on the same ground as has been now adopted, namely the alleged mukarrari and possession of Maharaja Bahadur of Gidhour. That order was the subject of an application in revision to this Court, but Macpherson J. refused to entertain it on the ground that the operation of that order had already expired. The Magistrate's order in the present case was passed on 26th January 1938. It was taken up in revision before the District Magistrate who on 22nd February decided, resting his order even more definitely than the trying Magistrate on the fact that Mr. Chrestien's men were prevented from causing trouble by an order under S. 144 passed two years ago. An application against the orders of the lower Courts was filed on 25th February, and was admitted by Manohar Lall, J. on 1st March before the expiry of two months from the order of the Subdivisional Officer of Jamui. It is therefore impossible now to dispose of the matter merely by saying that the order has spent its force, and that course is further definitely contradicted by the obvious misconception of the lower Courts as regards the application of S. 144. It has been repeatedly pointed out that it is not open to a Magistrate by passing repeated orders under S. 144, Criminal P. C., to avoid the decision of a dispute which may be appropriately dealt with under S. 145 or S. 107, Criminal P. C., and that the power given by S. 144 is essentially an emergent power which has sometimes to be passed in disregard of private rights. An order of that kind cannot possibly be allowed by repetition to spell a more or less permanent interference with private rights; and the Subdivisional Magistrate would have done well to bear this aspect of the matter in mind before he decided on the present occasion to pass an order under S. 144 in reliance on the fact that an order under this Section had been passed three years previously against Mr Chrestien's men.

Mr. Das urged that there are on record many rent decrees obtained by the Maharaja Bahadur of Gidhour against the tenants of this mauza from 1913 onwards, and that the Maharaja Bahadur has succeeded all along in the Courts in his litigation connected with this mauza. It is however not pretended that to any of the litigation Mr. Chrestien was a party. He had also referred to an undertaking that is said to

have been given by the tikait of Chakia, the predecessor-in-title of Mr. Chrestien but this was in 1934 before Mr. Chrestien came into possession of the property as the mortgagee auction-purchaser of the estate. That undertaking, such as it was, is clearly not binding on Mr. Chrestien. Mr. Das has also urged that if, in view of the possession of the mauza by the Maharaja Bahadur of Gidhour as mukarraridar, the lower Courts have come to the conclusion that Mr. Chrestien's or Mr. Blong's attempt to build a mica godown on the land is only another pretext for taking possession of the mauza, that is a finding of fact which gave them jurisdiction and which ought not to be lightly interfered with by this Court in revision. But as I have pointed out, the reasoning of the lower Courts in the application of S. 144 on the present occasion is essentially wrong. The interference with Mr. Chrestien's private rights by an order under Sec. 144 in 1935 does not warrant similar interference again without the Magistrate taking the trouble to find out who is really in possession. A party against whom an order is passed in proceeding under S. 145 has to go to the Civil Court and cannot, unless he does so, be heard to repeat his claim in the Criminal Court. The position when an order is passed under S. 144 is quite different; such an order decides nothing about the respective rights of the parties and may be no more than an interference with private rights required in a temporary emergency: see 6 P L T 746,² and 5 P L T 656.³ To repeat such an order on the ground of maintaining the status quo is to compel the unsuccessful party to resort to the Civil Court even though the Criminal Court may have done nothing to look into the rights of the parties, and further, indirectly to prolong the effect of the original order beyond the period of two months fixed in sub-s. (6) of the Section. Such a use of the Section is altogether unwarrantable. The order of the lower Courts must, therefore, be set aside.

D.S./R.K.

Order set aside.

2. Munnial v. Gatti Ahir, (1925) 12 A I R Pat 514=88 I C 845=26 Cr L J 1229=6 P L T 746.

3. Gita Pursad Singh v. Emperor, (1925) 12 A I R Pat 17=81 I C 535=25 Cr L J 919=5 P L T 656.

A. I. R. 1939 Patna 514

MANOHAR LALL AND CHATTERJI JJ.
Central India Spinning, Weaving and
Manufacturing Co. Ltd. — Appellant.

v.

Khemraj Marwari and others —

Respondents.

Appeal No. 204 of 1936, Decided on 23rd January 1939, from original decree of Sub. Judge, Ranchi, D/- 27th June 1936.

Civil P. C. (1908), O. 23, R. 3 — Appeal — Parties inviting Court to adopt procedure not contemplated by Civil Procedure Code—Whether appeal lies or not depends upon intention of parties—Parties to mortgage suit filing compromise petition and asking Court to pass decree in terms—After expiry of time allowed for executing necessary deeds, parties informing Court to decide hitch as to whether certain survey number was included in suit mortgage — Court upon deciding matter passing decree in terms of compromise—Appeal held did not lie from the decree.

Where the party invites the Court to adopt a procedure which is not contemplated by the Code of Civil Procedure, and in fact the procedure is *extra cursum curiae*, he cannot turn round and say that the Court is to blame for the very procedure which he invited the Court to follow. In each case the Appellate Court will try to find as to what the true intention of the party was and the question whether an appeal lies or not will depend upon the conclusion arrived at by the Court. Intention of the parties must be gathered in each case, and if the intention is clear that the parties are binding themselves by the decision that might be given by the Court, no appeal would lie, but if such an intention cannot be gathered, then the right to appeal is not shut out. [P 516 C 1, 2]

In a mortgage suit the parties came to certain terms and filed a petition in Court to the effect that they had compromised the suit on terms that the plaintiff's claim against the defendant was settled at a certain sum for which the defendant should execute a conveyance by way of absolute sale of the suit mortgage properties in favour of the plaintiff and that on execution of the sale deed plaintiff should file a petition for full satisfaction in Court. The parties asked the Court to postpone the suit for a week to enable them to execute the necessary deeds. Thereafter, the parties however informed the Court that there was a hitch in the execution of the sale deed as they could not agree whether a certain survey number was or was not included in the suit mortgage and requested the Court that it should make a local inquiry regarding the mortgage properties and decide the matter. After making such inquiry, the Court declared that the survey number was outside the mortgage property and decreed the suit in terms of the compromise adding therein that the suit mortgage consisted of certain survey numbers:

Held that no appeal lay from the decree passed by the Court as the suit stood disposed in terms of the compromise petition as soon as the same was put in. The Court had no jurisdiction to incorporate in the decree its decision as to what survey numbers fell within the suit mortgage as the same had bearing upon the condition that defendants should execute sale of the mortgage properties

which condition related to the discharge of the decree : *A I R 1930 All 127 ; (1896) A C 136 ; A I R 1926 All 90 and (1874) 5 P C 516, Ref.*
[P 516 C 2]

B. C. De and K. K. Banerji —

for Appellant.

U. N. Banerjee and L. K. Chowdhury —

for Respondents.

Manohar Lall J. — This is an appeal by the plaintiff against the decision of the learned Subordinate Judge dated 27th June 1936, by which he decreed the suit of the plaintiffs in terms of the compromise arrived at between the parties on 8th June 1936. The suit was instituted on 1st December 1934, to recover a sum of Rs. 9000 and interest to be enforced against the properties mentioned in a security bond dated 5th July 1927. In para. 5 (v) of the plaint the property subject to the mortgage was specified. The action was contested challenging that the amount due was not as stated in the plaint ; the liability was also denied. On 8th June 1936, it appears that the parties came to terms and actually filed a petition to that effect which is printed at p. 12 of the paper book. The petition states that the parties have compromised the above suit on the terms stated therein, namely that the claim of the plaintiff against defendants 1 to 3 is settled at Rs. 7000 and the defendants 1 to 3 shall execute a conveyance by way of absolute sale of the properties mortgaged by the bond in suit in favour of plaintiff for the aforesaid amount of Rs. 7000. It was also agreed that on execution of this sale deed the plaintiff shall file a petition for full satisfaction in Court and that defendants 4 to 7 will be discharged from the suit. The parties on filing this petition prayed as stated therein that the suit be postponed for a week to enable the parties to execute the necessary sale deeds. On 15th June 1936, the parties informed the Court that there was a hitch to the execution of the kobala, that they could not agree as to whether certain survey plots were or were not actually covered by the security bond and they requested the Court to decide this matter. The Court by its Order No. 61 stated the points in dispute between the parties in these terms :

The hitch to the execution of the kobala is about the survey numbers of the first three properties. According to the plaintiff the first property mortgaged is entered as survey plots Nos. 1523, 1537 to 1542 and Holding No. 459 of Ward No. I and the second mortgaged property is entered as survey plot No. 1426 of Holding No. 411 of Ward No. II ; whereas defendants 1 to 3 state that portions of

plots Nos. 1523, 1537 to 1542 and portion of plot No. 1426 are the properties Nos. 1 and 2 mortgaged. This dispute they require now to be decided by the Court.

Order No. 62 records that the pleader for the plaintiff urged that plot No. 1425 was a part of the second property mortgaged and was left out in the plaint through mistake of the scribe. Defendants took one day's time to give their definite version. On 16th June 1936, the parties put in their documents which were taken into consideration, formal proof of Exs. A and 4 being waived. Argument was then heard and the parties put in a joint petition that the Court should make a local enquiry regarding the mortgaged property and then decide the matter. The Court accordingly held a local enquiry on 17th June 1936, but no record was kept thereof. He then, by his order dated 27th June 1936, decided on the documents which were filed before him and as result of what he saw and heard at the local enquiry that the mortgaged property No. 1 consists of plots Nos. 1537 to 1542 only and that plot No. 1523 is outside the mortgaged property.

There was no dispute regarding property No. 2. As a result of this decision the Court made the following decree :

It is ordered that the suit is decreed in part according to the terms incorporated in the petition filed by the parties on 8th June 1936. The mortgaged property No. 1 consists of plots Nos. 1537 to 1542 and the mortgaged property Nos. 2 and 3 are as stated in the plaint.

Against this decision the present appeal has been preferred by the plaintiff. It was stated before us that the only dispute between the parties now is about plot No. 1523. A preliminary objection has been raised on behalf of the respondents that the suit having been decided as a result of a compromise, the present appeal is not maintainable and that the parties must be taken in law to have agreed to be bound by the decision of the Court with regard to the dispute which they specifically asked him to decide. In my opinion the contention of the respondents is correct. As soon as the compromise petition was filed on 8th June 1936, the suit stood disposed of in terms of the compromise petition, that is to say, the claim of the plaintiff was settled at Rs. 7000 and that the defendants shall execute a conveyance by way of absolute sale of the properties mortgaged by the bond in suit.

The further condition in the compromise petition that, "on execution of the sale deed the plaintiff shall file a petition for full

satisfaction in Court," relates to the discharge of the decree or the claim which had already been accepted at Rs. 7000 and for which the defendants had undertaken to execute a conveyance. A large number of cases were cited on behalf of both the parties in support of their respective contentions. I have examined each and every one of these cases. The true rule, in my opinion, is that the intention of the parties must be gathered in each case, and if the intention is clear that the parties are binding themselves by the decision that might be given by the Court, no appeal would lie, but if such an intention cannot be gathered, then the right to appeal is not shut out. In some cases it has been held that all that the parties did was that they refrained from adducing any oral evidence but asked the Court to decide upon the documentary evidence and upon local inspection. No hard and fast rule can be laid down. In A I R 1930 All 127,¹ an application was jointly made by the parties to the Munsif asking him to make an inspection of the locality to decide the matters in question and in place of evidence the Munsif might ask questions on the spot. In these circumstances it was held that it was not open to the defeated party to bring in an appeal after he had agreed to the Munsif deciding the case in the manner stated above and the learned Judges observed that

it is not open to a party to ask for a departure from the ordinary course of procedure and require the Court to decide questions of fact in this manner by local inspection and oral statements on the spot and then come forward and ask the Appellate Court to decide the same question. For one thing there is no evidence in the record which would enable the Court to come to a decision.

In (1896) A C 136,² it was held by the House of Lords that

where in pursuance of an agreement between the parties the Court proceeds outside its ordinary jurisdiction, the proper inference would be that there was to be no appeal from the decision as would be in the case if the trial were in the ordinary way.

But it does not follow, as pointed out by Sulaiman, J. in A I R 1926 All 90,³ that this is a test of universal application because unless "the Court has proceeded outside its ordinary jurisdiction, a right to appeal always exists." On the other hand,

in (1874) 5 P C 516,⁴ where the parties agreed

that the rights, if any of the several defendants, may be ascertained and declared by decree of the Court and that they may be ordered to pay each to the others and other of them their and his costs of this suit, and that the Court will give such further directions as shall be necessary,

it was held that the

above words clearly meant that the parties were to keep themselves in curia and that it was plain also that the parties and the Judge thought that an appeal was open.

It is unnecessary to refer to further cases. The true rule, which I conclude is that where the party invites the Court to adopt a procedure which is not contemplated by the Civil P. C., and in fact the procedure is *extra cursum curiæ*, he cannot turn round and say that the Court is to blame for the very procedure which he invited the Court to follow. In each case the Appellate Court will try to find as to what the true intention of the party was and the question whether an appeal lies or not will depend upon the conclusion arrived at by the Court. In the present case it is clear to my mind that the suit was disposed of in terms of paras. 1, 2, 3 and 5 of the compromise petition; accordingly, the Court should have ordered that the suit is decreed in part according to the terms incorporated in the petition of compromise filed by the parties on 8th June 1936. The Court had no jurisdiction to enter in the decree the words:

The mortgaged property No. 1 consists of plots Nos. 1537 to 1542 and the mortgaged property Nos. 2 and 3 are as stated in the plaint.

Whatever the Court did on 15th, 16th and 17th June 1936, was merely to decide the dispute which the parties asked him to decide, but the result of that decision could not be incorporated in the decree. Accordingly, I hold that no appeal lies against the decree passed by the learned Subordinate Judge dated 3rd July 1936, following his decision dated 27th June 1936, but in the exercise of our powers of revision, I would delete the portion indicated above, namely the mortgaged property No. 1 consists of plots Nos. 1537 to 1542 and the mortgaged property Nos. 2 and 3 are as stated in the plaint from the decree. Parties will bear their own costs of this appeal.

Chatterji J. — I agree.

N.S./R.K.

Order accordingly.

1. Jaggu Mal v. Brij Lal, (1930) 17 A I R All 127 = 122 I C 685 = 1930 A L J 452.

2. Robert Murray Burgess v. Andrew Morton, (1896) A C 136 = 65 L J Q B 321 = 73 L T 713.

3. Ballabh Das v. Sri Kishan, (1926) 13 A I R All 90 = 89 I C 586.

4. Pisaní v. Attorney-General for Gibraltar, (1874) 5 P C 516 = 30 L T 729 = 22 W R 900.

A. I. R. 1939 Patna 517

FAZL ALI AND JAMES JJ.

Bharath Bhushan Prasad Singh —
Plaintiff — Appellant.

v.

Secretary of State and others —

Defendants — Respondents.

Appeal No. 177 of 1938, Decided on 15th March 1939, from original order of Sub-Judge, Chapra, D/. 18th July 1938.

Bengal Revenue Recovery Act (1 of 1890), S. 4 (2)—Collector of Mirzapore in U. P. issuing certificate for certain sum recoverable as rent of public ferry settled by District Board of Mirzapore—Certificate sent to Collector of Saran in Bihar with request to recover sum under provisions of Revenue Recovery Act — Collector of Saran selling certain properties of that person—Person paying under protest entire sum and then bringing suit in Court of Saran for recovery of amount paid by him — S. 4 (2) held applied and suit should have been instituted at Mirzapore.

The Collector of Mirzapore in U. P. issued a certificate for a certain sum and sent it to the Collector of Saran in Bihar with a request to recover it from certain person under the provisions of the Bengal Revenue Recovery Act and remit it to his office at Mirzapore. The sum mentioned was said to be recoverable on account of the rent of a public ferry settled by the District Board of Mirzapore with the father of that person. On receipt of the certificate, the Collector of Saran sold certain property of that person. The person paid under protest the entire sum for which the certificate had been issued to save his properties. He instituted a suit in the Court of the Subordinate Judge of Saran at Chapra for recovery of the amount paid by him, on the ground that he was not liable to pay that amount or any part thereof.

Held that according to S. 5 the sum for which the certificate had been issued was recoverable by the Collector as an arrear of Government revenue as if the sum was payable to himself. In other words, for the recovery of the sum the Collector had to follow the procedure laid down in S. 8 of the Act in spite of the fact that the ferry had been settled by the District Board. Sub-s. (2) of Sec. 4 was therefore fully applicable to the case and the suit should have been instituted in the Civil Court at Mirzapore and not at Chapra. [P 518 C 2]

Khurshed Husnain, T. N. Sahay and
 Ram Chandra Prasad —

for Appellant.

Advocate-General and C. P. Sinha —

for Respondents 1 and 2, respectively.

Fazl Ali J. — The only question to be decided in this appeal is whether Sec. 4, cl. (2) Revenue Recovery Act, Act 1 of 1890, is applicable to the facts of the present case; or in other words, whether the present suit should have been instituted in the Civil Court at Mirzapore in the United Provinces, or in the Civil Court at Chapra in this province.

It appears that on 30th May 1935, the Collector of Mirzapore issued a certificate for a sum of Rs. 14,399.9.0 and sent it to the Collector of Saran with a request to recover it from the appellant under the provisions of the Revenue Recovery Act and remit it to his office at Mirzapore. The sum mentioned above was said to be recoverable on account of the rent of a public ferry settled by the District Board of Mirzapore with the father of the appellant. On receipt of the certificate, the Collector of Saran sold certain properties of the appellant and on 31st October 1936, the appellant paid under protest the entire sum for which the certificate had been issued to save his properties. On 6th November 1937, he instituted the present suit in the Court of the Subordinate Judge of Saran at Chapra for recovery of the amount paid by him, on the ground that he was not liable to pay that amount or any part thereof. The suit was resisted by the Secretary of State and the District Board (who were defendants 1 and 2), on various grounds. One of them was that the suit was not triable by the Subordinate Judge of Saran and should have been instituted in the Civil Court having jurisdiction in the local area in which the office of the Collector who made the certificate was situate. This last contention has been accepted by the learned Subordinate Judge of Saran who has directed the plaint to be returned for presentation to the proper Court. Hence this appeal. S. 7-A, Northern India Ferries Act (Act 17 of 1878), provides that :

The Provincial Government may direct that any public ferry, wholly or partly within the area subject to the authority of a District Council or a District Board or a Local Board in the Province be managed by that Council or Board, and thereupon that ferry shall be managed accordingly.

As in the present case the ferry was settled by the District Board, it may be presumed that the District Board, had been authorized by the Provincial Government to manage it. Sec. 9 of the same Act provides that :

All arrears due by the lessee of the tolls of a public ferry on account of his lease may be recovered from the lessee or his surety (if any) by the Magistrate of the District in which such ferry is situate as if they were arrears of land revenue.

Section 3 (1), Revenue Recovery Act (Act 1 of 1890) provides that :

Where an arrear of land revenue, or a sum recoverable as an arrear of land revenue, is payable to a Collector by a defaulter being or having property in a district other than that in which the arrear accrued or the sum is payable, the Collector may send to the Collector of that other district a certifi-

ificate in the form as nearly as may be of the schedule, stating:

(a) the name of the defaulter and such other particulars as may be necessary for his identification, and

(b) the amount payable by him and the account on which it is due.

Sub-ss. (2) and (3) of S. 3 run as follows:

(2) The certificate shall be signed by the Collector making it (or by any officer to whom such Collector may, by order in writing, delegate this duty), and, save as otherwise provided by this Act, shall be conclusive proof of the matter therein stated.

(3) The Collector of the other district shall, on receiving the certificate, proceed to recover the amount stated therein as if it were an arrear of land revenue which had accrued in his own district.

Now it is not disputed that if the present certificate can be held to be issued under this Section the suit should have been instituted not at Chapra but at Mirzapore in view of what is provided in Sec. 4. This Section reads thus:

(1) When proceedings are taken against a person under the last foregoing Section for the recovery of an amount stated in a certificate, that person may, if he denies his liability to pay the amount or any part thereof and pays the same under protest made in writing at the time of payment and signed by him or his agent, institute a suit for the re-payment of the amount or the part thereof so paid.

(2) A suit under sub-s. (1) must be instituted in a Civil Court having jurisdiction in the local area in which the office of the Collector who made the certificate is situate, and the suit shall be determined in accordance with the law in force at the place where the arrear accrued or the liability for the payment of the sum arose.

Now what is contended on behalf of the appellant is that even though the sum for which the certificate was issued may be assumed to have been recoverable as an arrear of land revenue by virtue of S. 9, Northern India Ferries Act, this sum was payable to the District Board of Mirzapore, and not to the Collector, and therefore the case does not fall under S. 3, Revenue Recovery Act. For the purpose however of deciding whether the present case falls under sub-s. (2) of Sec. 4 of the Act, we cannot overlook the provisions of S. 5 of the Act which are to the following effect:

Where any sum is recoverable as an arrear of land-revenue by any public officer other than a Collector or by any local authority, the Collector of the district in which the office of that officer or authority is situate shall, on the request of the officer or authority, proceed to recover the sum as if it were an arrear of land-revenue which has accrued in his own district, and may send a certificate of the amount to be recovered to the Collector of another district under the foregoing provisions of this Act, as if the sum were payable to himself.

According to this Section the sum for which the certificate has been issued in the

present case was recoverable by the Collector as an arrear of Government revenue as if the sum was payable to himself. In other words for the recovery of the sum the Collector had to follow the procedure laid down in S. 3 of the Act in spite of the fact that the ferry had been settled by the District Board. This brings the case directly within Sec. 4, because all that the Section requires is that the proceedings are taken against a person under the last foregoing Section for the recovery of an amount stated in a certificate.

If we read Ss. 3 and 5 together, it follows that whether the amount stated in a certificate is recoverable as payable to the Collector or as payable to any public officer or any local authority other than the Collector, the proceedings taken against the defaulter must be the proceedings referred to in S. 3 of the Act. Thus, I have no doubt in my mind that sub-s. (2) of S. 4 is fully applicable to the present case and the suit should have been instituted in the Civil Court at Mirzapore and not at Chapra. The appeal therefore fails and the order of the Court below must be upheld.

The District Board of Mirzapore, defendant 2 in the suit, has filed a cross-objection on the ground that the sum of Rupees 50 awarded as costs to the defendant by the Court below is inadequate; but as there is no error of principle in the order passed by the Court below, I am not prepared to interfere with that order. I would dismiss the cross objection also. The Secretary of State and the District Board are entitled to their costs in this Court. Hearing fee in each case will be two gold mohurs.

James J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 518

WORT J.

Mir Syed Husain — Decree-holder
— Petitioner.

v.

Rasoo Singh and others —

Judgment-debtors — Opposite Party.

Civil Revn. No. 621 of 1938, Decided on 30th March 1939, from order of Munsif, Jamui, D/- 26th July 1938.

Civil P. C. (1908), S. 115 — Lower Court imposing on decree-holder an order, which it has no jurisdiction to make—Decree-holder is entitled to relief—Order should be set aside.

Where the Court has imposed on a decree-holder an order, which it had no jurisdiction to make, to the effect that a portion only of his holdings should be sold at a time when the provisions relating to

that matter, of the amended Bihar Tenancy Act, were not enforced, the decree-holder is entitled to relief in revision and the order should be set aside. [P 519 C 1]

Syed Ali Khan — *for Petitioner.*

Ramnandan Prasad and Girijanandan Prasad — *for Opposite Party.*

Order. — This Rule is directed against the order of the Judge dismissing an execution case for want of prosecution. My mind has changed very considerably with regard to the matter during the argument, but I have come to the conclusion that having regard to the fact that the Court imposed on the decree-holder an order, which it had no jurisdiction to make on 9th July, that is to say a portion only of the holding should be sold at a time when the provisions relating to that matter of the amended Bihar Tenancy Act were not enforced, the decree-holder should have some relief in this case. I would therefore set aside the order of the Judge of 26th July 1938, but the petitioner must pay the costs of the respondents to this application, hearing-fee two gold mohurs.

R.M./R.K.

Appeal allowed.

A. I. R. 1939 Patna 519

WORT AND FAZL ALI JJ.

Dalip Narain Singh — Defendant — Appellant.

v.

Deokinadan Prasad Singh, Plaintiff and another, Defendant —

Respondents.

Appeal No. 522 of 1938, Decided on 5th May 1939, from appellate decree of Sub-Judge, Monghyr, D/- 7th July 1938.

Res judicata — Suit for rent — Issue framed being as to whether plea of payment had been established — Question of title if only incidentally raised is not *res judicata* in subsequent suit.

Where in a suit for rent the issues framed were as to what was the jama and whether the plea of payment had been established and the question of title was raised only incidentally, the landlord is not precluded in subsequent suit against the same party from agitating the question of title.

[P 519 C 2]

Mahabir Prasad and K. N. Lal — *for Appellant.*

S. N. Bose and K. Sahay — *for Respondents.*

Wort J.—This seems to be a reasonably clear case. The plaintiff-respondent in the action claimed a declaration against two persons (one of them being defendant second party, the appellant before us) of his title to plot No. 1034 under Khata No. 422. The

suit has been decreed against both defendants. The question which arises is whether as against the plaintiff and in favour of defendant 1 the matter is *res judicata*. The facts shortly are these. The plaintiff brought a previous suit against the defendant first party claiming rent, and it appears that the issues framed in that suit were first, what was the jama, and secondly, whether the plea of payment had been established. I am using my own words and not the actual words of the issues as framed by the learned Judge. That suit was dismissed, and it is contended that it was dismissed on the ground that the plaintiff had failed to establish his title to the land which I have mentioned. It seems to me that the solution of the problem is arrived at on one very simple ground.

The contention of Mr. Mahabir Prasad is that as the question of title was decided in the previous suit, it was concluded at least in favour of defendant first party who was stated there to be tenant, and it was faintly contended that the matter was also decided in favour of defendant second party, a person also claiming title to the property. That is an impossible argument; the second party defendant was not a party to the previous suit, and therefore it necessarily follows that the plaintiff could agitate the question of title as against him (the defendant second party). With regard to defendant first party the answer is this: the question which was decided in the previous suit, as I have indicated by stating the issues settled in that suit, was the question purely between landlord and tenant. It may very well be that in order to decide whether relationship of landlord and tenant existed, the matter was disposed of on the footing of status: that is to say, that the plaintiff attempted to establish that he was the proprietor of the land and that he being the proprietor of the land, the defendant (being on the land) was necessarily his tenant: I say possibly it was decided on the footing of status and not *ex contractu*, but all the same it was abundantly clear that the question of title was only raised incidentally, and, if raised incidentally only, it does not preclude the plaintiff from agitating the question in an action both against defendant first party and defendant second party.

There is one other point which is raised, and that is, that the plaintiff was not entitled to the relief by way of injunction. S. 54, Specific Relief Act, provides for cases

in which a perpetual injunction can be granted. After stating in cls. (a), (b), (c) and (d) the circumstances under which such an injunction can be granted, cl. (e) provides "where the injunction is necessary to prevent a multiplicity of judicial proceedings." The present seems to me to be a case coming within that clause, and therefore the plaintiff was entitled to restrain the defendant second party from collecting rent from defendant first party and to restrain the defendant first party from paying rent to defendant second party. If he was not entitled to that, he would be obliged to bring proceedings against one or other of the parties either for rent as against defendant first party or as against defendant second party if he persisted in collecting rent from defendant first party as money had and received to the plaintiff's use. In those circumstances, the decision of the learned Subordinate Judge is right; it must be affirmed and the appeal dismissed with costs.

Fazl Ali J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Patna 520

SPECIAL BENCH

HARRIES C. J., JAMES AND AGARWALA JJ.

Mahanth Dwarka Dass—Appellant.

v.

Bhekhu Mahton and others

— Respondents.

Appeals Nos. 655 to 657 of 1936, Decided on 17th April 1939, from appellate decree of Sub-Judge, Muzaffarpur, D/- 28th March 1936.

(a) Bihar Tenancy Act (8 of 1934), S. 153—Jeth raiyat relieved of his duties by landlord—Question whether tenants are liable to pay lower rent after deducting amount of mafi is dispute regarding amount of rent — Claim of tenants that holding is other than occupancy tenancy raises question relating to interest in land—Second appeal is admissible.

Where the jeth raiyat has been relieved of his duties by the landlord, the question whether the tenants are liable to pay rent at the full rate or at a rate after deducting the amount of mafi should be treated as a dispute regarding the amount of rent annually payable by the tenant. Moreover, the claim of the tenants that their holding is something other than an occupancy holding, that they hold under a grant burdened with service; and the dispute regarding the status of the tenants raises a question relating to an interest in land. Hence second appeal is admissible under S. 153 : *A I R 1917 Pat 504, Disting.* [P 521 C 1]

(b) Land Tenure — Service tenure — Occupancy raiyat allowed to deduct certain amount from rent for rendering services as jeth raiyat — Entry in Record of Rights not in-

dicating holding as jeth-raiyati jagir— Holding partitioned—Holding held not service tenure.

A tenant's ancestor was an occupancy raiyat; he did not hold a service tenure but an occupancy holding the rent of which was settled at certain amount annually. He was appointed jeth raiyat and on condition of rendering such services he was permitted to deduct certain sum from the amount of rent payable. This was not described in the Record of Rights as an incident of the tenure, but as the mode in which the rent had been fixed. There was nothing in the entry from which it could be deduced that the holding was a jeth-raiyati jagir. The holding had also been partitioned. The tenants divided up the amount allowed as remuneration to the jeth-raiyat on condition of his performing services :

Held that the occupancy holding was not of the nature of service tenure and the settlement of the original holding was not a grant of land burdened with services. The zamindar was therefore entitled to resume after dispensing with the services of the jeth raiyat. [P 522 C 1]

A. K. Mitter—*for Appellant.*

T. N. Sahay and Girijanandan Prasad
—*for Respondents.*

Judgment.—In the Record of Rights of Ghanipur in Muzaffarpur district the occupier of the land covered by khatian No. 254 is recorded as a settled raiyat of the village liable to pay rent at rupees 53.2.6 a year. There is an entry to the effect that at the end of the year the raiyat receives Rs. 12 as haqazri on condition of his having worked for the landlord. The Record of Rights does not specify the nature of the duty; but it is agreed that the duties which were rendered were those of a jeth raiyat assisting the landlord in the collection of rent. The holding has now been partitioned with the result that there are three holdings, one occupier having taken half of the original holding and two others a quarter each. The landlord instituted three suits for rent claiming the proportionate amount, Rs. 53.2.6, from each of the tenants; but the tenants contended that the right to deduct Rs. 12 was an incident of the tenancy so that the occupier of the half holding was entitled to deduct Rs. 6 and the other two raiyats were entitled to deduct Rs. 3 each. The landlord had dispensed with the services of the jeth raiyat and he therefore claimed that he was entitled to the full rent of the holding. The Munsif held that as the right to deduct Rs. 12 was entered in the Record of Rights in a column which contained the incidents of the tenancy, this right must be considered an incident of the tenancy, which must be treated as a grant burdened with service, of which the tenants were entitled to take advantage so long as they were

willing to render the services, whether the landlord required the services or not. The decision was affirmed on appeal by the Subordinate Judge; and the landlord has now come to this Court in second appeal.

A preliminary ground of objection to the appeals is taken on behalf of the respondents that the provisions of S. 153, Bihar Tenancy Act, bar a second appeal in this case. The respondents rely on the decision in 1 Pat L J 504¹ wherein it was held that mafi allowed to a jeth-raiyat in lieu of wages was not rent, and that a dispute as to whether the mafi could be claimed or not was not a dispute relating to the amount of rent payable for the holding. It does not appear from the judgment in that case that the jeth-raiyat had been relieved of his duties or that right to pay lower rent was claimed irrespective of whether the duties had been performed or not. In the present case where the jeth-raiyat has been relieved of his duties by the landlord, the question of whether the tenants are liable to pay at the rate of Rs. 53.2.6 or at Rs. 41.2.6 should, in our judgment, be treated as a dispute regarding the amount of rent annually payable by the tenant. It is also to be observed that the claim of the tenants which has been allowed by the Courts below amounts to a claim that their holding is something other than an occupancy holding, that they hold under a grant burdened with service; and the dispute regarding the status of the tenants raises a question relating to an interest in land which has been decided by the decree under appeal. We consider therefore that this appeal is admissible under S. 153, Bihar Tenancy Act.

It is pointed out on behalf of the appellant that the Courts below are in error when they regard the entry in the Record of Rights as describing this right to deduct Rs. 12 on condition of rendering of services as an incident of the tenancy. The learned Munsif has remarked that this mafi is not entered in the column of rent, and he goes on to say that if that had been so the natural conclusion would have been that a certain amount of rent was to be deducted in lieu of wages; but in fact the entry is in the column which has been provided for giving particulars regarding the rent, although that column also contains special conditions and incidents, if any, of the tenancy. It certainly cannot be said that the entry

in the Record of Rights describes this right to mafi unequivocally as an incident of the tenancy. The question remains of whether in these circumstances the Courts below could properly come to the conclusion that this tenancy was a service tenure, a grant of land burdened with service.

Mr. A. K. Mitter on behalf of the appellant relies upon the decision of the Privy Council in 33 I A 46² wherein it was held that the grant of village as a service mokhasa to a naik who undertook to be present with 14 peons at harvest time and to accompany the zamindar carrying spears, muskets and other weapons when he went hunting, was a grant burdened with service; and that it was not resumable when the zamindar dispensed with the services because he found that the inconvenience arising from the expense of maintaining this following was greater than the services were worth. The tenure described in that case was a tenure of a feudal nature having no proper analogy with the case of a zamindar who appoints a considerable raiyat of the village to give him some assistance in his collection, and allows him to deduct his wages from his rent, thereby saving the raiyat from the trouble of recovering his wages in the zamindar's office. The services to be rendered in the cases with which we are concerned here have more analogy with the services of a gorait, the nature of which was discussed in 22 Cal 938.³ In that case the gorait held a jagir which had descended from father to son; the son had been allowed to retain possession without rendering services to the zamindar and the zamindar could not prove the terms of the grant. It was held by the Calcutta High Court that the facts found did not legitimately lead to the inference that the tenure was of a permanent character, and it was held that the zamindar was entitled to resume on dispensing with the services of the gorait.

In the present case the facts apparent from the entries in the Record of Rights from which the inference has been drawn that the zamindar is not liable to resume are as follows: The defendants' ancestor was an occupancy raiyat; he did not hold a service tenure but an occupancy holding the rent of which was settled at Rs. 53.2.6 annually. He was appointed

2. Venkata Narsinha v. Sobhanadri, (1906) 29 Mad 52=33 I A 46=8 Sar 897 (P O).

3. Radha Prasad Singh v. Budhu Dushadh, (1895) 22 Cal 938.

1. Safait Hossain v. Walzuddin, (1917) 4 A I R Pat 504=87 I O 670=1 Pat L J 504.

jeth-raiyat and on condition of rendering such services he was permitted to deduct Rs. 12 from the amount of rent payable. This is not described in the Record of Rights as an incident of the tenure but as the mode in which the rent now payable has been fixed; and the entry cannot properly be treated as indicating that the holding is something other than an occupancy holding or that it is a jeth-raiyati tenure. There is nothing in the entry from which it can be deduced that this holding is a jeth-raiyati jagir; or that it is anything but an ordinary occupancy holding of which the annual rental including cess is Rs. 53-2-6. The Courts below in coming to the conclusion that this was a grant burdened with services have also omitted to notice the very important fact that the holding has been partitioned. They have divided up the amount allowed as remuneration to the jeth-raiyat on condition of his performing services so that one of the tenants is treated as being half of a jeth-raiyat and each of the other two as a quarter. This is altogether inconsistent with the theory that the holding is something other than an occupancy holding and that it is in the nature of a jagir for a village servant. It is also to be observed that throughout the case there has been no suggestion that the jeth-raiyat occupied any position like that of a village servant such as a chaukidar, or that the services which he rendered were anything but purely personal services to the zamindar. The zamindar is ordinarily entitled to dispense with such services at his pleasure, as was held in 22 Cal 938.³

We consider that it must be held that the facts found do not warrant the inference that these occupancy holdings are of the nature of service tenures, or that the settlement of the original holding was a grant of land burdened with services. The zamindar has dispensed with the services of the jeth-raiyat and having done so, he is entitled to recover the rent of the subdivided holding at the rate which is shown as payable in the Record of Rights; and the tenants are no longer entitled to claim remission which they enjoyed on condition of rendering service as jeth-raiyat to the landlord. The result is that the appeals must be allowed and the decisions of the Courts below are set aside. The plaintiff's suit is decreed with costs throughout.

D.S./R.K.

Appeals allowed.

A. I. R. 1939 Patna 522

ROWLAND AND CHATTERJI JJ.

Sukhdeo Pandey and another —
Defendants — Appellants.

v.

Rameshwar Prasad Agarwala and others
— Plaintiffs — Respondents.

Appeal No. 456 of 1937, Decided on 26th July 1939, from appellate decree of Addl. Dist. Judge, Shahabad, D/- 31st March 1937.

(a) Bengal Tenancy Act (8 of 1885), S. 22(2) — Cosharer landlord purchasing occupancy holding acquires separate interest in raiyati holding paying to his coproprietors their share of rent — His interest passes to his transferee with transfer of proprietary interest — Transferee subletting it to another—Latter becomes raiyat.

The status of a cosharer landlord who has purchased an occupancy holding is not the status of a raiyat but a peculiar status. His right is that of a proprietor entitled to retain possession of the land subject to payment to his coproprietors of their shares of the rent. The status is a peculiar status which attaches to the cosharer so long as he remains a cosharer. If he ceases to be a cosharer and his proprietary interest is lost, then he has no right to retain possession of the land and it would pass on to the person who acquires the interest of that cosharer. The person who acquires such interest can sublet the same to another who thereupon becomes a raiyat of the holding : *A I R 1925 Pat 547 and A I R 1927 Pat 172, Foll. ; A I R 1928 Pat 62, Disting.* [P 524 C 2]

(b) Landlord and tenant — Privity of estate between lessor and lessee's assignee when arises stated.

Privity of estate between the lessor and the lessee's assignee can hardly be said to arise except where the interest of the lessee has been transferred in whole to an assignee. [P 525 C 1]

B. P. Sinha and Brahmdeo Narayan —
for Appellants.

S. N. Bose — for Respondents.

Rowland J.—This appeal though valued at under Rs. 100 has given rise to a question of title and was referred to a Division Bench by the Single Judge before whom it at first came for hearing. The suit was instituted as a title suit, the prayers in the plaint being in the first instance to have a declaration that the land in suit is the kasht land of defendants 1 to 3 of which the rent is Rs. 24-3-6 plus cess; that the plaintiffs are landlords of this holding to the extent of 2/3rds share and are entitled to 2/3rds of the rent. The other 5 annas 4 pies cosharers are the defendants who are impleaded as pro forma defendants. In accordance with the declaration claimed above, the plaintiffs ask for a decree for the sum due, Rs. 72-14-0, against the defendants first party and defendants second

party and for an order for recovery of costs from either defendants first party or defendants second party. The nature of the title set up by the parties will appear from the history of the land. The suit refers to plot No. 303 in khata No. 2 in tauzi No. 56 in village Nargada. Its area is 7 bighas 15 kathas and the rent as alleged by the plaintiffs is Rs. 24.3.6. The proprietors of this tauzi No. 56 were at one time three brothers Ram Autar, Bankey Behari and Radha Raman holding in equal $\frac{1}{3}$ rd shares. Within it there was a bhauli holding of 23 bighas 16 kathas of one Mahant Ramgir. This included the rent claimed land. The holding was put to sale on 6th February 1904 and was purchased by Ramnagina and it was described as kasht land and delivery of possession was taken on 5th May 1904. Out of this, Ramnagina sold 11 bighas 16, kathas on 2nd July 1904 to Bisesarnath. This area included the rent claimed land which is still described as kasht. The above Bisesarnath transferred 7 bighas 13 kathas out of his purchased land on 3rd January 1905 to Bankey Behari, one of the three proprietors. This 7 bighas 15 kathas is the exact area now in suit. The land was described as kasht land and it is stated that after this transfer its rent was commuted to nagdi rent at Rs. 24.3.6 and apparently it has been found by the Courts below that this was so. On 19th May 1905, Bankey Behari gave this plot No. 303 in usufructuary mortgage to one Basdeo as security for an advance of Rupees 2000. The land is still described as kasht land. Thereafter there was a dispute between the three proprietors resulting in an award dated 28th December 1908.

In pursuance of this award Bankey Behari sold the disputed plot, 7 bighas 15 kathas to Ram Autar, another of the three proprietors on 12th January 1909. The land is described as kasht land bearing a rent of Rs. 24.3.6. This acquisition by Ramautar must have been subject to the lien of Basdeo for his advance of Rs. 2000. On 23rd October 1909 Ramautar raised a loan of Rs. 2995 from the defendant second party on a usufructuary mortgage of this same plot. Of the consideration, Rs. 2000 was left with defendants second party for payment to the previous creditor Basdeo and this was paid off. In this document the land is described as Ramautar's zerat land. The next event affecting the history of the land is the revisional survey record of rights prepared in 1911. Here the plot in ques-

tion is shown in bakasht khata No. 2 of the proprietors and as belonging to Ramautar with defendants second party as rehandars in possession. Ramautar seems to have created a simple mortgage on his entire 5 annas 4 pies share in the tauzi. At any rate a mortgage decree was obtained against him and in execution this entire share was put up to sale and was purchased on 12th May 1920 by Nand Bahadur, predecessor of defendants third party of the present suit. It is the case of the defendants second party who are appellants here that by this execution purchase defendants third party took along with the 5 annas 4 pies share in the milkiat all rights of Ramautar in this plot 303.

Then on 30th September 1921 Nand Bahadur gave a mokarrari lease to defendants second party in respect of the rent claimed land. The premium for the lease was fixed at Rs. 2995 which was set off against the previous dues of these defendants under the rehan of 23rd October 1909 and the rent payable to Nand Bahadur for the land was fixed at Rs. 8.10.0 in perpetuity. On the other hand, Ramautar on 1st November 1921 (as if the sale of his 5 annas 4 pies share had not affected his right to hold the rent claimed land as a tenant) sold or purported to sell that tenancy right in the rent claimed land to defendants first party, defendants 1 to 3, on a consideration of Rs. 4000 of which Rs. 2995 was left with the purchasers for the purpose of paying off the rehan of 1909 in favour of the defendants second party. In this document the land is described as kasht land of Ramautar. Ramautar's other cosharers in the tauzi transferred their shares to the plaintiffs in 1922. At present therefore the proprietary interest in the tauzi is held to the extent of $\frac{2}{3}$ rds by the plaintiffs and to the extent of $\frac{1}{3}$ rd by defendants third party. The whole appeal turns on the question whether after the 12th May 1920 a tenancy subsisted in Ramautar which he could transfer to defendants first party or whether from 12th May 1920 onwards Nand Bahadur had succeeded along with his purchase of the tauzi in general to a right of the nature contemplated by S. 22, Bengal Tenancy Act, that is to say a right to hold this plot 303, a plot the rent of which was Rs. 24.3.6, subject to payment to his cosharers of $\frac{2}{3}$ rds of this rent. The Munsif held that the land had become bakasht and that Ramautar had no interest in it on 1st November 1921. Therefore the defendants first party did not acquire any interest in it by virtue of

their purchase. He also expressed an opinion that the rental of the holding now is Rs. 8.10.0 only. On this view he dismissed the suit.

In appeal the Additional District Judge took the opposite view regarding the rights which Ramautar had in the suit land while he was proprietor and as to the effect on those rights of the auction sale in favour of Nand Bahadur. The District Judge thought that first Bankey Behari and then Ramautar each of them as a 5 annas 4 pies proprietor of the village acquired by their purchase of the raiyati right of Mahant Ramgir the right to hold it not only during the subsistence of their right as cosharer proprietors, but also after they lost that right on its transfer to others, not as bakasht but as tenants independently of their proprietary right with liability to pay the proportionate rent to the other cosharer landlords under S. 22 (2), Bengal Tenancy Act, before its amendment in 1907. For this proposition he relied on (3 P L T 22=A I R 1922 Pat 62¹) and two other similar decisions; but the point for decision in those cases was not the same as here. Undoubtedly, it is a correct proposition of law that when a cosharer proprietor acquires the holding of an occupancy raiyat, the holding does not cease to exist. In A I R 1922 Pat 62¹ the Court was considering the results which followed when there was a subsequent partition in the tauzi and the land fell within the share of another cosharer. It was held in the result that the right to hold the land still continued and the other cosharer would receive in future the rent of the holding from that proprietor who had acquired the right to hold the land. But the question in the present case is a different one. The position we have to consider is that in which Ramautar having acquired a holding has parted by sale with his proprietary interest in the tauzi. The question is whether the land which he holds within the tauzi will pass to the purchaser along with Ramautar's share in the tauzi.

This specific point was considered in this Court in 7 P L T 87.² In this case it was pointed out by Kulwant Sahay J. that the status of a cosharer landlord who has purchased an occupancy holding is not the status of a raiyat but a peculiar status. His

right is that of a proprietor entitled to retain possession of the land subject to payment to his co-proprietors of their shares of the rent. The status is a peculiar status which attaches to the cosharer so long as he remains a cosharer. If he ceases to be a co-sharer and his proprietary interest is lost, then he has no right to retain possession of the land and it would pass on to the person who acquires the interest of that co-sharer. That decision is directly in point and in my view we are bound to follow it. In 8 P L T 69³ Dawson Miller C J., again stated the law applicable where the occupancy right of a tenant is transferred to a fractional proprietor. In this case his Lordship said:

Although no occupancy right can vest in the fractional proprietor, he still acquires a separate interest in the raiyati holding paying to his co-proprietors their share of the rent. This interest passes to his transferee with the transfer of the proprietary interest and the holder can sublet the same to another who thereupon becomes a raiyat of the holding.

These two decisions in my opinion are sufficient authority for holding that by Nand Bahadur's purchase on 30th September 1921 the right passed to hold plot 303 subject to payment by Nand Bahadur of 2/3rds of the rent to his cosharer proprietors. According to the observation in the latter of these decisions Nand Bahadur was entitled to sub-let the same to another person who thereupon becomes a raiyat of the holding and on that view the mukarrari patta in favour of the defendant second party would be valid; they are tenants under Nand Bahadur and not under the plaintiffs. As for Ramautar nothing would be left in him which he could transfer to any person by purporting to execute a sale deed dated 1st November 1921. The defendants first party took nothing and have not become tenants of anybody.

Before leaving this appeal I think it should be observed that the plaintiffs have not made any claim of rent against defendants third party and the question of their right to recover it from those defendants cannot be decided in this appeal so as to be binding between the plaintiffs and those defendants. Similarly, the question of the right of defendants third party to recover rent from defendants second party at rupees 8.10.0 is a matter not directly in issue between those parties in this appeal and whatever we may say about it will not be

8. Gopi Singh v. Jagdeo Singh, (1927) 14 A I R Pat 172 = 102 I O 886 = 8 P L T 69.

1. Basudeo Narain v. Radha Kisan, (1922) 9 A I R Pat 62 = 65 I O 281 = 3 P L T 22.

2. Bambahadur Lal v. Mt. Gungra Kuer, (1925) 12 A I R Pat 547 = 89 I O 232 = 7 P L T 87.

binding between those parties. It has been necessary to make some observations as to the title of these parties for the purpose of determining the appeal as between the plaintiffs and the defendants first and second parties and for determining the result of this appeal. It follows from what I have said that the plaintiffs are not entitled to recover any rent from defendants second party or defendants first party. What I have said above is I think sufficient for the disposal of the appeal; but I may refer to another objection preferred by the appellants to the District Judge's decree and that is that defendants second party were in any case not tenants under the plaintiffs. They were mortgagees in possession from Ramautar up till 1921 when they obtained the mukarrari patta from Nand Bahadur and if that mukarrari patta was of no effect they are still mortgagees in possession. As such there is no privity of contract between them and the plaintiffs. It was suggested for the respondents that it was not a question of privity of contract but of privity of estate; but privity of estate between the lessor and the lessee's assignee can hardly be said to arise except where the interest of the lessee has been transferred in whole to an assignee. The respondents have attempted to escape the conclusion that Ramautar's interest passed on the ground that the decision in 7 P L T 87² was a case referring to transfers after the amendment of the Bengal Tenancy Act in 1907. I do not see why this should make any substantial difference so far as the point that we are considering is concerned. In the other case in 8 P L T 69³ the purchase, the effect of which was being considered was actually made before the amendment of the Bengal Tenancy Act.

In the result I would allow the appeal with costs of this Court and of the lower Appellate Court, set aside the decree and judgment of the District Judge and restore the decree of the Munsif.

Chatterji J.—I agree.

D.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 525

AGARWALA J.

*Pt. Harihar Tiwari — Complainant—
Petitioner.*

v.

*Etwari Gop and another — Accused —
Opposite Party.*

Criminal Revn. No. 232 of 1939, Decided on 19th May 1939.

Child Marriage Restraint Act (1929), S. 10
—Accused making no objection to trial on ground of omission to hold preliminary inquiry
—Order of Magistrate cannot be complained of if trial establishes not only *prima facie* but also substantive case against accused.

The object of the preliminary inquiry under S. 10 is to inquire whether there is a *prima facie* case or not. If the accused objects to being tried until a preliminary inquiry has been made, the Magistrate is bound to make such an inquiry, and if he has proceeded in disregard of the objection of the accused his order would have to be set aside. But where the accused makes no objection to the trial he cannot, when the result has gone against him, benefit by an objection, based on non-compliance with S. 10 which is entirely technical in its nature, if the trial has established that there was not only a *prima facie* case but there was a substantive case against the accused. [P 525 C 2; P 526 C 1]

C. P. Sinha — *for Petitioner.*

Raj Kishore Prasad — *for Opposite Party.*

Order.—The opposite party Etwari Gop and Pairu Gop were convicted by the Sub-divisional Magistrate of Bihar under S. 6(1), Child Marriage Restraint Act on a finding that they had brought about the marriage of Etwari's son, aged 11 with Pairu's daughter, aged 6. On appeal, the learned Sessions Judge of Patna set aside the conviction on the ground that the Magistrate who entertained the complaint and convicted the accused persons, had not complied with the provisions of S. 10 of the Act. That Section provides :

The Court taking cognizance of an offence under this Act shall, unless it dismisses the complaint under S. 203, Criminal P. C., 1898, either itself make an inquiry under S. 202 of that Code, or direct a Magistrate of the First Class subordinate to it to make such inquiry.

It is quite clear that the object of this provision is that no one should be harassed by a prosecution under the Act until a Magistrate has satisfied himself by inquiry that there is a *prima facie* case against him. The object of the preliminary inquiry is therefore to inquire whether there is a *prima facie* case or not. Now in the present proceedings not only has the Magistrate found that there was a *prima facie* case but by reason of the fact that the trial has actually been held he has found that the offence charged has been established conclusively by the evidence that was available. In these circumstances, it is impossible to take the view that the order of the Magistrate must be set aside for the technical reason given by the Sessions Judge. By that I do not mean that Magistrates are entitled to disregard the provisions of S. 10. If the accused in this case had objected to being tried until a preliminary inquiry had

been made, the Magistrate would have been bound to make such an inquiry, and if he had proceeded in disregard of the objection of the accused, his order would have had to be set aside. But, in the present proceedings, the accused made no objection to the trial and cannot, when the result has gone against him, benefit by an objection, which is entirely technical in its nature, for, as I have said, nothing more could be established at a preliminary inquiry than that there was a prima facie case against the accused, whereas the trial has established that there was not only a prima facie case but there was a substantive case against the accused. The order of the Sessions Judge is therefore set aside and the case is remitted to him to be disposed of in accordance with law.

D.S./R.K.

Case remanded.

* A. I. R. 1939 Patna 526

FAZL ALI AND VARMA JJ.

Radhey Lal—Defendant—Appellant.

v.

Kanhai Lal—Plaintiff — Respondent.

Appeal No. 134 of 1936, Decided on 23rd December 1938, from original decree of Sub-Judge, Patna, D/- 23rd December 1935.

(a) Civil P. C. (1908), Sch. 2, Para 1—Partition suit—Parties not having agreed as to mode of division referring matter to arbitrators — Para. 1 covers such case.

The expression "the matter in difference between the parties" which has been used in para. 1 of Sch. 2 is quite general and it fully covers the case, where the parties in partition suit not having agreed among themselves as to how the properties were to be divided referred the question to the arbitrators. [P 527 C 2]

(b) Partition—Commissioner to effect partition and arbitrator — Difference between, explained.

The essential difference between a commissioner appointed to effect a partition and an arbitrator is that the former is an officer selected and appointed by the Court, in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the Court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the commissioner who is appointed by the Court and whose decision the parties may challenge before the Court passing a final decree. In the latter case they have expressed such consent and cannot challenge the arbitrator's decision on question of law and fact except on the limited grounds mentioned in Sch. 2, Civil P. C. : A I R 1927 Pat 135, *Foll.* [P 527 C 2]

(c) Civil P. C. (1908), Sch. 2—Partition suit — Parties agreeing as to their respective shares — Agreement incorporated in preliminary decree and division of properties referred to arbitra-

tors — Final decree based wholly on award — Case is covered by Sch. 2.

There is nothing in the Code to prevent the parties from referring the matter in difference between them to arbitration at any stage of the suit. Where the parties in partition suit have agreed among themselves as to their respective shares and this agreement is incorporated in the preliminary decree but the division of the properties is referred to arbitrators and the division of the properties which is the subject of the final decree is wholly based upon the award of the arbitrators, the case falls under Schedule 2. [P 527 C 2 ; P 528 C 1]

* (d) Civil P. C. (1908), Sch. 2, Para 16 — Decree in accordance with award — Appeal does not lie even if award itself is in excess of powers conferred on arbitrators.

There is ample provision in paras. 14 and 15 of Sch. 2 to enable the Court to which the award is submitted to refuse to give effect to the award if in its opinion it is either void or invalid or illegal. If however the award is accepted, it means that in the opinion of the Court it is neither void nor invalid and the Legislature does not appear to have intended that the opinion of the Court should be challenged in appeal. Para. 16 merely gives effect to the principle of finality of awards and the intention of the Legislature evidently is that an award should be subjected to the scrutiny of one Court only, namely the Court through which reference is made to arbitrator and not that Court and an Appellate Court. Hence, where the decree is in accordance with the award no appeal lies from the decree even if the award itself is in excess of the powers conferred upon the arbitrators: A I R 1931 Cal 109, *Dissent.* [P 529 C 2]

Sir Manmatha Nath Mukherjee, B. C. De, S. N. Mukherjee, Mehdi Imam and K. P. Varma — *for Appellant.*

Khurshaid Husnain, N. K. Prasad II and Ramanugrah Prasad — *for Respondent.*

Fazl Ali J. — This is an appeal from a final decree in a partition suit which purports to be based upon an award given by certain arbitrators appointed by the parties just before the final decree in the suit was passed. The parties are brothers, the plaintiff being the younger brother of the defendant and both being the sons of one Basant Lal. On 18th June 1934, the plaintiff instituted the present suit for the partition of properties, both moveable and immovable, and in sch. 1 of the plaint he claimed that one of the items of the properties to be divided between him and the defendant was cash amounting to nine lakhs of rupees. The plaintiff also made an application to the Court for the appointment of a commissioner to make an inventory of the joint properties on the allegation that the moveable properties were in danger of being removed by the defendant. The defendant did not file any written statement, but he filed an application in which he denied some of the allegations made by

the plaintiff and tried to resist the appointment of the commissioner. Ultimately a commissioner was appointed and before him on 23rd June 1934 the parties presented a compromise petition. This petition recited that it had been settled between the parties (1) that the plaintiff would accept 7 annas share in all the moveable properties, articles, cash, ornaments etc., and the defendant would take the remaining 9 annas, and (2) that the properties should be partitioned by three persons who had been chosen by the parties, the names of these persons being Nanda Lal Bhagat, Lachman Sao and Hari Kishun. The petition further stated

that in whatever manner the aforesaid arbitrators shall partition and allot the properties, cash, articles and bond, ijara (deeds), decrees, etc. shall be acceptable to both parties, and should, for any reasons, they fail to agree in the partition of any property the opinion of the majority shall prevail and the partition shall take effect accordingly.

The arbitrators subsequently gave their award setting out therein details of properties allotted to the plaintiff and the defendant respectively. They decided that the defendant had concealed a sum of three lakhs and not over nine lakhs of rupees as was alleged by the plaintiff, and to equalize the share of the plaintiff in the total asset, they directed the defendant to pay to him a sum of Rs. 98,773 odd. Certain objections were preferred by the defendant to the award, but they were disallowed by the Subordinate Judge who directed the preparation of the final decree in accordance with the award. The defendant then moved this Court against the order of the Subordinate Judge giving effect to the award, but their application was dismissed. They have now preferred this appeal from the final decree passed by the learned Subordinate Judge and the main question which has been argued in this Court is whether an appeal lies from the decree. Para. 16 (2), Sch. 2, Civil P. C., provides :

Upon the judgment pronounced according to the award a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Prima facie therefore, no appeal can be entertained from the decree passed in the present suit. It is however contended by Sir Manmatha Nath Mukherjee who appears on behalf of the appellant that in the present case an appeal will lie, because in the first place Sch. 2, Civil P. C., has no application to the facts of the present case; and, secondly, because the so-called award of the arbitrators was without juris-

diction and was therefore in law no award at all. As to the first point it is contended that the parties having agreed among themselves as to their respective share in the properties to be divided, there was no longer any matter in difference between them so as to bring the case under para. 16, Sch. 2 and the position of the so-called arbitrators was not unlike that of a commissioner who is usually appointed for the partition of properties in a suit for partition after the preliminary decree is passed. This contention is obviously untenable, because the compromise petition itself shows that all the differences between the parties had not been settled. Indeed, in the very preamble of the petition it is recited that the reference to the three persons named in the petition became necessary because many kinds of harassment and monetary loss are involved in a dispute between the parties and it is not known how long the suit will be going on and what will be the result.

Evidently the parties were not agreed among themselves as to how the properties were to be divided, otherwise there would have been no necessity of referring the question to the arbitrators. The expression "the matter in difference between the parties" which has been used in para. 1, Sch. 2, is quite general and I have no doubt that it fully covers the present case. As to the distinction between a commissioner and an arbitrator, it has been clearly pointed out in 7 P L T 739,¹ and I shall merely quote the following passage from the judgment delivered in that case :

The essential difference between a Commissioner appointed to effect a partition and an arbitrator appears to me to be that the former is an officer selected and appointed by the Court, in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the Court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the Commissioner who is appointed by the Court and whose decision the parties may challenge before the Court passing a final decree. In the latter case they have expressed such consent and cannot challenge the arbitrator's decision on questions of law and fact except on the limited grounds mentioned in Sch. 2 of the Code.

Thus the first contention put forward on behalf of the appellant must fail.

It is next contended that the present case does not fall within Sch. 2, Civil P. C. at all, because this schedule is intended to apply to those cases only where a decree is based wholly upon the award of the arbitrators, whereas in the present case the

1. Bholanath Roy v. Bata Krishto Roy, (1927) 14 A I R Pat 185=95 I C 821=7 P L T 789.

final decree is based partly upon a preliminary decree and partly upon the award of the arbitrators. This contention must be negatived on the short ground that there is nothing in the Code to prevent the parties from referring the matter in difference between them to arbitration at any stage of the suit and that it is not quite correct to say that the final decree which has been passed in the suit is not wholly based upon the award of the arbitrators. It is true that the parties agreed among themselves as to their respective shares and this agreement was incorporated in the preliminary decree but the division of the properties which is the subject of the final decree was wholly based upon the award of the arbitrators.

Lastly, it was contended that the award of the arbitrators is void, because they had no authority to divide the cash which was not produced before them. It is contended that the arbitrators had been authorized merely to divide those properties the existence of which was admitted and they went beyond their jurisdiction in deciding that the defendants had concealed a sum of three lakhs of rupees. It appears that this was precisely one of the points raised by the appellant before this Court in the civil revision to which reference has already been made, but it was overruled, it being pointed out that the arbitrators had been empowered not only to divide the properties but also to ascertain what was to be divided. It appears to us that the view which was expressed in that case is the only reasonable view which can be taken when the compromise petition is carefully read. As I have already stated, one of the properties which the plaintiff asked the Court to divide was cash amounting to about nine lakhs of rupees. The compromise petition does not suggest anywhere that the allegations of the plaintiff in this respect were to be entirely ignored nor does it say that the arbitrators were to divide only such properties as were produced before them. On the other hand, it recites that in whatever manner the arbitrator shall partition and allot the properties including the cash shall be acceptable to both parties. I do not think therefore that the compromise petition which is the basis of the arbitrators' authority imposed any such limitation upon the power of the arbitrators as to prevent them from trying to ascertain what was to be divided. This is quite sufficient to dispose of the contention

put forward on behalf of the appellant; but the legal aspect of the matter must also be examined, inasmuch as the learned advocate for the appellant argued upon it at some length and cited various authorities in support of his contention.

It appears that previous to the decision of the Judicial Committee in 29 Cal 167² it was held in a number of cases that though a decree might be in accordance with an award, an appeal would lie from the decree if the award upon which the decree was passed was invalid. This view however has been abandoned by the majority of the High Courts in India since the pronouncement of the Judicial Committee in that case. The Judicial Committee dealing with Sec. 522 which corresponded to para. 16 of Sch. 2, Civil P. C., observes as follows with reference to the concluding words of this provision which are to the effect that no appeal shall lie from a decree passed upon a judgment pronounced according to an award except in so far as a decree is in excess of or not in accordance with the award :

Those words appear to be perfectly clear. Their Lordships would be doing violence to the plain language and the obvious intention of the Code if they were to hold that an appeal lies from a decree pronounced under Sec. 522 except in so far as the decree may be in excess of or not in accordance with the award. The principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decision in this country. The time has long gone by since the Courts of this country showed disposition to sit as a Court of appeal on award in respect of matters of fact or in respect of matters of law.

It may be pointed out here that the Civil Procedure Code does take into account those cases where an award determines any matter not referred to arbitration and para. 14 of Sch. 2 clearly provides that in such cases the Court may remit the award to the reconsideration of the arbitrator upon such terms as it thinks fit. In the present case, the defendant did not ask the Court specifically to remit the award or any part of it to the arbitrators under para. 14, but it is pointed out that one of his objections to the award was that the arbitrators had gone beyond the scope of the reference in awarding a decree for Rs. 98,773.2.3. This objection, however, even if we assume it for the purpose of this appeal to have been an objection under para. 14, was considered and overruled and

² Ghulam Khan v. Mohammad Hassan, (1902) 29 Cal 167=29 I A 51=6 O W N 226=8 Sar 154 (PO).

the application made by the appellant to the High Court to revise the order of the Subordinate Judge overruling his objection did not also succeed. Then comes para. 15 which provides firstly that the award remitted under para. 14 becomes void on the failure of the arbitrators to reconsider it; and, secondly, that an award may be set aside on certain grounds specified in that paragraph. The first part of the paragraph had no application to the case, as the award was never remitted to the arbitrators and the defendant did not succeed in persuading the Subordinate Judge to set it aside under the second part of the paragraph. Para. 16 says :

Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in the manner provided in para. 14 and where the Court has refused an application made to it to set aside an award, the Court shall proceed to pronounce judgment according to the award.

In the present case the Court below followed the course clearly indicated in this paragraph and pronounced a judgment according to the award. It follows therefore that under cl. (2) of this paragraph, in order to determine whether an appeal lies from a decree based upon a judgment so pronounced, all that is to be ascertained is whether the decree is in excess of or not in accordance with the award. Here it is not disputed that the decree is in accordance with the award but it is contended that the award itself is in excess of the powers conferred upon the arbitrators. It appears to me in these circumstances that no appeal lies from the decree of the arbitrators and I am fortified in this view by several decisions of this High Court and other High Courts of this country. Sir Manmatha Nath Mukherjee referred us to the decision of a Division Bench of the Calcutta High Court in 34 C W N 813³ in which it was held that there is a distinction between an award which is irregular and an award which is void, and that where the decree is based upon an award which is without jurisdiction, the decree is really based on something which is not an award. That case however has not been followed by the other High Courts and with great respect to the learned Judges who decided it I am unable to agree to the proposition enunciated therein.

The expressions "void" and "without jurisdiction" are sometimes used in a loose sense

³ S. Durga Charan Deb Nath v. Gangadhar Deb Nath, (1931) 18 A I R Cal 109 = 130 I O 137 = 34 C W N 813.
1939 P/67 & 68

as bearing the same meaning as the terms invalid and illegal. But in whatever sense they may be used, I think that there is ample provision in paras. 14 and 15 of Sch. 2, Civil P. C., to enable the Court, to which the award is submitted, to refuse to give effect to the award if in its opinion it is either void or invalid or illegal. If however the award is accepted, it means that in the opinion of the Court it is neither void nor invalid and the Legislature does not appear to have intended that the opinion of the Court should be challenged in appeal. Para. 16 merely gives effect to the principle of finality of awards and the intention of the Legislature evidently is that an award should be subjected to the scrutiny of one Court only, namely the Court through which reference is made to arbitrator and not that Court and an Appellate Court. I would thus prefer to follow the decisions of our own Court which seem to be in consonance with the decision of the Judicial Committee as well as the plain language of para. 16 of Sch. 2, Civil P. C. I would therefore dismiss this appeal with costs. Hearing fee ten gold mohurs.

Varma J.—I agree. The contention on behalf of the appellants against the decree is not that the decree is in excess of or not in accordance with the award but that the award itself is defective in some of the ways pointed out by Sir Manmatha Nath Mukherjee. Firstly, he contends that the arbitrators had exceeded the powers that were conferred upon them, because although the plaint referred to the property ascertained and unascertained, the petition of compromise did not refer to the unascertained portion of the property. Now, reading the various documents in connexion therewith, namely the petition of compromise and the preliminary decree passed thereon, it is clear to me that even the unascertained cash was included because when the arbitrators were to divide the property between the brothers all the properties could not be known to the arbitrators from the very beginning and they had to ascertain as to what the properties were which they were to divide. Moreover, the defendants raised this point before the Court below. The petition of objection shows that they wanted to question (though not very clearly but in a round-about way) the authority of the arbitrators to give an award with regard to the property not ascertained by them. But that objection was disallowed. That is to say, even if we

assume that there was a petition under para. 14 of Sch. 2, Civil P. C., that petition was rejected and then comes the mischief of para. 16 of Sch. 2 that after a petition under para. 14 is rejected, a judgment must follow and a decree passed thereon and when that decree is passed, then, unless the party questioning the decree can show that the decree is in excess of the award or not in accordance with the award, he has no right to appeal. About the other point that this is not a decree passed entirely upon the award, it is clear from the materials before us that although a large number of documents had to be referred to, it is really a decree based on the award. I agree that no appeal lies in this case.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1939 Patna 530**

WORT J.

Ram Keshan Chamar and others,
Plaintiffs—Appellants.
 v.

Ramsohag Chamar and others,
Defendants—Respondents.

Appeal No. 521 of 1938, Decided on 3rd April 1939, from appellate decree of Addl. Dist. Judge, Shahbad, D/- 30th May 1938.

Practice—Evidence—Admissibility—Court once refusing to admit document has no jurisdiction to consider it when put in second time without explanation.

When Court refuses to admit in the first instance a certain document in evidence, it has no jurisdiction to take the document into consideration when put in for the second time, unless some explanation or reason is given by the party so producing it for the second time. [P 530 C 2; P 531 C 1]

Akhauri Badri Nath Sinha—

for Appellants.

Hardeshwar Prasad Sinha and K. N. Lall—*for Respondents.*

Judgment.—This appeal by the plaintiffs arises out of an action in which they claimed that a certain deed of gift executed by defendant 3, (the widow of Ramrati Chamar) was binding upon the reversioner. The plaintiffs' case was in the result dismissed on the main question, they not having satisfied the lower Appellate Court that they were the nearest reversioners. Very reluctantly do I interfere in such cases and it seems to me that it is impossible for me to interfere in the present case having regard to what happened. The plaintiffs had produced certain receipts which, they stated, established the relation-

ship they set up. These receipts were produced at a late stage and rejected, both the trial and the Appellate Courts then saying that they had been introduced by a dodge or trick. These receipts not having been admitted, they were put to one of the witnesses and the trial Court, while recognizing that they had been really rejected, considered them. The lower Appellate Court on the other hand rejected them for the reason I have stated. Once the trial Court had taken these receipts into consideration, it would be difficult to suggest that the Appellate Court could interfere with the decision of the trial Court.

The question which I have to consider is whether in the circumstances the Appellate Court was right in its conclusion. Once having rejected the document, there was an end of the matter. The conduct of the trial Judge is a little difficult to explain; but the fact remains that he did take the receipts into consideration and did find that the plaintiffs had established their case with regard to the matter with which those documents were concerned. Considering this matter the trial Judge says:

The receipts have all appearance of antiquity. The parties are illiterate chamars and I do not believe that they would go the length of fabricating documents.

The learned Judge in the Appellate Court makes this observation:

Then the plaintiffs played a trick and got them produced by Raghunandan by summoning him as a witness as observed by the learned Munsif. Those receipts have not been proved and they have been exhibited on proof of custody as documents more than 30 years old. But Raghunandan has not stated how he got hold of the receipts in the name of Dhanpat and his custody of the receipts has been falsified by their previous production by the plaintiffs.

Had I come to the conclusion that these receipts definitely established the relationship which they purported to establish, the view that I might take of the matter would be somewhat different. It is true that they purported to show that one person was the son of another, which was the fact that they were produced to establish, but at the same time there was no clear evidence as to whether these persons were members of the family, nor, as pointed out by the learned Judge of the Appellate Court, was it established that the documents were produced from proper custody. It would be useless in those circumstances to send the case back in order that the learned Judge might come to the very same conclusion on which I shall rely. The Judge having refused to accept the evi-

dence in the first instance, he has no jurisdiction to take them again into consideration unless some explanation or reason could be given by the plaintiffs. But no attempt, as far as I can see from the judgment, was made by the plaintiffs to do so. In my judgment, it is a case in which I cannot interfere. The appeal therefore fails and must be dismissed with costs.

N.S./R.K.

*Appeal dismissed.***A. I. R. 1939 Patna 531****MOHAMMAD NOOR AND ROWLAND JJ.***Mt. Deokali Kuari* — Petitioner.

v.

Mahadeo Prasad Bhagat —

Opposite Party.

Civil Revn. No. 709 of 1938, Decided on 1st May 1939, from order of Sub.Judge, Hazaribagh, D/- 30th November 1938.

Court-fees Act (1870), S. 7—Suit for averting danger or loss to property already in possession—Suit cannot be valued at value of property—Plaintiff can put any valuation to relief claimed—Unless such valuation is unreasonable or arbitrary Court should not interfere with it.

There is a good deal of difference between a suit in which the plaintiff seeks to recover the property which is not in his possession and a suit in which he wants to avert danger which is likely to come to his property which is already in his possession. In cases of second type the proper method of valuing the suit is according to the injury or loss from which the plaintiff seeks to be protected. That loss cannot be valued at the total value of property in his possession such valuation being in fact valuation for suits of the first type in which the plaintiff who is out of possession, comes to the Court for changing his position from a person enjoying no rights to that of a person enjoying full rights. In cases of the second type where the plaintiff being already in possession of the property comes to the Court for something better it is open to him to put any valuation to the relief claimed and unless such valuation is unreasonable or arbitrary Court should not interfere with it.

[P 531 C 2; P 532 C 1]

Sarjoo Prasad and K. Dayal —

for Petitioner.

S. M. Mullick, T. K. Prasad, Gurusaran Prasad and Advocate-General

— for the Crown.

Rowland J. — The petitioner in this civil revision is the widow of the late Babu Ganga Prasad Bhagat. She is plaintiff in a suit to cancel a deed of family settlement executed on 19th November 1934, between herself and her husband's brother, on the allegation that she was induced to sign it by fraud and misrepresentation. There is a prayer to send a copy of the decree to the registration office for a note being made that the document had

been cancelled. The plaintiff's case is that her husband was separate from his brother and on his death she got possession of his entire estate as his widow and heir; but the recitals in the document are on the footing that the brothers were joint and the plaintiff on her husband's death was entitled to maintenance in lieu of which she was given properties worth Rs. 20,000. At the time of the institution of the suit, she paid Rs. 15 as court-fee treating it as a declaratory suit but she was directed to value the relief and she valued it at rupees 5100 on which amount we are told that court-fee has been paid. The defendant objected that the valuation of the suit should be not less than Rs. 20,000 and the Subordinate Judge after taking evidence held that the suit should be valued on the basis of the market value of the properties involved which he found to be Rs. 41,000 and odd. He rejected the contention of the plaintiff that

in the present suit the plaintiff is in possession of the properties and she is only bound to value the suit according to the injury or loss which she apprehends she will have to suffer if the document be left standing.

The learned Subordinate Judge directed the plaintiff to pay the deficit court-fee on Rs. 41,525, and against that order, the plaintiff has come in revision to this Court. We have no doubt that the proper method of valuing the suit is according to the injury or loss from which the plaintiff seeks to be protected, and that loss cannot be valued as the Subordinate Judge has valued it at the total value of the properties in suit; such a value would be proper if the plaintiff was out of possession of the properties or if the document denied her any right and title whatsoever and she had to come to Court to change her position from that of a person enjoying no rights to that of a person enjoying the full right. But here the document gives her considerable rights and she comes for something better. It is then for the plaintiff in the first instance to put a valuation on the relief claimed. If this valuation is not wholly unreasonable or arbitrary, the Court will *prima facie* be disposed to accept it though there is, as the learned Subordinate Judge has pointed out, ample authority for the Court to interfere, should the plaintiff's valuation be wholly arbitrary and unreasonable. In the present case, the valuation placed on the relief by the plaintiff does not seem to us to be at all unreasonable or arbitrary and we think this is a case in which the Subordinate

Judge should not have interfered with. In my view the Court below should have accepted the valuation of Rs. 5100 placed upon the suit by the plaintiff. I would allow the application with costs one gold mohur against the contesting respondent. There will be no costs against the Advocate-General.

Mohammad Noor J.—I agree that this was a case in which the learned Subordinate Judge ought to have accepted the valuation as given by the plaintiff. In fact it was almost impossible to fix a money value on the injury or loss which, according to the plaintiff, was likely to cause to her if the document stood as it was. In a case like this unless the valuation given by the plaintiff is ludicrously low, which cannot be supported on any grounds whatsoever, the Courts ought to accept the valuation of the plaintiff. But even if this would have been a case in which the intervention of the Court for correcting the valuation given by the plaintiff was needed, the method of valuation adopted by the learned Subordinate Judge was wrong as has been pointed out by my learned brother. There is a good deal of difference between a suit in which the plaintiff seeks to recover a property which is not in his possession and a suit in which he wants to avert the danger which is likely to come to the property which is already in his possession. This was a case of the second kind and the valuation on the basis of a suit of the first kind was wholly unjustified.

N.S./R.K. *Application allowed.*

A. I. R. 1939 Patna 532

FAZL ALI AND MANOHAR LALL JJ.

Khirod Chandra Ghosh—Defendant —
Appellant.

v.

Panchu Gopal Sadhukhan, Plaintiff and
others, Defendants — Respondents.

Appeal No. 557 of 1938, Decided on 10th May 1939, from appellate decree of Dist. Judge, Santal Parganas, D/- 4th March 1938.

Execution—Executing Court cannot sell property situated outside its jurisdiction — Judgment-debtor not objecting to confirmation of sale is estopped from contending that sale was nullity — But another execution creditor is not prevented from proceeding against same property in execution of his decree.

An executing Court cannot sell a property which is situated outside its jurisdiction: *Case law relied on.* [P 533 C 2]

Though a judgment-debtor, who does not object to the confirmation of sale by a Court having no territorial jurisdiction to sell a property, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate to prevent an execution creditor from proceeding against the same judgment-debtor. The reason is that if a Court which has no jurisdiction to sell a property sells it, the purchaser acquires no title to it. It may be that the judgment-debtor himself may have made it impossible for himself owing to his conduct to assert that such a person has no title to the property, but the fact remains that the property continues to be the property of the judgment-debtor and another execution creditor who purchases it in execution of the decree is not debarred from proving that as between himself and the previous purchaser his title ought to prevail: *A I R 1920 Mad 505, Rel. on.* [P 534 C 1]

Shiva Narayan Bose — *for Appellant.*

S. M. Mullick and N. N. Sen —

for Respondents.

Fazl Ali J.—This is an appeal from an appellate decree passed by the District Judge of the Santal Parganas reversing the judgment and decree of the Subordinate Judge of Deoghar in a suit brought by respondent 1 for a declaration of his title to a house in Deoghar which has been attached by the appellant in execution of his decree. The facts of the case are briefly as follows.

Upendra Nath Dutt and Nirtyagopal Khan had obtained a decree against the pro forma defendants second party which they assigned to respondent 1. Respondent 1 applied for the execution of this decree which being transferred to the Subordinate Judge at Alipur, three properties including the house in suit were advertised for sale in three lots. Thereupon the appellant who also had a decree against the pro forma defendant applied for rateable distribution and also objected to the jurisdiction of the Subordinate Judge at Alipur to sell the properties. At that time the appellant was interested only in one of the three properties, namely Howrah Dragon Iron Works and ultimately a compromise being arrived at between him and respondent 1 his objection to the sale was dismissed and he got a sum of Rs. 445 out of the sale proceeds of the Howrah Dragon Iron Works in the Alipur Court. Some time later, the appellant executed his decree against the defendants second party at Deoghar and attached two-fifths share in the disputed house which had in the meantime been purchased by respondent 1 at a sale held at Alipur. Respondent 1 thereupon preferred a claim under O. 21, R. 58, but his claim being summarily rejected, he brought the present suit under O. 21, R. 63 to obtain a decla-

ration that by virtue of the sale held at Alipur he had obtained an absolute title to the disputed property and that as it no longer belonged to the defendants second party, it could not be attached in the execution of the decree against them. The appellant resisted the suit on several grounds, one of which was that the Alipur Court had no jurisdiction to sell the house in question. The trial Court upheld the objection and dismissed the suit and also held that the plaintiff was not the real purchaser of the decree obtained by Upendranath Dutt and Nirtyagopal Khan against the defendants second party but was merely a benamidar on behalf of the latter. On appeal however, the learned District Judge of the Santal Parganas found, firstly that the plaintiff was not a benamidar and secondly, that the sale of the disputed house at Alipur was not ab initio void and inasmuch as the order of the Alipur Court as to its sale had not been questioned before a higher tribunal, the appellant was not competent to avoid it in a collateral proceeding. Thus, the learned District Judge reversed the decision of the learned Subordinate Judge and decreed the plaintiff's suit. Defendant 1 has now preferred this second appeal.

It appears that the decree in execution of which the plaintiff purchased the property in dispute had been passed by the Subordinate Judge at Howrah and it was subsequently transferred for execution to Alipur on the application of the decree-holder. In the course of the execution, the Subordinate Judge of Alipur sold three properties, one of which was situated within his own jurisdiction and of the remaining two, one was situated at Howrah and the other at Deoghar. So far as the property at Howrah is concerned, there was a compromise between the parties and the sale of that property is no longer in question. The dispute between the parties is now centred round the property at Deoghar and the question to be decided in this appeal is whether the appellant can impugn the sale of that property to respondent 1. S. 38, Civil P. C., provides that "a decree may be executed either by a Court which passed it, or by the Court to which it is sent for execution." S. 39 provides that the Court which passed the decree may, on the application of the decree-holder, send it for execution to another Court, if the person against whom the decree is passed has no property within the local limits of the juris-

diction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such Court, or if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it. These two provisions have been construed in a large number of cases and it is now well settled that an executing Court cannot sell a property which is situated outside its jurisdiction: see 17 Cal 699,¹ 59 Cal 199,² 43 Mad 135,³ 39 Cal 104,⁴ 6 P L T 71⁵ and 4 P L J 141.⁶ In the last case, which is the leading case on the point so far as this Court is concerned, the legal position was explained by Atkinson J. in these words:

Speaking generally, it is an accepted principle of international jurisprudence that the jurisdiction of a Court in enforcing execution of its decrees is restricted by its territorial limitations. That is to say, the jurisdiction of Courts is circumscribed by and co-extensive with its territorial limits. Thus a Court desiring to seize or attach the property of a judgment-debtor outside its jurisdiction, and where such property is in the hands of, or custody of another, also outside the jurisdiction, such property sought to be attached in aid of the executing Court can only be reached by a regular method of procedure which has been prescribed by the rules of the Civil Procedure Code, and similar codes which prevail in all countries, viz. the decree of the executing Court, must be transferred to the local limits of the jurisdiction of the external Court within which the property sought to be attached is for the time being.

There can therefore be no doubt that the Court at Alipur had no jurisdiction to sell the disputed property. The point however which is raised on behalf of respondent 1 is that even though it be assumed that the Court at Alipur had no jurisdiction to sell the disputed property, yet inasmuch as the attachment, sale and confirmation of it were effected without objection by the judgment-debtor not only he but also the appellant is now precluded from attacking the title acquired by respondent 1 under the sale. Up to a point this argument is supported

1. Prem Chand Dey v. Mokhoda Debi, (1890) 17 Cal 699 (F B).
2. Haridas Basu v. National Insurance Co. Ltd., (1932) 19 A I R Cal 213=136 I C 593=59 Cal 199=35 O W N 1096.
3. Veerappa Chetty v. Ramasami Chetty, (1920) 7 A I R Mad 505=53 I C 579=43 Mad 135=37 M L J 442.
4. Begg Dunlop & Co. v. Jagannath Marwari, (1912) 39 Cal 104=11 I C 417=14 O L J 228=16 C W N 402.
5. Abdul Hadi v. Kabultunissa, (1925) 12 A I R Pat 189=80 I C 901=6 P L T 71.
6. Bank of Bengal v. Sarat Chandra Mittra, (1918) 5 A I R Pat 126=48 I C 913=4 P L J 141.

by several decisions which have laid down that if the judgment-debtor does not object to the jurisdiction of a Court to sell the property before the sale is confirmed, he cannot question the sale after it has been confirmed : see A I R 1934 Mad 573⁷ and A I R 1924 Mad 457.⁸ In fact these cases merely extend the principle underlying S. 21, Civil P. C., to execution proceedings. S. 21 provides that

no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

In some cases however, it has been held that S. 21 must be strictly construed and it would not be legitimate to extend the bar of that Section beyond the limit expressly provided for it, namely appellate or revisional stages of the original suit : see for instance, 53 All 560.⁹ But the authority which has a direct bearing on this case is 43 Mad 135,³ in which it has been held that though a judgment-debtor, who does not object to a confirmation of sale by a Court having no territorial jurisdiction to sell a property, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate to prevent an execution creditor from proceeding against the same judgment-debtor. With the view expressed in this case I fully agree. If a Court which has no jurisdiction to sell a property, sells it, it is clear that the purchaser acquires no title to it. It may be that the judgment-debtor himself may have made it impossible for himself owing to his conduct to assert that such a person has no title to the property, but the fact remains that the property continues to be the property of the judgment-debtor and I do not see why another execution creditor who purchases it in execution of the decree should be debarred from proving that as between himself and the previous purchaser his title ought to prevail. In my opinion, it was open to the appellant to show in the present suit that the sale held at Alipur was a nullity and that he was entitled to proceed against the disputed house in exe-

cution of his decree. I would therefore allow this appeal, set aside the judgment and decree of the Court below and restore the decree of the trial Court. There will be no order as to costs so far as this Court and the lower Appellate Court are concerned, but the appellant will be entitled to the costs awarded to him by the trial Court.

Manohar Lall J.—I agree.

D.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 534

DHAVLE AND ROWLAND JJ.

Ram Khelawan Choudhury—Appellant.

v.

Ramudar Choudhury—Respondent.

Appeal No. 238 of 1938, Decided on 17th April 1939, from appellate order of Sub-Judge, Darbhanga, D/- 23rd March 1938.

Civil P. C. (1908), S. 47 — Executing Court can see whether decree under execution was null and void — Suit heard and decided after plaintiff's death — Decree is nullity and can be treated as such in execution — Judgment-debtor becoming aware of nullity of decree after sale in execution but before last date for application under O. 21, R. 90 — He has not lost his right to apply under S. 47 for setting aside sale.

The executing Court cannot set aside a decree. But it is open to the executing Court to see whether the decree under execution was or was not null and void. The question whether a decree is null and void on the ground of the death of a party can be raised in execution. [P 535 C 1 ; P 536 C 1]

Where the plaintiff had died before the hearing and decision of the suit, the decree is a nullity and must be treated as such in the execution proceedings: *A I R 1919 Pat 430 (F B)* and *4 I C 137, Rel. on; A I R 1916 Mad 574, Disting.* [P 535 C 2]

The question is one of jurisdiction and therefore it is immaterial that the decree was passed for an amount which was admitted by the defendant. Where the judgment-debtor only became aware of the nullity of the decree after the sale but before the last date on which he could have applied under O. 21, R. 90, for having the sale set aside on any ground indicated in that provision of the law, the judgment-debtor has not lost his right to object in execution. [P 536 C 1]

S. N. Rai, M. N. Pal and R. Choudhury
— *for Appellant.*

L. K. Jha and Rati Kant Choudhury —
for Respondent.

Dhavlé J. — This is an appeal by the judgment-debtor who applied under S. 47, Civil P. C., for setting an execution sale aside on the ground that the decree, in execution of which the sale had been held, was null and void as the plaintiff had died before the hearing and decision of the suit. The application was allowed by the trial Court, but on appeal the lower Appellate Court held that the decree was only voidable at

7. *Ayisa Beevi Ammal v. Negaratna Mudaliar*, (1934) 21 A I R Mad 573 = 152 I C 891.

8. *Manavikraman v. Ananthanarayana Ayyar*, (1924) 11 A I R Mad 457 = 79 I C 806 = 46 M L J 250.

9. *Raghubir Saran v. Hori Lal*, (1931) 18 A I R All 454 = 131 I C 248 = 53 All 560 = 1931 A L J 240.

the instance of the plaintiff's representatives, that having been passed for the amount admitted by the defendant, there was no prejudice done to this party, and that therefore the sale ought to stand. The facts have been found beyond dispute. The plaintiff died in Benares on 20th May 1934, while the suit was heard on 22nd May 1934, and decreed on the 25th of that month for the amount admitted by the defendant. The decree was afterwards assigned by the widow of the plaintiff to Ramudar Choudhury, respondent before us, who executed the decree and brought the judgment-debtor's property to sale on 27th July 1936, and purchased it himself. The judgment-debtor's application, out of which the present appeal arises, was made on 23rd August 1936, and also asked for setting the decree aside, a prayer which must, as it stands, be ignored. The executing Court cannot set aside a decree. But it is open to the executing Court to see whether the decree under execution was or was not null and void: 4 Pat L J 240.¹ It has been contended on behalf of the appellant that the view of the learned Subordinate Judge on the authority of 33 Mad 167,² that a decree in favour of a dead person is not a nullity but is only voidable at the instance of his legal representative is erroneous and opposed to a decision of the Bombay High Court in 4 Ind Cas 137³ and should not be accepted as the Bombay decision was referred to with approval in our Full Bench decision in 4 Pat L J 240,¹ to which I have referred. What was held in the Bombay case was that a Court has no jurisdiction to make a decree whether against or in favour of a deceased person, with the sole exception of the special case provided for in O. 22, R. 6, where one of the parties dies after all that the parties are required to do has been done in the case and there is an adjournment merely for the purpose of enabling the Court to prepare and pronounce its judgment. The actual decision in 33 Mad 167² was that where a decree had been passed in favour of a deceased plaintiff on the day of his death, which occurred before the case was taken up for disposal and heard, his representatives were barred from bringing a fresh suit on the same cause of action and for the same relief.

1. *Jungli Lall v. Laddu Ram Marwari*, (1919) 6 AIR Pat 430=50 IC 529=4 Pat L J 240 (FB).

2. *Coopooramier v. Soondarammull*, (1909) 33 Mad 167=3 IC 739.

3. *Vishvanath Dynanoba v. Lallu Kabla*, (1909) 11 Bom L R 1070=4 IC 137.

In support of this decision the learned Judges referred among other things to the provisions of S. 371, Civil P. C. of 1882, and O. 22, R. 9 of Civil P. C., now in force. They also referred to the English view that a suit abates on the death of a party and the American view to the contrary. I am not sure that those observations were not really mere obiter in the circumstances of the case. Nor do the learned Judges refer to the question of jurisdiction on the death of a party in circumstances other than those dealt with in O. 22, R. 6. Several other cases have been referred to before us, but it does not seem necessary to deal with them, for they are easily distinguishable on the facts. 39 Mad 386,⁴ for instance, is distinguishable on the ground that it was a case of the death of one of the defendants and not of the sole defendant, and it is obvious that where one of the defendants dies, the death need not be any reason for the suit to abate against the living defendants as well. The question is one of jurisdiction as was pointed out by Chandavarkar J. in 4 IC 137,³ and therefore it is immaterial that the decree was passed for an amount which was admitted by the respondent. In my opinion, the decree was a nullity and must be treated as such in the execution proceedings.

The learned advocate for the auction-purchaser respondent endeavoured to support the order of the lower Appellate Court on the authority of cases like that of 39 Mad 386⁴ and on the additional ground that the judgment-debtor's application under S. 47 was itself not competent. He should have applied, so it was argued, before the property was sold in execution, and in support of this contention 15 IC 436⁵ was cited. But it has been found as a fact in the present case that the judgment-debtor only came to know of the death of the plaintiff on 14th August 1936, more than three years after the decree and more than a fortnight after the execution sale itself. It is impossible in such circumstances to hold that the judgment-debtor ought to have objected to the execution before the sale.

Some question was also raised regarding whether the judgment-debtor should proceed by application or by suit in the circumstances of this case. It does not seem to me

4. *Vellayan Chetty v. Mahalinga Aiyar*, (1916) 3 AIR Mad 574=28 IC 83=39 Mad 386=28 MLJ 138.

5. *Bani Madhab Roy v. Bissessar Bharrat*, (1912) 16 O L J 542=15 IC 436=17 O W N 84.

necessary to deal with this question either in view of the provisions of sub-s. 2 of S. 47, Civil P. C., for it has been definitely ruled in this Court that the question whether a decree is null and void on the ground of the death of a party can be raised in execution, and I am not prepared to hold that in the circumstances of this case where the judgment-debtor only became aware of the nullity of the decree after the sale but before the last date on which he could have applied under O. 21, R. 90, for having the sale set aside on any ground indicated in that provision of the law, the judgment-debtor has lost his right to object in execution because the sale has already taken place but has not been confirmed. I would therefore allow this appeal with costs, set aside the decision of the lower Appellate Court and restore that of the trial Court.

Rowland J.—I agree.

D.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 536

HARRIES C. J. AND MEREDITH J.

*Sachinder Rai and another
Accused — Appellants.*

v.

Emperor.

Criminal Appeals Nos. 102 and 106 of 1939, Decided on 25th July 1939, from decision of Asst. Sess. Judge, Shahabad, Arrah, D/- 17th April 1939.

(a) Criminal Trial—Trial by jury—Non-direction — Failure of Judge in cases of sexual offences to warn jury of danger of convicting accused on uncorroborated testimony of girl amounts to non-direction.

It is extremely dangerous and permissible only in exceptional cases to convict a man of a sexual offence on the uncorroborated testimony of the complainant. The corroboration must be by independent evidence, that is to say, by some additional evidence coming from another person altogether, and the rule must be properly emphasized in the charge to the jury. Failure to warn the jury of the danger of convicting the accused on the girl's evidence alone amounts to a non-direction, which vitiates the trial particularly when the girl has hopelessly made inconsistent statements and she had shown herself to be an unscrupulous liar : *AIR 1934 Cal 7 and AIR 1936 Cal 18, Rel. on.*

[P 538 C 1, 2]

(b) Criminal Trial—Trial by jury—Mis-direction—In case of sexual offences like abduction, Judge should tell jury that if girl was immoral it made her story of abduction less probable—Failure to do this amounts to misdirection.

In cases of sexual offences like abduction, the Judge should tell the jury that if the girl was immoral it made her story of abduction and deceit less probable and that of abductor that she had a love-affair with him more probable. If this aspect of

the case has not been put to the jury it amounts to misdirection : *AIR 1933 Cal 718, Rel.*

[P 539 C 1]

(c) Penal Code (1860), Sec. 366-A—Absence of exact evidence of age—Judge should strongly emphasize this aspect of case to jury.

In case of an offence under Sec. 366-A the question of age is the crucial one and strict and exact evidence of age is essential. Where there is no exact evidence of age, the Judge should strongly emphasize this feature of the case and clearly direct the jury that if they are not completely satisfied that it has been established that the girl was under eighteen they are bound to acquit upon that charge.

[P 539 C 1]

(d) Penal Code (1860), S. 366—No evidence that girl was under 16 years — Charge under Sec. 366 depends entirely on proof of force or deceit—Judge should explain this to jury.

Whereas in cases of sexual offences, the law is somewhat complicated and liable to be misunderstood by jury, it is essential for the Judge to say exactly how he has explained it to the jury, so that the Appellate Court may be in a position to judge whether he has done so correctly and fully. Where there is no evidence that the girl was under sixteen, the charge under Sec. 366 depends entirely on the proof of force or deceit. The Judge should explain this to the jury and ask them to consider carefully whether any deceit had really been shown to have been practised upon the girl. A general statement that the Sections in question had been read over and explained to the jury will not do.

[P 539 C 1, 2]

K. K. Banarji (in 106) — *for Appellants.*
Advocate-General — *for the Crown.*

Meredith J. — These are two appeals from the judgment of the Assistant Sessions Judge of Shahabad, Mr. Ananta Nath Banarji. That of the appellant Hafiz Mian is a regular appeal; that of Sachinder Rai is a jail appeal. Both have been taken together for convenience. Both appellants have been convicted by a 4 to 1 majority verdict of the jury under Sections 366 and 366-A, I. P. C., and accepting this verdict the learned Judge has sentenced each of them to undergo rigorous imprisonment for five years. The sentences are under Sec. 366, no separate sentence being passed under Sec. 366-A. The appellants were on trial with two other accused, Salim Mian and Munshi Mian. Besides the charges mentioned, there was a charge of rape under Sec. 376, I. P. C., against the appellants and one other man, and there was a charge under Sec. 379, I. P. C., against the appellant Sachinder. These charges have ended in acquittal by a unanimous verdict of the jury.

Briefly, Sec. 366 is the offence of kidnapping or abducting any woman with intent that she may be compelled or knowing it to be likely that she will be compelled, to marry any person against her will, or in

order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse. The definition of kidnapping is to be found in Sec. 361 and it amounts to this, taking or enticing away any female under sixteen years of age. With the rest of the definition we are not concerned. Abduction is defined in S. 362 as follows :

Whoever by force compels, or by any deceitful means induces any person to go from any place, is said to abduct that person.

As will appear presently, there is no question of kidnapping in this case as there is no evidence, and it is not contended, that the girl is under sixteen. The charge therefore rests on abduction: hence it is essential that either force or deceit shall be established as an ingredient of the offence. S. 366-A is as follows :

Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable, etc.

This is a special Section, and before a conviction under it can be sustained, there must be strict proof that the girl in question is below the age of eighteen. The facts of the case under appeal are as follows. The complainant in the case, Ekram Singh (P. W. 1), with his wife Kishori (P. W. 4) lived with their uncle Sukhdeo Singh (P. W. 8) in quarter No. 6 of the Cement Department at Dalmianagar. On 17th December 1938, Ekram Singh discovered in the evening that his wife was missing. He failed to find her that night and the following day, and on the evening of the 18th he went to Benares to his father-in-law's place to search for her. There also she was not found and the complainant returned to Dehri on the evening of the 19th. At 8 P. M. that day he lodged a sanha at the Dehri thana. This sanha is Ex. 4 and is to the effect that on the afternoon of the 17th there was an altercation between the complainant and his wife and she being enraged fled from his house. Subsequently, the complainant received certain information leading him to suspect that his wife might have been kept in the gola of one Ramzan Mian in Dehri and subsequently removed. He made some further inquiries and then at midday on 20th December he lodged a formal information at the thana (F. I. R. Ex. 2). In this first information it is stated that he had learnt from Mulukraj Sharma (P. W. 7) that a woman, who might be his

wife, had been kept by Sachitanand (perhaps a mistake for Sachinder), Hafiz, Saleem, Alim and Munshi in the gola of Ramzan. He had learnt that these persons had kidnapped his wife from his quarter and after keeping her for some days in the gola had removed her to some place of which he had no trace. It should be mentioned that all the persons named were residing in the gola of Ramzan.

On this information the police arrested the appellant Hafiz and started an inquiry. On certain information received, a requisition was sent to the Sub-Inspector of Buxar who received it on 25th December. He sent a constable to the house of Sachinder's uncle in village Nuaon. From there they went to Buxar railway station where the girl was eventually found with Sachinder. Sachinder was then arrested and the girl was made over to her uncle Sukhdeo Singh (P. W. 8) and taken back to her husband's quarter. After completing investigation charge-sheet was submitted against the appellants and two other accused as already mentioned. It may be noticed here that at various stages of the case the woman made wholly inconsistent statements. There were serious discrepancies in her story as to the circumstances in which she had left her husband's quarter. It may be also noticed, as already indicated, that her husband in the sanha had said that she had left of her own accord as the result of a quarrel, whereas his case in the first information was that she had been abducted from his quarter by the accused.

In Court the woman's case was that she had gone to the railway station to start for her parent's home in Benares. There she had been met by the accused who deceitfully decoyed her away, more or less forcibly detained her in the gola, and next morning she was forcibly ravished by the appellant Hafiz and two others. After that the appellant Sachinder compelled her to go to his uncle's place at Buxar and on the way he not only raped her in the railway waiting room, but he also robbed her of her ornaments. Her story to the Sub-Inspector of Buxar, when first found, was entirely different. Then she said that she had not been raped or even molested by anyone. She was in love with the appellant Sachinder and had gone away with him of her own accord. This first story of the girl was almost in complete accord with the defence of Sachinder, a defence which he put forward at once and stuck to right through up

to the Court of Session. It is also his case in his petition of appeal filed from jail. It is to the effect that he and Kishori Devi, the girl, had been known to each other for some months and that the girl told him she had been badly treated at the quarters of her husband and was being practically made to live the life of a prostitute. She requested him to take her away somewhere and she left the quarter and went with him of her own accord. He stated that the other three accused were in no way concerned in the affair. As for the appellant Hafiz, his case was, and is, that he had nothing to do with the affair and had been falsely implicated by Mulukarj Sharma (P. W. 7) as he had declined to join in a labour strike. In this appeal we are not, of course, directly concerned with questions of fact. The charge to the jury has, however, been strongly attacked both on the ground of non-direction and of misdirection. I consider that both these grounds have been established.

With regard to non-direction, the point made is that the jury were never warned about the danger of convicting in such cases as this upon the evidence of the woman alone. The charge does contain no warning of this sort. Two rulings have been cited in which it has been held that such a warning is absolutely necessary, and must be emphatic, and in its absence the conviction is vitiated. The first is A I R 1934 Cal 7.¹ There it was laid down that it is extremely dangerous and permissible only in exceptional cases to convict a man of a sexual offence on the uncorroborated testimony of the complainant. The corroboration must be by independent evidence, that is to say, by some additional evidence coming from another person altogether, and the rule must be properly emphasized in the charge to the jury. In A I R 1936 Cal 18,² the learned Judge went even further. He held that in a trial for an offence under S. 366, I. P. C., the Judge should point out to the jury that they are entitled, if they please, to convict the accused upon the uncorroborated testimony of the girl but that it is dangerous to do so in cases dealing with sexual offences, such as rape, abduction and similar cases, and that only in exceptional cases they should convict the accused upon the uncorroborated testimony of the girl.

Failure to warn the jury of the danger of convicting the accused on the girl's evidence alone amounts to a non-direction, which vitiates the trial.

The present was a case where there was no real corroboration of the girl's statement. The only suggested corroboration is first a statement of P. W. 3 that he had noticed the appellant Hafiz with others seeing the girl off at the railway station. He was not able to explain how he was sure that the appellant had gone to the station for that purpose, worse still he had not made this statement at all before the police or in the lower Court. It was a statement which deserved no credence whatever. Even how ever could it have been accepted, it did not amount to corroboration, because it was equally consistent both with the version of the prosecution and with that of the defence.

The same remark applies to the only other suggested corroboration—a statement of P. W. 7 that he had seen the appellant Hafiz entering Ramzan's gola. Many other persons had been seen entering the gola, and some of them admittedly had gone there only to make inquiries about the presence of a strange woman. The statement, therefore, amounted to no corroboration whatever. In Sachinder's case there was really no corroboration at all. Thus the case was certainly one where there was no real evidence except the girl's statement and the rulings cited were strictly applicable. But the learned Judge did not utter a single word of warning. I consider that his failure to do so was in itself sufficient to vitiate the conviction. In the present case a warning was all the more necessary in view of the hopelessly inconsistent statements made by the woman, and the fact that she had shown herself to be an unscrupulous liar. Her story of rape was evidently disbelieved even by the jury themselves.

With regard to misdirection, attention has been drawn to a statement in the charge to the effect that about the girl being of loose morals, the Judge considered that he should tell them that as far as charges under Ss. 366, 366-A and 379, I. P. C., were concerned, her general moral character was of no consequence. In this connexion a ruling has been cited : A I R 1933 Cal 718³ where it was laid down that it must be shown that the girl was leading a pure life at the time of the alleged kidnapping or

1. *Emperor v. Nur Ahmad*, (1934) 21 A I R Cal 7 = 1934 Cr C 23 = 155 I O 584 = 98 O W N 108.

2. *Chamuddin Sardar v. Emperor*, (1936) 23 A I R Cal 18 = 1936 Cr C 110 = 160 I O 1028 = 87 Cr L J 359.

3. *Saheball v. Emperor*, (1933) 20 A I R Cal 718 = 1933 Cr C 1268 = 147 I O 79 = 85 Cr L J 307 = 60 Cal 1457.

abduction. It is not perhaps necessary to go quite so far as that, but at least the Judge should have told the jury that if the girl was immoral it made her story of abduction and deceit less probable and that of Sachinder that she had a love affair with him more probable. That was an aspect of the case which the jury should have carefully considered; but it was never put to them at all. On the contrary, the Judge's unfortunate statement, if technically a correct statement of the law, was highly likely to mislead them. The charge therefore was vitiated both on grounds of non-direction and of misdirection. The necessity cannot be too strongly emphasised for charging the jury in cases of this nature with extreme care, for experience has shown that juries in this country are most liable to misunderstand the law on the subject and to misapply it.

With regard to S. 366-A, there is yet another defect in the charge. Here, as I said in the beginning, the question of age is the crucial one and strict and exact evidence of age is essential. There was however no exact evidence of age. The parents were not examined. Two witnesses made vague statements that she was aged fifteen or sixteen, and the doctor, who thought she was about sixteen, was also vague and admitted that it was only a matter of opinion, and that he could not say definitely that she was not over sixteen. The judge should have strongly emphasised this feature of the case and clearly directed the jury that if they were not completely satisfied that it had been established that the girl was under eighteen they were bound to acquit upon that charge.

There is yet another aspect in which this charge is defective. I stated at the beginning that as there is no question of kidnapping, there being no evidence that the girl was under sixteen, the charge under S. 366 depended entirely on the proof of force or deceit. There is nothing in the charge to show that the Judge ever explained this to the jury and asked them to consider carefully whether any deceit had really been shown to have been practised upon the girl. All that the charge contains on this subject is a general statement that the Sections in question had been read over and explained to the jury. This will not do. Where, as in cases of this nature, the law is somewhat complicated and liable to be misunderstood by jury it is essential for the Judge to say

exactly how he has explained it to the jury, so that the Appellate Court may be in a position to judge whether he has done so correctly and fully. I consider the charge in this case so defective that a verdict based upon it, and only a majority verdict as that, could not safely be sustained. Nor having regard to all the circumstances of the case, do I consider it one where a retrial should be ordered. I would allow the appeals, set aside the convictions and acquit both appellants.

Harries C. J.—I agree. This case belongs to that class of cases commonly referred to as sexual cases. In such cases it is, in my view, essential that the learned Judge should specially warn the jury of the danger of convicting upon the uncorroborated testimony of the woman concerned. It is true that there is no rule of law in this country requiring corroboration; but experience has shown both in England and in India that it is extremely dangerous in this class of case to act solely upon the woman's evidence. The rule is a rule of practice, but it has been followed for such a length of time that it has virtually become a rule of law. In the present case, the learned Judge did not warn the jury of the danger of acting upon the uncorroborated testimony of the girl. As pointed out by my learned brother in his judgment, the girl's evidence was a mass of contradictions, and this was eminently a case in which the jury should have been warned most emphatically. In my view, in cases of this kind the learned Judge must point out in the clearest language that it is extremely dangerous to base a conviction upon the girl's evidence and he should stress the fact that before the jury can properly return a verdict of guilty they must be satisfied that the girl's evidence is corroborated by other independent testimony. Having given such a warning, the learned Judge should explain to the jury what amounts to corroboration. He should then point out to the jury what evidence can legally amount to corroboration and he should ask the jury to consider whether or not they accept such evidence. Finally, he should tell the jury that they should only convict if they are satisfied that the evidence tendered as corroboration is true and worthy of credence.

In the present case the learned Judge gave no warning of any kind and has not dealt at all with the question of corroboration. He never asked the jury to consider whether the pieces of evidence which might

amount to corroboration could possibly be accepted. As pointed out by my learned brother, one piece of evidence suggested as corroboration of the girl's story against Hafiz could not possibly be accepted by any responsible jury. In my view, the charge in this case was deficient and the convictions based on it cannot possibly be sustained. I entirely agree that this is not a case in which a retrial should be ordered.

D.S./R.K.

*Appeals allowed.***A. I. R. 1939 Patna 540****HARRIES C. J. AND CHATTERJI J.***Butto Kristo Roy and others —**Defendants — Appellants.*

v.

Gobindaram Marwari and others,
Plaintiffs and another, Defendant —
Respondents.

Appeal No. 139 of 1936, Decided on 15th March 1939, from original decree of Sub-Judge, Dhanbad, D/- 14th May 1936.

(a) **Transfer of Property Act (1882), S. 98** (before amendment of 1929)—**Scope of S. 98—Mortgage giving right to mortgagee to recover mortgage debt either by sale of mortgaged property or by realizing rent of mortgage property from tenants — Mortgage does not fall under Section 98.**

The general recognized forms of mortgages are defined in S. 58, but parties in course of business are sometimes apt to import in particular mortgage transactions some terms which do not strictly come within any of these general forms. The terms may partly be of one form of mortgage and partly of another, and this is the sort of combination which is contemplated by S. 98. [P 542 C 2]

Where by the terms of a mortgage, the mortgagee is given the right to recover the mortgage debt by sale of the mortgage property and in the alternative by realizing the rent of the mortgage property from the tenants, the mortgage being a combination of a simple mortgage and a usufructuary mortgage, does not fall within the scope of Section 98. [P 542 C 2]

(b) **Mortgage—Usufructuary mortgage—Tenanted property—Mode of giving possession.**

In the case of a tenanted property, the only way in which possession can be given to a usufructuary mortgagee is to give him the right to realize the rents and appropriate them towards the mortgage money. [P 542 C 2]

(c) **Mortgage—Enforcement of—Under mortgage deed, mortgagee entitled to recover mortgage debt by sale of mortgage property or by realizing rent from tenants of mortgage property — Failure to file suit on mortgage against mortgagor does not debar mortgagee from filing suit for rent against tenants.**

Where the mortgage deed provides that the mortgagees will have the right to realize the rents of the mortgaged properties and apply the amount realized firstly towards interest and secondly towards the principal, and in case there is any diffi-

culty in realization of the rents the mortgagees will be entitled to realize their mortgage money by selling the mortgage properties, they have the option, instead of suing the tenants for recovery of rents, to sue the mortgagee for sale of the mortgaged properties. But this is their option which, if not exercised, does not debar them from enforcing their right of suit against the tenants for recovery of rents. [P 543 C 1]

(d) **Evidence Act (1872), S. 92 — Lease in favour of one person—Fact that another person is cosharer with him is not matter which varies terms of lease.**

Where a lease on the face of it purports to be executed in favour of one person, the fact that another person is also a cosharer by whatever arrangement with that person is not a matter which can be said to vary the terms of the lease within the meaning of S. 92. [P 544 C 1]

(e) **Transfer of Property Act (1882), S. 50—Mortgagee entitled under mortgage to realize rent from tenants giving notice to them—Tenants paying rent to mortgagee—Mortgage property purchased by stranger—Purchaser giving notice to tenants alleging mortgage to be satisfied—Tenants without inquiring whether mortgagee is satisfied, paying rent to purchaser cannot claim benefit of S. 50.**

Where under a mortgage deed, the mortgagee is given the right to realize rent from tenants in possession of the mortgage property and mortgagee accordingly gives notice to the tenants and in pursuance of that notice the tenants pay the rent to the mortgagee, this liability of payment subsists so long as the mortgage debt is not satisfied unless the mortgagee subsequently assents to their paying the rent to the mortgagor. If subsequent to the execution of the mortgage, the property is purchased by a third party at a court sale and the purchaser gives notice to the tenants to pay rent to him alleging that the mortgage has been satisfied, then if the tenants, without making any inquiry whether the mortgage has in fact been satisfied, pay rent to such purchaser, they cannot be said to have acted in good faith within the meaning of Sec. 50 and cannot therefore claim benefit of such payment in suit against them by the mortgagee upon the mortgage still subsisting. [P 547 C 1 ; P 548 C 1]

(f) **Evidence Act (1872), S. 114, Illus. (f) — Letter posted but returned as being refused by addressee—Presumption.**

Of course a letter, if posted and not received back through the Dead Letter Office shall be presumed to have been received by the addressee. But this presumption does not apply where the letter purports to have been returned as being refused by the addressee : *A I R 1915 Cal 313, Rel. on.* [P 547 C 1]

(g) **Landlord and Tenant — Rent — Right to recover rent implies right to realize it with interest in case of default.**

The right to realize rent carries with it the right to realize it with interest in case of default of payment at the kist time. [P 548 C 1]

P. R. Das, S. C. Mazumdar and Ramnugrah Narain Sinha—*for Appellants.*
Sir S. N. Mukherji, J. M. Ghosh and S. S. Rakshit — *for Respondents.*

Chatterji J.—This appeal arises out of a suit for recovery of Rs. 24,941-11-3 for

minimum royalty with interest from the principal defendants 1 to 3 (who will be hereinafter referred to as defendants). The royalty is payable under a registered lease dated 28th March 1907, executed by Thakur Giridhari Singha, deceased father of pro forma defendant 4, in favour of Prasanna Kumar Rai, deceased father of defendants 1 and 2 and grandfather of defendant 3, in respect of 220 bighas of coal land in Mauza Kenduadih. The annual minimum royalty reserved by the lease was Rs. 2200 payable in six instalments subject to the payment of interest at Rs. 3.2.0 per cent. per month in case of default of payment of any kist. It is alleged in the plaint that out of this annual royalty of Rs. 2200 Giridhari Singh had assigned Rs. 275 to another person and the remaining Rs. 1925 was being paid annually by Prasanna and, after him, by the defendants, to Giridhari Singh and, after him, to the pro forma defendant. On 29th November 1922, the pro forma defendant borrowed from the plaintiffs Rs. 15,000 carrying compound interest at 2 per cent. per month with yearly rests under a registered mortgage bond, hypothecating thereby the aforesaid 220 bighas of coal land with another property, namely the entire mauza Nautandih. This last-mentioned mauza which was mainly comprised of coal lands was also in lease with one Damodar Lal Lala at an annual jama of Rs. 4720. By the mortgage bond the plaintiffs were given the right to realise the annual minimum royalty of Rs. 1925 from the defendants and Rs. 4720 from Damodar Lala. The plaintiffs after the mortgage sent notices to the defendants and also to Damodar Lala and thereupon the defendants used to pay the annual royalty of Rs. 1925 to them but Damodar Lala sent a reply stating that he was not liable to pay royalty until the railway siding in mauza Nautandih was constructed. The defendants paid to the plaintiffs the royalty up to Aswin kist 1333 B. S. but since then have not paid anything in spite of repeated demands. The plaintiffs, therefore, instituted the present suit on 29th November 1934, claiming the royalty for six years from Agrahayan kist 1335 (November-December, 1928) to Aswin kist 1341 B. S. (September-October, 1934) with interest at Rs. 3.2.0 per cent. per month from the date of default of each kist.

This suit was contested by the defendants mainly on the following allegations: The plaintiffs under their mortgage which was

a simple mortgage had no right to realize the rent of the mortgaged properties but were merely constituted agents for collection of the same. The defendants paid rents to the plaintiffs from Agrahayan 1329 to Aswin 1333 under the direction of their landlord, defendant 4. The said agency was terminated in 1926 by defendant 4 who directed the defendants not to pay the rent to the plaintiffs any more as their mortgage had been fully satisfied but to pay to his managing agent Biseswar Chakrabarty. In pursuance of this direction the defendants paid rent to Biseswar till Maga kist 1333; and in order to avoid trouble, they duly informed the plaintiffs of the matter who remained quiet. In April 1927, one Sailesh Kumar Sarkar intimated to the defendants that he had purchased the right, title and interest of defendant 4, at a court sale and called upon them to pay the rent to him. Accordingly they paid rents to him from Chait kist 1333 to Magh kist 1337. The plaintiffs, therefore, are not entitled to receive any rent from the defendants. As regards the allegation in the plaint that Rs. 275 out of the annual royalty of Rs. 2200 was assigned, it was denied by the defendants in the written statement. They, however, admit that Rs. 1925 is annually payable by them. They also denied the liability to pay any interest and further pleaded that the interest claimed was excessive.

The learned Subordinate Judge who tried the suit has decreed it, disallowing the claim for interest. The defendants have preferred this appeal and the plaintiffs also have filed a cross objection with regard to interest. The points urged by Mr. P. R. Das on behalf of the appellants are: (1) That the plaintiffs' mortgage being, if not a simple mortgage, an anomalous mortgage, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed and the defendants being no parties to the contract, its terms are not enforceable against them. (2) That under the mortgage the plaintiffs have no authority to realize the rents from the defendants in their own right, the effect of the mortgage being merely to constitute them as agents for collection of the rents of the mortgaged properties, and the agency having been already terminated by defendant 4 in 1926, the plaintiffs have no longer any authority to realize the rents. (3) The annual royalty reserved under the lease in favour of Prasanna Kumar Rai

being Rs. 2200, the plaintiffs' mortgage which was in respect of Rs. 1925 only was bad in law, being an assignment of a portion of a debt. (4) That the defendants have in good faith paid the rents for the period under claim to Sailesh Kumar Sarkar and are therefore protected under S. 50, T. P. Act.

Point No. 1. — The relevant portion of the mortgage bond Ex. 1 is as follows :

As security for repayment of the entire amount of principal and interest, I mortgage the properties, described in the schedule below, rightfully held possession of by me. You will be competent to realize the amount due on this mortgage bond of yours by selling my right and interest in the said properties. Out of the properties, mentioned in the said schedule, the annual minimum royalty of Rs. 4720 is due to me for the property of item 1. In respect of property of item 2 of the schedule, the annual jama of Rs. 1925 is due to me. From this day you obtain the right of realizing the amount of the said minimum royalty and jama from my tenants, mentioned in the schedule. You will realize the same amicably or by suit and you will send to me a copy of the account by way of testimony of the amounts you will realize amicably or by suit and at first you will credit the amounts you will realize towards the interest due to you, and after crediting the same, if you get money in excess, you will credit towards principal. In addition to my minimum royalty on account of the property of item 1, mentioned in the schedule, commission is due to me. That also you will be competent to realize; and according to the former rule, you will credit the amount you will get therefor towards principal and interest due to you. I shall be liable for the legitimate costs, which will be incurred for realizing commission and royalty and rent. At first, after deducting your costs out of the amount realized you will credit, according to the above-mentioned rule, towards principal and interest due to you. If there be any obstacle to realizing the aforesaid royalty and rents and commission or there be delay in it or any other wrongful act done comes to light, or any of the terms of this deed is violated, you will be able to sue against me for the amount of principal and interest, mentioned in the schedule below and realize the money by selling the mortgaged property, mentioned in the schedule below, treating it as mortgaged. I have not encumbered in any way or transferred the property, specified in the schedule, previously; and until the amount due to you is repaid, I shall not be competent to create any encumbrance on the said property, or transfer the same. In case the entire amount due to you for this bond is not satisfied by the sale of the mortgaged property specified in the schedule, you will be competent to realize the remaining amount from my person as well as from any of my other properties.

The mortgage, in so far as it gives the mortgagees the right to realize their mortgage money by selling the mortgaged properties, is a simple mortgage; at the same time, it has the characteristic of a usufructuary mortgage inasmuch as the mortgagees are given the right to realize the rents of the mortgaged properties and ap-

propriate the same firstly towards interest and secondly towards principal. In the case of a tenanted property, the only way in which possession can be given to a usufructuary mortgagee is to give him the right to realize the rents and appropriate them towards the mortgage money. The mortgage in question is thus a combination of a simple mortgage and a usufructuary mortgage. It is agreed on all hands that this mortgage, if it is what is called an anomalous mortgage, will be governed by the provisions of S. 98, T. P. Act, as it stood before the amendment of 1929. The old Section which was headed "anomalous mortgages" was as follows :

In the case of a mortgage, not being a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, or an English mortgage or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and so far as such contract does not extend, by local usage.

The present mortgage, as I have already pointed out, is partly of the nature of a simple mortgage and partly of the nature of a usufructuary mortgage and thus being a combination of these two particular forms of mortgage, does not fall within "anomalous mortgages" as described in the old S. 98. Mr. Das contends that the combination of two forms of mortgages contemplated in the Section means that it must have all the characteristics of each of the two forms, and judged by this test, the present mortgage which does not possess all the characteristics of a usufructuary mortgage as defined in S. 58, cl. (d), T. P. Act, cannot be classed under such combination as is recognized by the Section. This argument is opposed to the very tenor of the Section. The general recognized forms of mortgages are defined in S. 58, but parties in course of business are sometimes apt to import in particular mortgage transactions some terms which do not strictly come within any of these general forms. The terms may partly be of one form of mortgage and partly of another, and this is the sort of combination which is contemplated by S. 98. Ordinarily, a combination of an entirely simple mortgage and an entirely usufructuary mortgage is hardly conceivable. In my view therefore the present mortgage falls outside the scope of old S. 98.

The question then arises as to what are the rights of the plaintiffs under the mortgage. There can be no doubt that the rights must be determined with reference to the

terms of the mortgage deed Ex. 1. Now, what the deed in substance provides is that the mortgagees will have the right to realize the rents of the mortgaged properties and apply the amount realized firstly towards interest and secondly towards the principal, and in case there is any difficulty in realization of the rents, the mortgagees will be entitled to realize their mortgage money by selling the mortgaged properties. The mortgaged properties being in possession of tenants, the realization of rents from them is the only mode by which the mortgagees can enjoy possession of the properties. The mortgagees in the exercise of such rights of possession are entitled to recover the rents by suit where they are not paid amicably. Of course, they have also the option, instead of suing the tenants for recovery of rents, to sue the mortgagor for sale of the mortgaged properties. But this is their option which, if not exercised, does not debar them from enforcing their right of suit against the tenants for recovery of rents. The plaintiffs have chosen to enforce this latter right to which they are undoubtedly entitled under the terms of the mortgage.

I should, however, observe that even if the mortgages fell within the scope of old Sec. 98, Transfer of Property Act, I fail to see how the plaintiffs' rights would be affected. In any view, the terms of the mortgage must govern the rights and liabilities of the parties. The right to receive rents of the mortgaged properties has been assigned by the mortgage to the mortgagees and the tenants, once they are given notice of the assignment, are bound in law to pay the rents to the mortgagees so long as their mortgage is alive. I should here make it clear that the mortgage does not amount to an absolute assignment of the rent but an assignment to the limited extent just indicated.

Point No. 2. — Mr. Das's contention on this head is based on the assumption that the mortgage in question is entirely a simple mortgage. The fallacy of this assumption has already been exposed while dealing with the first point and it needs no further discussion. But I may add that upon a perusal of the mortgage deed, Ex. 1, it is impossible to construe it as clothing the mortgagees merely with the power of an agent so far as realization of the rents of the mortgaged properties is concerned.

Point No. 3. — No doubt, under the terms of the kabuliyat (Ex. 2) the annual minimum royalty payable was Rs. 2200 and the

plaintiffs in their plaint stated that out of this Rs. 2200, the original lessor Giridhari had assigned Rs. 275 to another person and the remaining Rs. 1925 was being paid annually to him by the lessee. This allegation about the assignment was denied by the defendants in para. 3 of their statement. They, however, in the same paragraph admit that Rs. 1925 is annually payable by them. But when we come to the evidence in the case, we find that the truth of the matter is that one Rajendra was a two annas cosharer with the defendants and he was liable to pay Rs. 275 for his quota of the rent. This is the statement of D. W. 2 Sailesh Kumar Sarkar, the auction-purchaser of the pro forma defendant's interest, to whom the defendants are said to have paid rents for the period under claim. D. W. 5 who is a clerk of defendant 1 for fourteen or fifteen years also says :

Rs. 275 out of our rent has been remitted by defendant 4; it was orally; Rajen (sic) is our co-sharer for two annas in the said colliery.

The rent receipts (Ex. 5 series) which were granted by the plaintiffs to the defendants for rents paid by them up to Aswin kiet 1333 also clearly mention that Rs. 1925 was the annual rental in fourteen annas share. The admitted evidence thus clearly establishes the fact that Rajen is a cosharer with the defendants and the defendants themselves are actually liable to pay Rupees 1925 annually as the minimum royalty to the pro forma defendant. And it was the right to receive this entire amount of annual royalty from them that was assigned under the mortgage in question to the plaintiffs. Consequently, the question of assignment of part of a debt does not arise. If the defendants' case had been that they are liable to pay the entire royalty of Rs. 2200, the position might have been different. In that case by reason of the assignment under the plaintiffs' mortgage they would have been liable to pay Rs. 1925 only to the plaintiffs and the remaining Rs. 275 to another person.

But Mr. Das argues that the evidence to show that the principal defendants are liable to pay Rs. 1925 as the annual royalty being in variation of the terms of the registered instrument of lease, is inadmissible under S. 92, Evidence Act. The answer to this contention is two-fold. Firstly, it is an admitted fact that the defendants are liable to pay Rs. 1925 only as the annual royalty. Under S. 58, Evidence Act, facts admitted need not be proved. Evidence is required to prove a fact when it is in dis-

pute. It is then that the question arises as to whether any particular evidence is admissible or not. S. 92, as a salutary rule of evidence prescribes that the terms of a written contract should not be permitted to be varied by oral agreement except under certain contingencies. Upon the facts of the present case there is no room for the application of S. 92.

Secondly, the fact which transpires from the defendants' own evidence, namely that Rajen is a cosharer with them to the extent of two annas is not a matter which can be said to vary the terms of the lease within the meaning of S. 92, Evidence Act. How Rajen came to be a cosharer is not clear. It may be that at the very inception of the lease he was taken as a partner in the lease in which case his position would be that of an undisclosed partner, his name not appearing in the lease, or it may be that by some subsequent arrangement agreed to by all the parties concerned he was allowed to come in as a partner or cosharer. In either case the arrangement by which he came in as a two annas cosharer does not offend against the provisions of S. 92, Evidence Act. On the first hypothesis, the arrangement, if it at all comes under S. 92, will be covered by proviso 2 which permits evidence to be given of the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms. On the second hypothesis the matter falls wholly outside the scope of S. 92, because it is in effect an assignment by the lessees in respect of their two annas share. How the assignment was effected and its validity or otherwise, if it was oral, are matters which do not fall to be determined in the present litigation in which Rajen is not a party nor is alleged to be a necessary party.

In this connexion Mr. Das has referred to a decision of the Judicial Committee in 40 I A 223¹ at p. 233 where it was held that the defendant who was sued for rent on the basis of a registered lease could not be permitted to prove that by an oral agreement the lessor had reduced the rent. In that case there was evidence that the lessor did for some time accept a reduced rent but their Lordships observed that this fact was consistent with the reduction having been a mere voluntary and temporary abatement. This decision has no bear-

ing on the present case. No doubt D. W. 5 says that defendant 4 granted an oral remission of Rs. 275 out of the entire rent. But as I have already pointed out this sum of Rs. 275 is payable by Rajen for his two annas share. Whether Rajen has been allowed remission is a matter between him and the lessor. So far as the principal defendants are concerned, they are liable to pay Rs. 1925 only.

Point No. 4.—S. 50, T. P. Act, on which the contention is based runs thus :

No person shall be chargeable with any rents or profits of any immovable property which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

The defendants' case is that for the period under claim they paid the rents in good faith to Sailesh Kumar Sarkar. They therefore in order to get the benefit of S. 50 must prove firstly that they did in fact pay to Sailesh and secondly that they did so in good faith. Admittedly the plaintiffs soon after their mortgage gave a notice to the defendants asking them to pay the rents to them; and the defendants after receipt of such notice actually paid the rents to them from Agrahayan kist of 1329 to 1333 Aswin kist, the last payment being made on 28th December 1926 under the receipt, Ex. 5 (a). The defendants however discontinued payment to the plaintiffs since then and the reason assigned for their doing so is this. On 9th June 1926, defendant 4 sent them a letter, Ex. F (4), asking them to stop payment of the royalty to the plaintiffs and to pay it to his manager, Babu Hari Pado Mukerji. Thereupon defendant 1 is said to have sent a letter on 17th June 1926 to the plaintiffs informing them of the said notice and stating that he would not be able to pay them anything thereafter on account of the royalty. The plaintiffs denied having received this letter. Ex. L is a typed copy of the letter which is said to have been sent by ordinary post.

The learned Subordinate Judge has disbelieved the evidence concerning this letter, and I think rightly. Mr. Das did not place so much reliance upon it, and it appears that in spite of it the defendants, some months later, on 28th December 1926 paid rent to the plaintiffs under the receipt Ex. 5 (a). On 18th December 1926, one Bisweswar Chakrabarty, describing himself as a managing agent of defendant 4 sent a notice (Ex. C) to defendant 1

1. *Durga Prasad Singh v. R. N. Bagchi*, (1913) 41 Cal 493 = 21 I C 750 = 40 I A 223 = 19 C L J 95 = 18 C W N 66 (P O).

asking him to pay the royalty to him as he was appointed the managing agent of defendant 4 by a registered deed dated 14th December 1926. Then on 2nd February 1927, defendant 4 sent a pleader's notice (Ex. A) to defendants 1 and 3 asking them not to make any further payment on account of royalty, etc., to the plaintiffs whose mortgage, it was stated, had been fully satisfied; the notice further directed them to pay the royalty to Babu Bisweswar Chakrabarty who was appointed the managing agent of defendant 4. Again on 5th February 1927, defendant 4 himself sent a notice Ex. F (5) to defendants 1 and 3 confirming the notice Ex. A already given by his pleader. Thereupon defendant 1 is said to have sent a letter dated 7th February 1927 to the plaintiffs by registered post. Ex. L (1) which is a copy of this letter is as follows :

Babu Shewdanmull Marwari
and
Babu Gajadhar Marwari.
P. O. Dubra, (Manbhum).

Dear Sir,

Thakur Ran Bahadur Singh of Barora has informed me by a postal registered letter that the amount due to you from him has been paid off; and for that reason he has asked me to pay now to his managing agent Babu Bisweswar Chakrabarty the rent of 220 bighas of coal land of mouza Kenduadih after the last Aswin kist, which he directed (me) to pay to you by letter dated 11th July 1923. For that reason I informed you that I shall no longer be able to pay to you any amount out of the said rent after the Aswin kist. I write to you for information.

Yours faithfully,
(Sd.) Butto Kristo Roy.

On the same day, 7th February 1927, defendant 1 sent a letter of which Ex. L (2) is a copy to defendant 4 by registered post with acknowledgment due in which he acknowledged the receipt of defendant 4's letter, dated 5th February 1927 and also intimated that he paid that day (7th February) Rs. 350 to Bisweswar Chakrabarty. In the meantime, on 16th July 1925, the interest of defendant 4 in mauza Kenduadih was purchased by Sailesh Kumar Sarkar in execution of a decree obtained by him against defendant 4 the sale being confirmed on 12th December 1925 (*vide* sale certificate Ex. 3). Sailesh took delivery of possession on 3rd October 1926 (*vide* Ex. G). Thereafter, on 2nd April 1927, he, through his pleader, sent two notices, one (Ex. H) to the defendants and another Ex. H (4) to the plaintiffs, intimating the fact of his auction-purchase and demanding payment of the royalty from the defendants

and forbidding the plaintiffs to realize the same. In the notice (Ex. H) to the defendants it was also mentioned that a similar notice (meaning Ex. H.4) was sent to the plaintiffs. Again on 15th March 1928 Sailesh through his same pleader sent a notice Ex. H (1) to the defendants in which he referred to his previous notice dated 2nd April 1927 and repeated the demand for payment of royalty to him. Subsequent to the receipt of this last-mentioned notice, the defendants are said to have paid rents to Sailesh and obtained from him the receipts Exs. I to I (15) the earliest of which is dated 27th May 1928 and the latest dated 11th August 1934, the total amount covered by the receipts being Rs. 5,938-12-3. The claim in the present suit being for six years from Agrabayan kist 1335 (November-December 1928) to Aswin kist 1341 (September-October 1934), the payments said to have been made under the receipts Ex. I series excepting Ex. I (10) which is dated 27th May 1928 are covered by the period under claim.

The defendants in support of their plea of payment in good faith to Sailesh rely on their letter Ex. L (1) and the subsequent conduct of the plaintiffs. What they contend is that when they received the notice (Ex. A) dated 2nd February 1927 from defendant 4's pleader and the notice Ex. F (5) dated 5th February 1927, from defendant 4 himself they sent the letter Ex. L (1) on 7th February 1927 to the plaintiffs by registered post to which no reply having been received, they honestly believed as true the representation conveyed to them by defendant 4's pleader in his notice (Ex. A) that the plaintiffs' mortgage had been fully satisfied. Their belief was further strengthened by the fact that the plaintiffs, although payment to them was stopped, remained quite silent and made no further demands for payment from them. The plaintiffs on the other hand deny having received the letter Ex. L (1) and also assert that they made repeated demands for payment though orally.

The first question for consideration, therefore, is whether the letter Ex. L (1) is genuine. The learned Subordinate Judge after considering the evidence has held that it is not so. What is significant with regard to this letter is that although on the same day defendant 1 sent the registered letter (Ex. L.2) to defendant 4 with acknowledgment due, the letter Ex. L (1) to the plaintiffs, which was from the point of view of

the defendants far more important, was sent without acknowledgment due. The original letter was signed by defendant 1 and though he was present in the Court room, as admitted by his clerk D. W. 3 in his evidence, he did not come forward to pledge his oath. It also appears from D. W. 5's evidence that the defendants maintain a press copy but the copy Ex. L (1) does not bear any trace of being a press copy. Great stress is laid on the registered receipt Ex. M granted by the post office on 7th February 1927. This receipt, so far as it is decipherable, shows that the letter was addressed to "Shew Nandan Lal (torn) ewary and B (illeg.)." This address must have been copied by the postal clerk from the address mentioned in (sic) the envelope. The names of the addressees as mentioned in the letter Ex. L (1) are Babu Shewdanmull Marwari and Babu Gajadhar Marwari. Thus the names of the addressees in the postal receipt, Ex. M do not tally with those mentioned in Ex. L (1). We cannot assume that the address on the envelope mentioned the names of the addressees differently from the enclosed letter. The genuineness of the postal receipt Ex. M need not be doubted, but it might refer to some other letter addressed to some other persons than the plaintiffs. In these circumstances the evidence adduced by the defendants does not appear to be convincing enough to establish the genuineness of the letter, Ex. L (1).

Next assuming that the letter, Ex. L (1) is genuine, let us see how it affects the position of the parties. The plaintiffs, being under the mortgage assignees of the rent, are entitled in law to realize it from the defendants subject to this condition that if the latter paid the rent in good faith to the lessor without notice of the mortgage, they will not be bound to pay it again to the plaintiffs. But the plaintiffs did give notice of their mortgage to the defendants and in pursuance of that notice, the defendants did pay the rents to them for four years from Agrahayan 1329 to Aswin kist 1333. They therefore knew full well that they were liable to pay the rents to the plaintiffs. This liability would, in law, continue until the plaintiffs' mortgage was extinguished or unless the plaintiffs assented to their paying the rent to the mortgagor. S. 50, T. P. Act, will be of no avail unless they establish that they had sufficient reasons for honestly believing that the plaintiffs' mortgage had been satisfied and that in that honest belief they paid the

rents to Sailesh. Now the letter, Ex. L (1) which I have already quoted, far from disclosing any desire on the part of defendant 1 to be satisfied by enquiry from the plaintiffs themselves as to whether their mortgage was in fact paid off, appears to have conveyed to them merely for their information his own view that he would no longer be liable to them for the rent. His attitude is made more manifest by his letter, Ex. L (2) of the same date which he wrote to defendant 4 and which is as follows :

Rajkrishna Thakur Ran Bahadur Singh,
Ramnagarharh,
P. O. Mahuda, B. N. R.

Respects,

From the Registered letter bearing your signature dated 5th February 1927, I learn that hereafter I shall have to pay to Bisweswar Chakrabarty, the managing agent of your estate, the rent due to you from me and my minor nephew on account of 220 bighas of coal land of mauza Kenduadih, which I have, according to your direction, paid to Shewdanmull Marwari of Dubra up to Aswin kist. After receipt of the said letter, I have paid this day to the said Bisweswar Chakrabarty Rs. 350 (three hundred fifty) payable in our share for Agrahayan and Magh kists and taken receipt signed by him. Submitted for your information.

Yours faithfully,
(Sd.) Butto Kristo Roy.

By this letter he readily expresses his willingness to pay the rent to Bisweswar without even waiting for a reply to Ex. L (1) from the plaintiffs. And if he actually paid that day Rs. 350 to Bisweswar, as stated in the letter, it seems he quietly made the payment on the mere asking of defendant 4. This is wholly inconsistent with the plea of good faith. Consequently, the letter Exhibit L (1), even if genuine, is of no assistance.

As I have already mentioned, the payments for the period under claim are said to have been made to Sailesh. Indeed, Sailesh through his pleader did send to the defendants the notice Ex. H, dated 2nd April 1927, and again the notice Ex. H (1), dated 15th March 1928. But Sailesh being the purchaser of the mortgagor's interest, was obviously most interested in asserting that the mortgage had been paid off and any number of notices sent by him would not afford any protection to the defendants from their liability to pay the rent to the mortgagees. It is not suggested that after receipt of the notices from Sailesh's pleader the defendants sent any notice to the plaintiffs or made any enquiry from them. Sailesh was not their original landlord and was a transferee; so also were the plaintiffs. The defendants had already notice of

the plaintiff's mortgage and were in fact paying the rents to them. When therefore the defendants received the notices from Sailesh's pleader it was their duty, before they made any payment in good faith to Sailesh, to make enquiries from the plaintiffs as regards the real situation. If they had only enquired from the plaintiffs they would have come to know at once that their mortgage was still unsatisfied. When they were told that the plaintiff's mortgage had been satisfied, they did not even care to ascertain whether the mortgagor got back the satisfied mortgage bond. Their failure to make any enquiry from the plaintiffs must be characterized as grossly negligent, if not wilful. As defined under S. 3, T. P. Act, "a person is said to have notice of a fact" when he actually knows that fact, or when but for wilful abstention from an enquiry or search, which he ought to have made, or gross negligence, he would have known it. This test may well be applied here. Under these circumstances, it is hardly possible to accept the plea that the defendants made payments to Sailesh in good faith.

As regards Sailesh's notice, Ex. H (4) dated 2nd April 1927, which was addressed to the plaintiffs, it must be observed that there is no legal proof that it was actually served on them. It was sent in a registered cover which purports to have been received back as the addressee refused to accept it, but the peon who endorsed the refusal on the cover has not been examined nor even his handwriting has been proved. Of course a letter, if posted and not received back through the Dead Letter Office, shall be presumed to have been received by the addressee. But this presumption does not apply where the letter purports to have been returned as being refused by the addressee. In this connexion reference may be made to 19 C W N 489.² The position therefore is that there is no legal evidence to prove that the notice Ex. H (4) was actually tendered to the plaintiffs and refused by them. But even assuming that this notice was served on the plaintiffs, it does not improve the defendants' position at all. They had already notice of the plaintiffs' mortgage and the plaintiffs were under no duty to inform them that their mortgage was still outstanding. Their silence when they had no duty to speak could not be construed as conveying by implication

a representation to the defendants that their mortgage was satisfied. Consequently, the defendants cannot take any advantage of the supposed silence on the part of the plaintiff.

Some stress has been laid upon the fact that the plaintiffs allowed the rent for two years from Agrahayan kist 1333 to Aswin kist 1335 to be barred and they further waited for six years before bringing this suit. The explanation offered by them on this point is that they could not sue earlier owing to differences between them from 1927 which led to separation amongst themselves. This explanation cannot be altogether disregarded. The fact remains that their mortgage is still in force and their rights thereunder cannot, in any way be affected merely because they allowed two years rent to be barred. This is a matter which will arise as between them and the mortgagor when there will be accounting at the time of redemption. It should be observed here that the defendants though they suggested that the plaintiff's mortgage was satisfied, have made no attempt to substantiate the suggestion.

I have so far discussed the plea of good faith under S. 50, T. P. Act, on the assumption that the defendants in fact made the alleged payments to Sailesh. They also allege to have made some payments to Bisweswar Chakrabarty, but those can be ignored because they fall outside the period under claim. The payments to Sailesh, as I have already stated, are covered by the receipts, Exs. I to I (9) and I (11) to I (15), the total amount of these payments being Rs. 5005-7-3. Sailesh himself has given and proved these receipts. D. W. 5 has also given evidence of the payments. It must be remembered that Sailesh is now in the position of the mortgagor and if the plaintiffs get a decree in this suit, the amount that will be realized by them in execution of the decree will diminish their claim under the mortgage to the extent of the amount so realized. Sailesh's evidence with regard to the payments therefore is against his own interest and it will be unreasonable to assume that he is falsely admitting the payments, if there was none. In this view, I feel disposed to accept his evidence. It is rather unfortunate that the learned Subordinate Judge has not come to a definite finding on this point. It has been faintly suggested that Sailesh is in collusion with the defendants. It appears from the sale certificate, Ex. 3 that he purchased

². Govind Chandra v. Dwarka Nath, (1915) 2 AIR Cal 818=26 IC 962=20 CLJ 455=19 OWN 489.

mauza Kenduadih for Rs. 1000 subject to a heavy mortgage in favour of one Dharani Dhar Rai for Rs. 1,00,000. This property is also subject to the plaintiffs' mortgage. Sailesh knowing that he had no right to realize the rents from the defendants so long as the plaintiffs' mortgage remained unpaid, might perhaps be tempted to grant collusive receipts to the defendants on receipt of some money, but this is after all a speculation which cannot justify our rejecting the positive evidence, oral and documentary. If really Sailesh intended to grant collusive receipts, we would have expected the receipts to have been given for the entire rents. But in fact the receipts for six years cover only Rs. 5005.7.3 which is less than half the total amount of rent payable for six years. It also appears from receipt, Ex. I that the payment was made by Suresh Chandra Mazumdar, the Receiver of the Trigunait Brothers' estate. It appears to me that there is no valid reason for rejecting the receipts. I therefore find that the payments are true.

The defendants however cannot take the benefit of these payments because I have already held that they have failed to establish the plea of good faith within the meaning of S. 50, T. P. Act. Of course, it may be said that they were not likely to have made the payments to Sailesh unless they thought that he was really the person entitled to receive the rents. But under the law, it was the plaintiffs and not Sailesh to whom the defendants were liable to pay the rents and if they, without proper inquiry, made the payments to a wrong person, they must take the consequences. All the contentions raised by the appellants fail and I would therefore dismiss the appeal but in the circumstances without costs.

Then remains the question of interest raised by the plaintiffs in their cross-objection. In the kabuliyat, Ex. 2 there is a clear stipulation for payment of interest at Rs. 3.2.0 per cent. per month. The reason given by the learned Subordinate Judge for disallowing interest is that under the mortgage bond, Ex. I the rent only was assigned and not the interest. This reason is entirely fallacious. The right to realize rent carries with it the right to realize it with interest in case of default of payment at the kist time. Under the terms of the kabuliyat the defendants are undoubtedly liable to pay interest from the date of expiry of each kist, and if the learned Subordinate Judge's argument were to be accepted, the defen-

dants would be liable to pay only the principal amount of the rent to the plaintiffs. To whom then would they pay the interest which is justly due from them? Obviously to the mortgagor, if the learned Subordinate Judge's argument were to prevail. This is absurd, because the mortgagor already parted with his interest in the mortgaged property by way of mortgage. In my opinion the plaintiffs are entitled to interest. The question then is, at what rate? The stipulated rate of Rs. 3.2.0 per cent. per month seems to be exorbitant and penal. Considering all the circumstances I think it will be fair and proper to allow six per cent. per annum which will be calculated from the date of expiry of each kist till the date of this decree. Future interest is disallowed. I would therefore allow the cross-objection to this extent but there will be no order as to costs of this Court. The plaintiffs however will get additional proportionate costs of the lower Court upon the amount of interest that will be found due according to the said calculation till the date of institution of the suit.

Harries C. J. — I entirely agree.

N.S./R.K.

Order accordingly.

A. I. R. 1939 Patna 548

DHAVLE AND CHATTERJI JJ.

Gadadhar Patra and others —

Defendants — Appellants.

v.

Bholanath Chaudhury, Plaintiff and others, Defendants — Respondents.

Appeal No. 678 of 1936, Decided on 15th February 1939, from appellate decree of Dist. Judge, Manbhum, D/- 14th March 1936.

(a) Limitation Act (1908), Arts. 120, 93 and 131 — Applicability — Plaintiff purchasing at rent sale intermediate tenure on 2nd September 1929 — Plaintiff suing for declaration that rent of occupancy holding under that tenure was liable to enhancement — Defendants recorded in the last entry of the Record of Rights dated 4th July 1921 as holding mukarrari right on fixed rent — Plaintiff challenging the entry — Suit falls under Art. 120 and Arts. 93 and 131 are not applicable — Starting point of limitation held to be date of final publication of Record of Rights and not date of plaintiffs' purchase.

Article 93 contemplates a case where the plaintiff in the suit is a party to the document or is otherwise bound by it and the cause of action for the suit is an attempt to enforce it against him.

[P 549 C 2]

Where an auction-purchaser of an intermediate tenure at a rent sale dated 2nd September 1929 sued the occupancy raiyats under that tenure for a declaration that the rent of the holding was liable

to enhancement and that an entry in the Record of Rights dated 4th July 1921 that they held the holding in mukarrari right on fixed rent was not correct :

Held that the suit fell under Art. 120 and that Articles 93 and 131 were not applicable and that the starting point of limitation was the date when the Record of Rights was finally published and not the date of plaintiffs' purchase : *A I R 1931 P C 89 and A I R 1930 P C 270, Ref. ; 22 All 83 (FB), Disting.* [P 550 C 2 ; P 551 C 1, ; P 552 C 1]

(b) Limitation Act (1908), Art. 131 — Entry in Record of Rights denying right not capable of enjoyment then— Suit challenging correctness of entry is not governed by Art. 131.

The words "when the plaintiff is first refused the enjoyment of the right" in col. 3 of Art. 131 imply that the right was capable of being enjoyed when the enjoyment was refused. Obviously, the enjoyment of a right cannot be refused when the right itself is not capable of enjoyment.

[P 550 C 2]

Hence a suit for a declaration that an entry in the Record of Rights which denies a right which is not capable of enjoyment then is incorrect, is not governed by Art. 131 : *A I R 1916 Pat 120 and A I R 1926 Pat 205, Ref.* [P 550 C 2]

Dr. D. N. Mitter, S. C. Mazumdar, Bishundeo Narain Singh and Ram Anugrah Narain Singh — *for Appellants.*

A. K. Roy and S. K. Roy —

for Respondents.

Chatterji J.—This appeal arises out of a suit for a declaratory decree, the declaration sought being

that it may be held that the deed alleged to have been executed by Hriday and Bhabani Mahapatra on 25th Jaistha 1226, B. S. on a plain paper as disclosed by the defendants is wholly false, that the jote included in Khata No. 176 in the names of the defendants is not held in mukarrari right and that the rent of the said jote is liable to enhancement.

The plaintiff is a purchaser of an intermediate tenure at a rent sale and the defendants are occupancy raiyats of a holding bearing Khata No. 176 under that tenure. The rent sale at which the plaintiff purchased the tenure was held on 2nd September 1929, in execution of a decree obtained by the superior landlords who are patnidars against the intermediate tenure-holders. The plaintiff's case is that after purchasing the tenure he discovered that in the last Record of Rights which was finally published on 4th July 1921, the defendants were recorded in Khata No. 176 as holding a mukarrari right on a fixed rent of Rs. 4, by virtue of a deed executed on 25th Jaistha 1226, B. S. by Hriday and Bhabani Mahapatra. The plaintiff challenges the genuineness of that deed and also the correctness of the entry in the Record of Rights.

The suit was contested on the grounds inter alia that the said deed is genuine and was executed by the then patnidars Hriday and Bhabani Mahapatra, that the under tenure which the plaintiff claims to have purchased had no real existence at all but was merely created on paper with an ulterior object, that the rent sale was invalid and that the suit is barred by limitation. The learned Subordinate Judge who tried the suit decreed it, and on appeal, his decision has been affirmed by the learned District Judge. The defendants have preferred this second appeal. Both the Courts below have found that the deed dated 25th Jaistha 1226, B. S. is not genuine and that the plaintiff's purchase at the rent sale is valid. These findings have not been seriously challenged in this appeal, and as findings of fact, they must stand.

The only question urged in this appeal is that of limitation. It is contended that so far as the prayer for declaration that the deed dated 25th Jaistha 1226, is not genuine is concerned, it is barred by the three years' rule of limitation provided in Art. 93, Lim. Act, and so far as the other declarations are concerned, they are barred by the six years' rule of limitation provided in Art. 120 the respective periods of limitation being counted from the date of the final publication of the Record of Rights that is 4th July 1921. Art. 93 is as follows:

To declare the forgery of an instrument attempted to be enforced against the plaintiff.	Three years	The date of the attempt
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This Article seems to contemplate a case where the plaintiff in the suit is a party to the document or is otherwise bound by it and the cause of action for the suit is an attempt to enforce it against him. These conditions are not satisfied in the present case. Besides, the substantial relief claimed in this suit is a declaration that the rent of the defendant's holding is liable to enhancement. Art. 93 therefore has no application. The substantial question for decision in this appeal is whether the prayer for a declaration that the rent of the defendants' holding is liable to enhancement is barred by limitation. The appellants contend that the real cause of action for this suit arose on 4th July 1921, the date of the final publication of the Record of Rights and the suit, having been brought on 30th June 1933, is barred under Art. 120, Limitation Act. Our attention has been

drawn to the allegations in para. 10 of the plaint which clearly show that the cause of action for this suit is the erroneous entry in the Record of Rights. Article 120 is as follows :

Suit for which no period of limitation is provided elsewhere in this schedule.	Six years.	When the right to sue accrues.
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Mr. A. K. Roy, the learned Advocate for the respondents, contends that this Article cannot apply if there is any other Article in the Limitation Act applicable to the present case. He points to Art. 131 as really governing this suit. That Article is as follows :

To establish a periodically recurring right.	Twelve years.	When the plaintiff is first refused the enjoyment of the right.
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If this Article applies, there is no doubt that the suit is within time because it was brought within 12 years from the date of the final publication of the Record of Rights. It is urged that the right to enhancement of rent is a periodically recurring right as held by this Court in 39 I C 85.¹ It is further urged that a suit for obtaining a declaration that rent is liable to enhancement is a suit to establish a periodically recurring right. That Art. 131 applies to a suit for obtaining such a declaration need not be disputed. This proposition will find some support from the decision of this Court in 5 Pat 249.² But to make Art. 131 applicable, it is further necessary that the condition required by col. 3 should be satisfied. Mr. A. K. Roy argues that the plaintiff was first refused the enjoyment of the right to obtain enhancement of rent when the Record of Rights was finally published. In Sec. 2, cl. (8), Limitation Act, the word "plaintiff" has been defined to include any person from or through whom a plaintiff derives his right to sue. If therefore the present plaintiff is said to derive his right to sue from or through the tenure-holders who were shown in the Record of Rights, he is obviously "the plaintiff" within the meaning of Art. 131 (last column). But the question still remains whether the plaintiff was first refused the enjoyment of the right within the meaning of that Article when the Record of Rights was finally published.

In the first place, there is no allegation in the plaint that during the course of the settlement proceedings, the then tenure-holders wanted to enhance the rent and their claim was refused. In the second place, the words "when the plaintiff is first refused the enjoyment of the right," to my mind, imply that the right was capable of being enjoyed when the enjoyment was refused. Obviously the enjoyment of a right cannot be refused when the right itself is not capable of enjoyment. Under S. 94, Chota Nagpur Tenancy Act, rent is not liable to enhancement, except under certain conditions which admittedly do not prevail here, for a period of 15 years from the final publication of the Record of Rights was finally prepared, the right to enhance rent was not capable of being enjoyed for 15 years. It cannot therefore be said that the entry in the finally published Record of Rights amounted to a refusal of the enjoyment of the right to obtain enhancement of rent. It may be said that the entry in the Record of Rights might be taken to be a denial of that right ; but that would not make Art. 131 applicable. If the Legislature intended to convey that meaning by the Article, the words used would have been "when the right is first denied" as we find the words used in Art. 129 with reference to a suit by a Hindu for a declaration of his right to maintenance are "when the right is denied." In my opinion therefore Art. 131 does not apply in the present case.

The proper Article of the Limitation Act applicable to the present case seems to be Art. 120. The question now is, when did the right to sue accrue ? Dr. D. N. Mitter on behalf of the appellants contends that the right to sue accrued on the final publication of the Record of Rights. Indeed in the plaint there is no specific prayer for a declaration that the entry in the Record of Rights is wrong; but a perusal of the plaint leaves no room for doubt that the real cause of action for the present suit is the entry in the Record of Rights. Para. 10 of the plaint which makes the matter clear runs as follows :

That the jote included in Khatian No. 176 in the name of the defendants is not in mukarrari right and the rent of Rs. 4 payable by them is not a mukarrari rent. They hold the said jote in ordinary occupancy right. The rent of the said jote is liable to enhancement. The document of 1226 B. S. disclosed by them is wholly false. There will be lots of difficulties and disorder in future if such fraudulent and erroneous Record of Rights is allowed to stand. Hence the plaintiff is compelled to institute this suit.

1. Brij Behari Singh v. Sheoshanker Jha, (1916) 3 A I R Pat 120=39 I C 85=2 Pat L J 124.

2. Baldyanath Jiu v. Har Dutt, (1926) 13 A I R Pat 205=94 I C 826=5 Pat 249=7 P L T 465.

Thus the Record of Rights is considered by the plaintiff to be an obstacle which stands in his way with regard to his claim for enhancement of rent and it is with a view to remove this obstacle that the suit has been brought. As pointed out by their Lordships of the Judicial Committee in 58 Cal 1187,³ the expression "right to sue" means the right to bring the particular suit with reference to which the plea of limitation is raised, the starting point for limitation being the date when that right was invaded. In 11 Lah 657,⁴ their Lordships of the Judicial Committee have held with reference to Art. 120, Limitation Act that there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right against the defendant against whom the suit is instituted.

In the present suit the right asserted is the right to claim enhancement of rent and this right was infringed when in accordance with the claim put forward by the defendants, the entry in the finally published Record of Rights was made. In the plaint there is absolutely no allegation of any further infringement by the defendants. In this view the right to sue must be held to have accrued when the Record of Rights was finally published.

Mr. A. K. Roy on the other hand contends that the plaintiff's right to sue could not accrue before his purchase on 2nd September 1929. He relies on the decision in 22 All 33.⁵ The facts of the case may be thus briefly stated. The plaintiff's maternal grandmother, a Hindu widow, made an alienation in 1876 and the transferee in his turn made a further alienation in 1893 in favour of the defendants who came into possession of the disputed property. At the time of the alienation by the widow, the nearest living reversioner was her daughter. The widow died in 1889, but her daughter never took any steps to question her alienation. The plaintiffs, who were the sons of that daughter born subsequent to the alienation of 1876, brought a suit in 1894 during the lifetime of their mother for a declaration that the alienation made by their maternal grandmother in 1876 and the further alienation made by the transferee in

1893 were void as against them and that they were entitled, after the death of their mother, to possession of the disputed property. The lower Courts held that the suit was barred by limitation as it was brought more than six years after the alienation of 1876. On second appeal the decision was reversed. Their Lordships held that the plaintiffs' right to impugn their grandmother's alienation did not accrue until either they were born or their grandmother died and they being all minors when the suit was brought, it was within time. Their Lordships observed :

As regards Art. 120, when the Legislature said that a suit may be brought six years from the time when the right to sue accrues, I think it clearly meant the right to sue of the plaintiff himself or some one through whom he claims, not a right of somebody else to sue through whom the plaintiff does not claim.

As one reversioner does not claim through or derive his title from another, their Lordships held that though the plaintiffs' mother's right to sue for a declaration might have been barred, the plaintiffs' right which was quite independent of their mother's right was not barred. The ratio decidendi of decision was that the plaintiffs acquired a new right at their birth. In the present case the position is quite different. It cannot be said that the plaintiff here by his purchase of 2nd September 1929, acquired any new right. It has been argued by Mr. A. K. Roy that the purchaser at a rent sale cannot be said to be the representative-in-interest of the judgment-debtor. Indeed the purchaser at a rent sale acquires not merely the right, title and interest of the judgment-debtor but the tenure itself free from encumbrances created by the judgment-debtor. But this does not mean that the purchaser acquires any new right independently of the judgment-debtor. He certainly stands in the shoes of the judgment-debtor except so far as statute gives him the right to avoid encumbrances created by the latter. Here, however, we are concerned not with the entire bundle of rights possessed by the plaintiff as purchaser but with the right asserted by him in this suit, viz. the right to claim enhancement of rent which is said to have been infringed. The Record of Rights affected not merely the rights of the tenure-holder for the time being but the tenure itself. In other words, whoever would take the tenure by whatever process it may be, must hold it subject to the statutory limitations imposed by the Record of Rights. So when the plaintiff pur-

3. Gobindnarayan Singh v. Shyam Lal Singh, (1931) 18 A I R P O 89=131 I C 753=58 I A 125=58 Cal 1187 (P C).

4. Bolo v. Koklan, (1930) 17 A I R P O 270=127 I O 787=57 I A 825=11 Lah 657 (P C).

5. Bhagwanta v. Sukhl, (1899) 22 All 33=1899 A W N 159 (FB).

chased the tenure in September 1929 he took it subject to the limitations imposed by the Record of Rights. No fresh right accrued to him to sue for a declaration that the Record of Rights was wrong. In my opinion, therefore, the suit is barred by limitation under Art. 120.

It has been contended by Mr. A. K. Roy that the actual relief sought by the plaintiff is that it may be declared that the defendant's holding is liable to enhancement of rent and not that the Record of Rights is wrong. Even assuming that we may look at the form and not to the substance of the plaint, there will in that case be no cause of action for the suit, because since the entry in the Record of Rights there has been no further infringement of the right to claim enhancement of rent. In that view the suit will be liable to be thrown out for want of cause of action. In the result, I would allow the appeal and dismiss the suit; but in the circumstances parties should bear their own costs throughout.

Dhavlé J. — I agree. The lower Courts rightly held that the suit did not come within Arts. 93 and 131, Limitation Act; and as regards Art. 120, which was applicable to the case, they considered that time ran against the plaintiff from the time of his purchase in 1929. The suit was rightly regarded by the lower Appellate Court as "essentially a suit for a declaration that the Record of Rights is incorrect," the "real" cause of action being "a cloud over the plaintiff's title to enhance rent, i. e. in the settlement record." There is no dispute that a suit brought upon such a challenge in the Record of Rights must where there is no change of landlords be brought within six years of the final publication. The landlord's right to enhance the rent of an occupancy raiyat corresponds to a statutory incident of the occupancy holding, and passes to his purchaser along with his other rights as landlord. I cannot see how any transfer of this right, whether voluntary or otherwise, can operate to create a new right to get the relevant entry in the Record of Rights declared to be wrong, for otherwise, all that a landlord who lets an adverse entry in the Record of Rights stand unchallenged for six years need do is to make a benami transfer. What the plaintiff purchased in execution of the rent decree was the previous landlord's interest in the holding free of any encumbrances created by that or previous landlords. The right of the landlord for the time being to assail the

Record of Rights, such as it was, would no doubt pass to the execution purchaser, but if it was already barred before the rent sale, it could neither be revived nor created afresh by plaintiff's purchase. I can find nothing in the wording of Art. 120 to compel us to hold that a statutory right of enhancement which has passed from a judgment-debtor to an auction-purchaser becomes a new right merely because the latter is not bound by any encumbrances that the former may have created, or that the right of the landlord to challenge the Record of Rights can be kept indefinitely open by transfers of the landlord's interest.

S.G./R.K.

Appeal allowed.

A. I. R. 1939 Patna 552

HARRIES C. J. AND MANOHAR LALL J.

Apurba Krishna Mitra — Plaintiff — Appellant.

v.

Subhanand Chaudhuri and others — Defendants — Respondents.

Appeal No. 158 of 1936, Decided on 17th January 1939, from original decree of Addl. Sub-Judge, Muzaffarpur, D/- 2nd March 1936.

(a) Interest — Rate of — Rate in each case depends upon facts and circumstances.

Rate of interest in each case depends upon its own facts and circumstances and although in some cases the Courts have allowed simple rate of interest and in other cases the Courts have allowed compound rate of interest, at varying rates, it is impossible to lay down any hard and fast rule.

[P 553 C 1, 2]

(b) Hindu Law — Joint family — Debts — Borrower sui juris — Onus is on coparcener to establish that bargain was vitiated by fraud or undue influence.

In the case of legal necessity where a joint family is concerned, it is upon the lender to establish that there was legal necessity for the interest agreed upon. But when the borrower is sui juris the onus is upon the coparcener to establish that the bargain into which he entered was vitiated by fraud, undue influence, coercion or things of a similar nature.

[P 554 C 1]

(c) Interest — Ample security — Merely from this 12 per cent. compound interest held not excessive.

Merely from the fact that there is ample security, it cannot be held that 12 per cent. compound interest is excessive : A I R 1924 P C 60, Rel. on; A I R 1915 Cal 383, held wrong.

[P 554 C 2; P 555 C 1]

(d) Hindu Law — Alienation — Father — After-born son cannot challenge alienation to extent to which it has already been made.

An after-born son can only acquire an interest in the property which exists on the date of his birth. If a property has already been alienated in part or in whole, he cannot succeed to the part

alienated but can have an interest in that property only to the extent to which it exists. In the case of a lease, for instance, for 999 years, the after-born son can only succeed to the remainder. In case of a mortgage the after-born son can only succeed to equity of redemption; but in either case he cannot challenge the transfer to the extent to which it has already been made: *AIR 1925 PC 264, Rel. on.* [P 555 C 1, 2]

S. M. Mullick, A. K. Mitra, B.C. De and S. C. Chakraborty — *for Appellant.*

L. K. Jha, P. Jha and S. K. Mitra — *for Respondents.*

Manohar Lall J. — This is an appeal by the plaintiff against a decision of the learned Subordinate Judge dated 2nd March 1936, by which he decreed in part the suit of the plaintiff, which was instituted to recover his dues on the basis of two mortgage bonds dated 16th February 1926 and 11th November 1927. The defendants have also preferred a cross objection. The appeal and the cross objection are both concerned with the question of interest. The learned Subordinate Judge decreed the interest in favour of the plaintiff on the two bonds at the rate of 10 annas per cent. per mensem with yearly rests instead of 12 per cent. per mensem with yearly rests in the case of the first bond of 1926 and 13½ per cent. with yearly rests in the case of the second bond of 1927 as claimed by the plaintiff; hence the appeal on behalf of the plaintiff before us.

The defendants, on the other hand, by their cross objection seek to reduce the interest decreed by the Court below to simple instead of compound with yearly rests. The suit was instituted on 20th December 1934; the principal contest between the parties on the matter which is now before us, was as to whether there was no legal justification for charging the rate of interest as stated in the two bonds. It was also pleaded that under the Usurious Loans Act the transaction as to the rate of interest was hard, unconscionable and unfair, between the parties, and, that the plaintiff had taken advantage of his relationship with defendant 1, who is now contesting the case, and his father, since deceased.

A large number of cases, which have centred round the question of interest which are usually cited, were placed before us on behalf of the parties. But it is now well settled, as was pointed out by the learned Subordinate Judge in the course of his judgment under appeal, that each case depends upon its own facts and circumstances, and that although in some cases

the Courts have allowed simple rate of interest and in other cases the Courts have allowed compound rate of interest, at varying rates, it is impossible to lay down any hard and fast rule. The question as to what is a "commercial rate of interest" was decided by their Lordships of the Privy Council in 7 Pat 294¹ where the earlier relevant cases were reviewed. It is well to bear the observations of Viscount Sumner in this case as to the meaning of the words to "borrow upon reasonable commercial terms" in order to decide the matters in issue. It is a matter of common experience in this Court that it is usual for rates of interest to be charged upon secured loans amounting to one per cent. per mensem, and in some circumstances even going as high as two per cent. per mensem compound: see 10 P L T 430.² Considering the circumstances in the present case, I do not see anything unusual in the plaintiff having charged interest at the compound rate at twelve per cent.

The learned advocate for the respondents has relied upon a number of documents to show that in the transactions covered by those documents interest at simple rate was charged: for instance, Ex. A (1) is a mortgage bond of the year 1922 executed by Kishore Chaudhury in favour of Indranarain Ojha of Nawada where interest at the simple rate of 10 annas per cent. was charged; but the evidence of witness 2 for the defendants shows that the mortgagor was related to the mortgagee; Ex. A at p. 10 of Part III of the paper book is another mortgage bond of the year 1919 executed by one Chandra Narayan Chaudhury in favour of Jatashanker Chaudhuri where the interest agreed upon was only 8 annas per cent.; similarly, Ex. A (10) is a mortgage bond of the year 1921 where interest at the rate of 11 annas per cent. was agreed to be paid; Ex. A (3), the mortgage bond of the year 1923, where interest at the rate of 10 annas per cent. was agreed to be paid; and, lastly, Ex. A (8) of the year 1930, that is four years after the date of the transaction in suit shows that a sum of Rs. 10,000 was borrowed at the rate of 8 annas per cent. Attention was also called to the evidence of a number of witnesses for the defendants who say in general terms

1. *Sunder Mall v. Satya Kinkor*, (1928) 15 AIR P O 64=103 I O 337=7 Pat 294=55 I A 85 (P O).

2. *Dalip Narayan Singh v. Sharfunnissa*, (1929) 16 AIR Pat 883=119 I O 410=10 P L T 430.

that the customary rate of interest in the locality where the defendants reside is 8 to 10 annas per cent. simple. But, in my opinion, this evidence, both oral and documentary, is wholly insufficient to enable us to come to a decision as to whether in this particular case the transaction between the mortgagor and the mortgagee was or was not unfair. It is no doubt that in the case of legal necessity where a joint family is concerned, it is upon the lender to establish that there was legal necessity for the interest agreed upon. But when the borrower is *sui juris* as in the case of the bond of 1927, the onus is upon the defendant to establish that the bargain into which he entered was vitiated by fraud, undue influence, coercion or things of a similar nature.

To take up the bond of 16th February 1926 first, it appears that the mortgagors, the father of defendant 1 and defendant 1, were under an undoubted necessity to raise the amount to pay off a decretal amount of a certain decree in execution of which property was put up for sale on 2nd March 1926. It is not argued before us that there was no necessity for the loan. The necessity is obvious. But it is argued that there was no necessity for agreeing to pay interest at such a high rate, that is to say 12 per cent. compoundable with annual rests. The learned advocate for the respondents relied upon a number of handnotes which were executed by his client or by the father of defendant 1 between the date of the first document of February 1926 and the date of the second document of November 1927. In these handnotes the plaintiff himself has charged interest at the simple rate of 12 to 13 per cent. It was therefore argued that when the plaintiff himself charged the defendant on unsecured loans at simple rate of interest this was sufficient to establish that an agreement to pay compound rate of interest on secured loans was wholly beyond the capacity of the father as the head of the joint Hindu family. But it is obvious that these loans on handnotes were short term loans which were intended by parties to be repaid within a short time and when the loans were not paid, it is clear from the facts of the case that the lender insisted upon a security, and accordingly he took the security well knowing that there would be difficulty in realizing the amount due on the bonds without recourse to a Court of law. Some handnotes were executed even after November 1927 in favour of the plaintiff by the defendants which were again at the

simple rate of interest. These handnotes would clearly indicate that when the loans were taken for a short time, the interest agreed between the parties was at the simple rate, and these also establish that the plaintiff was not taking any undue advantage of the position of the borrowers.

It was argued that the plaintiff was a pleader of the defendants and of their family and was instrumental in July 1925 in effecting a reconciliation between the father and the son, and, therefore, it was suggested that he was in a position to dominate the will of his clients. I do not find any evidence of a satisfactory character upon the record which would establish this suggestion even remotely. The evidence on the other hand, such as it is, is exactly to the contrary. As I have just shown, loans for short terms were advanced on the handnotes upon the ordinary simple rate of interest. It also appears that the plaintiff came to the rescue of the defendants when their properties were put up for sale and advanced the money from time to time to meet their necessities. The plaintiff and the defendants were at arms length and the latter knew the terms upon which the loans could be advanced or were available to the defendants from the plaintiff. If indeed the loans were available to the defendant upon very much easier terms in his locality, it is difficult to understand why he or his father would allow the properties to be in peril and wait till the very last date in February 1926 when he could secure the money only from the plaintiff. Upon a review of the oral and documentary evidence, I am satisfied that the rate of interest agreed upon in the bond of February 1926 is a fair reasonable rate of interest and that the joint family of defendants is liable to meet the debts secured by the bond. It was faintly argued that there being ample security the rate of interest must be held to be high. This contention is no doubt based upon an earlier Calcutta case, 42 Cal 690,³ but their Lordships of the Privy Council in 5 P L T 72⁴ have negatived this contention. In the case cited it is stated :

Their Lordships think it right to observe that the judgment now pronounced is not in accord with the principles laid down by the Appellate Civil Court of Calcutta in 42 Cal 690³ that 'where

3. Abdul Majeed v. Ksheroode Chandra, (1915) 2 A I R Cal 383=29 I O 843=42 Cal 690=19 C W N 809.

4. Raghunath Prasad v. Sarju Prasad, (1924) 11 A I R P C 60 = 82 I O 817 = 51 I A 101=3 Pat 279=5 P L T 72 (P O).

there is ample security the execution of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate.' Their Lordships think this decision to be wrong. There is no such presumption until the question has first been settled as to the lender being in a position to dominate the borrower's will.

In the present case I have already held that the plaintiff was not in a position to dominate the will of the defendant or his father. Therefore the fact that the security may have been sufficient is no ground for holding that the compound rate of interest was unjustified.

With regard to the second bond of 1927, it appears that defendant 2 was born some time after November 1927, and therefore he was not in existence on the date when defendant 1 executed the document. In this state of affairs, it is not open to defendant 2 to challenge the validity of the mortgage of November 1927. As an authority for this proposition, see 52 I A 443⁵ where in circumstances like the present, it was held that the only joint family estate to an interest in which the after-born succeeded was an interest which to the extent of the two mortgages in that case had already been alienated. Mr. Jha for the defendants-respondents, relying upon a commentary in Edn. 10 of Mayne's Hindu Law, paragraph 399, sought to distinguish this case by saying that the observations in the Privy Council case were not necessary for the decision of the case before their Lordships, or in any event, their Lordships had not given their decision after considering the available Indian authorities on the point. It is enough to say that it is not permissible to this Court to treat the decision of their Lordships of the Judicial Committee in the manner in which we are asked to do. Their Lordships have decided this point, and it is incumbent upon us to follow the decision. If I may say so respectfully, I think the decision is in accord with the state of law which existed in India even before the commentary in question. In Edn. 7 of the same book at p. 449, the learned commentator came to this very conclusion. It is obvious to me that an after-born son can only acquire an interest in the property which exists on the date of his birth. If a property has already been alienated in part or in whole, he cannot succeed to the part alienated but can have

an interest in that property only to the extent to which it exists. In the case of a lease, for instance, for 999 years the after-born son can only succeed to the remainder. In the case of a mortgage the after-born son can only succeed to the equity of redemption; but in either case he could not challenge the transfer to the extent to which it has already been made.

It appears, however, that the interest which is charged at 13½ per cent. compound is not justified. I do not see any change of circumstances in the state of this defendant which justifies a departure from the rate of interest agreed upon between the parties in February 1926. I would therefore allow a decree to the plaintiff at the compound rate of interest at the same rate as in the bond of 1926, namely 12 per cent. For these reasons the appeal is allowed to this extent that the plaintiff will be entitled to a mortgage decree to be drawn up on the two bonds with interest at 12 per cent. compounded annually. The period of grace will be fixed at one month from this date. The plaintiff will be entitled to receive from the defendants and pay to them proportionate costs in proportion to the success in each Court. The cross objection is dismissed. Reliance was placed by the respondents on S. 11, Bihar Money-Lenders Act; but we are bound by the decision of the Full Bench of this Court in 20 P L T 1.⁶ The appellants are entitled to a certificate that the case involves a construction of certain Sections of the Government of India Act and is a fit one for appeal to the Federal Court.

Harries C. J. — I agree.

D.S./R.K. *Appeal partly allowed.*

6. *Sadanand Jha v. Aman Khan*, (1939) 26 A I R Pat 55=179 I C 379=18 Pat 13=20 P L T 1.

A. I. R. 1939 Patna 555

HARRIES C. J. AND CHATTERJI J.

Jai Gobind Singh and others —

Defendants — Appellants.

v.

Pachkauri Ram and others, Plaintiffs and others, Defendants —

Respondents.

Appeal No. 128 of 1937, Decided on 15th February 1939, from original decree of Sub-Judge, Gaya, D/- 29th May 1937.

(a) Bihar Money-lenders Act (3 of 1938), S. 11—Scope.

In view of the provisions of S. 107, Government of India Act, 1935, S. 11, Bihar Money-lenders Act, being repugnant to the provisions of the

5. *Lal Bahadur v. Ambika Prasad*, (1925) 12 A I R P O 264=91 I C 471=47 All 795 = 52 I A 443=28 O C 371 (P O).

Usury Laws Repeal Act 28 of 1855, is void to the extent of the repugnancy : *A I R 1939 Pat 55, Rel. on.* [P 559 C 1]

(b) Bihar Money-lenders Act (3 of 1938), S. 12—S. 12 gives complete discretion to Court in matter of re-opening of accounts.

Section 12, Bihar Money-lenders Act gives a complete discretion to the Court in the matter of re-opening of the accounts between the parties.

Held upon the facts of the case that there was nothing which would justify the Court, in the exercise of its discretion, in re-opening the accounts.

(c) Deed—Attestation—Proof—Deed attested by more than two witnesses — One attesting witness proving its due execution and attestation—Mere fact that other attesting witness, subsequently examined, does not formally prove attestation does not lead to presumption that he did not in fact attest.

Where a deed is attested by more than two witnesses and one of the attesting witnesses proves its due execution and attestation, and, on his evidence, the deed is marked as an exhibit without objection, the mere fact that other attesting witness, who is subsequently examined, does not formally prove attestation, does not give rise to a presumption that he did not in fact attest the deed.

(d) Mortgage — Construction — Payment of interest—Stipulation to pay interest, not only up to stipulated period, but up to repayment of entire debt held proved.

The relevant provisions in a mortgage bond were: "We declare that we shall repay Rs. 2,500 aforesaid together with interest at Re. 1-1-0 per hundred rupees per month on the full moon of Jeth 1332 in full and in one lump sum. We shall pay the interest, whatever it may be, on the said sum every year to the said creditors. In the event of non-payment the said yearly interest shall be treated as principal and we shall also pay interest thereon at the above rate and till the date of payment the interest and compound interest shall continue to be treated as principal year after year and interest at the above rate shall continue to run thereon." It was contended that there was no provision for payment of interest after the stipulated period:

Held that the words did not admit of any other construction than that the principal with interest at the stipulated rate was to be paid in one lump sum on the full moon day of Jeth 1332 and thereafter compound interest was to be calculated at the end of every year at the stipulated rate and the interest would run till the repayment of the entire debt: *22 I A 199 (PC), Disting.* [P 558 C 1]

(e) Mortgage — Construction — Payment of interest — Covenant to pay interest after the stipulated period held proved.

The relevant provisions in a mortgage bond were: "We do declare that we shall repay Rupees 1800 aforesaid besides interest at 1 per cent. per mensem on full moon day of Baisakh 1338, Fasli. In the event of non-payment, we shall continue to pay the annual interest every year. In the event of non-payment of interest, the annual interest shall every year be treated as principal and we shall pay interest and compound interest thereon also till the date of repayment." It was contended that there was no provision for payment of interest after the stipulated period:

Held that the words were so clear that it was impossible to hold that there was no covenant for payment of interest after the stipulated period: *22 I A 199 (PC), Disting.* [P 558 C 2]

Khurshaid Husnain and R. Misra —

for Appellants.

Rajkishore Prasad — *for Respondents.*

Chatterji J. — This appeal arises out of a suit brought to enforce two simple mortgages executed by defendants 1 and 2, one on 4th October 1923, for Rs. 2500 carrying compound interest at Re. 1-1-0 per cent. per mensem with yearly rests and the other on 24th April 1930, for Rs. 1800 carrying compound interest at 1 per cent. per mensem with yearly rests. Defendants 1, 2 and 3 are brothers. Defendant 4 is the son of defendant 1. Defendants 5 and 6 are the sons of defendant 3 and defendant 7 is the son of defendant 5. All these defendants are members of a joint Mitakshara family of which defendant 1 is the karta. Defendant 7 is a subsequent mortgagee. The suit was contested by defendants 3 to 7 mainly on the grounds that the mortgages were invalid for want of legal necessity and that the rate of interest was excessive. The learned Subordinate Judge who heard the suit has decreed it and defendants 3 to 7 have preferred this appeal.

The first point urged on behalf of the appellants is that there was no legal necessity for the execution of either of the mortgage bonds in suit. The first mortgage bond, Ex. 5, of which the consideration was Rs. 2500, recites that Rs. 1500 was required to pay off an earlier mortgage debt due to one Lal Bahadur Singh on a registered bond dated 3rd April 1922, and the remaining Rs. 1000 was due to the mortgagees (plaintiffs), after some remission on several bonds and a hand note executed by defendant 1. The earlier mortgage in favour of Lal Bahadur Singh was executed by the three brothers, defendants 1, 2 and 3. So the debt due on that mortgage was antecedent debt binding on defendants 4 to 7. The plaintiffs have proved that this debt was satisfied on payment of Rs. 1500 out of the consideration of Ex. 5 and they have produced the satisfied bond. Accordingly, all the defendants are liable under the mortgage bond Ex. 5 so far as this sum of Rupees 1500 is concerned.

As regards the remaining Rs. 1,000, the plaintiffs have produced the earlier bonds Ex. 2 series and hand note Ex. 3, which were all executed by defendant 1. The debts due on these transactions do not come

under the category of antecedent debt, and therefore the plaintiffs have got to establish legal necessity for the same. The genuineness of the documents has not been disputed. Plaintiff 2 (P. W. 1) stated that defendant 1 borrowed money from him under simple bonds and hand note for meeting costs of gilandazi supplied by him and costs of Collectorate partition and also for cultivation expenses. This statement is supported by the recitals in the said bonds Ex. 2 series and hand note Ex. 3. The only attack on the evidence of this witness is that in his cross examination he said that without looking to the bonds and hand-note he could not say for what particular purposes the loans were taken. This is quite natural because there were several transactions which took place many years ago. The witness however did state the purposes for which the loans were taken, and his statement as I have already said, is supported by the recitals in the documents. Our attention has been drawn to the evidence of P. W. 4 who stated that defendant 1 borrowed money under the bonds Exs. 2 and 2 (a) for payment of Government revenue and for purchase of seeds as also for cultivation expenses whereas the recitals in these bonds show that the loans were taken for the cost of partition of village Kojhi. The different statements made by the witness in his cross examination show that he really knew nothing of those transactions though of course he attested the bonds. It is to be borne in mind that though the earlier bonds, Ex. 2 series and hand note, Ex. 3 were executed by defendant 1 alone, the mortgage bond, Ex. 5 was executed by both defendant 1 and defendant 2. If the loans under the bonds, Ex. 2 series and hand note, Ex. 3 were taken by defendant 1 for his own personal needs and not for family necessity, it is difficult to understand why defendant 2 would admit the liability for these loans. Taking this fact into consideration along with the evidence of P. W. 1, I have no reason to doubt that the sum of Rs. 1,000 which was due to the plaintiffs on the earlier transactions represented the defendants' family debt. Thus the entire consideration of the first mortgage (Ex. 5) is proved to have been required for purposes binding on the joint family.

The next mortgage bond, Ex. 5 (a) of which the consideration was Rs. 1,800 recites that the money was required for the marriage expenses of the daughter of defen-

dant 1. P. W. 1 has stated in his evidence that defendants 1 and 2 required this money for payment of tilak in connexion with the marriage of the second daughter of defendant 1. P. W. 5 however has made a statement to the effect that the marriage took place not about the time of the execution of the mortgage bond but at least three years later. Defendant 5 (D. W. 1), on the other hand has stated in his evidence that the marriage was performed about two years back. Relying on the aforesaid statement of P. W. 5, it is contended that the daughter of defendant 1 was married some years after the execution of Ex. 5 (a), and therefore the family could not have been under any necessity to borrow any money for the purpose at that time. Indeed this contention would have some force, if the statement of P. W. 5 were to be accepted as perfectly accurate. But some allowance must be made for the lapse of time after which he came to depose to the fact. What is important to be borne in mind is that in the bond itself, which was executed not by defendant 1 alone but also by defendant 2, there is a specific recital that the money was required for the marriage of the daughter of defendant 1. The defendants' own evidence shows that they have got account books in which the expenses incurred in connection with the marriage were entered, but those accounts have not been produced. Among the contesting defendants defendant 3 would have been the most competent witness in the case but he has been withheld. In these circumstances, I am not prepared to differ from the learned Subordinate Judge's finding that the sum of Rs. 1,800 was really for the expenses of the marriage of the daughter of defendant 1.

It has been strenuously argued by Mr. Khurshaid Husnain that the defendants have adduced evidence to show that the income of their family properties would be Rs. 5,000 to Rs. 6,000 a year, and therefore they were in fairly affluent circumstances so that there would be no necessity to borrow any money for the marriage expenses. But to this contention the simple answer is that the accounts in the possession of the defendant which would have been the best evidence on the point have been withheld. It has been contended that the evidence of the defendants shows that Rs. 500 only was paid as tilak on the occasion of the marriage of the daughter of defendant 1. This contention is also met by the same answer.

The next contention raised related to the rate of interest. So far as the first mortgage, Ex. 5 is concerned, it appears that the earlier mortgage in favour of Lal Bahadur carried compound interest at Re. 1.8.0 per cent. per mensem with yearly rests and the loans on the plaintiffs' earlier bonds, Ex. 2 series also carried compound interest at similar rate; and the loan on the hand-note Ex. 3, which was for Rs. 50 only, carried simple interest at Re. 1.8.0 per mensem. It was therefore quite prudent on the part of defendants 1 and 2 to create the mortgage, Ex. 5, on compound interest at Re. 1.1.0 per cent. per mensem with yearly rests. It should be observed here that in the plaint the plaintiffs have claimed compound interest at 1 per cent. and not Re. 1.1.0 per cent. As regards the second mortgage, Ex. 5 (a) the plaintiffs have adduced evidence to prove that the usual rate of interest varies from 1 per cent. to 2 per cent. per mensem compoundable every year. This evidence receives support from the earlier transactions commencing with the mortgage in favour of Lal Bahadur. There is no reliable evidence on the side of the defendants to prove that compound interest at 1 per cent. per mensem with yearly rests is excessive.

The next contention raised by Mr. Khurshaid Husnain is that upon a proper construction of the two mortgage bonds, Ex. 5 and Ex. 5 (a), there appear to be no provisions for payment of interest after the stipulated period. The relevant provisions in the bond, Ex. 5 are :

We declare that we shall repay Rs. 2500 aforesaid together with interest at Re. 1-1-0 per hundred rupees per month on the full moon day of Jeth 1332 in full and in one lump sum. We shall pay the interest whatever it may be on the said sum every year to the said creditors. In the event of non-payment, the said yearly interest shall be treated as principal and we shall also pay interest thereon at the above rate and till the date of payment the interest on compound interest shall continue to be treated as principal year after year and interest at the above rate shall continue to run thereon.

These words to my mind are plain enough and do not admit of any other construction than that the principal with interest at the stipulated rate was to be paid in one lump on the full moon day of Jeth 1332 and thereafter compound interest was to be calculated at the end of every year at the stipulated rate and the interest would run till repayment of the entire debt. Turning to the next bond, Ex. 5 (a), the provisions are as follows:

We do declare that we shall repay Rs. 1800 aforesaid besides interest at 1 per cent. per mensem on full moon day of Baisakh 1338 Fasli. In the event of non-payment, we shall continue to pay the annual interest every year. In the event of non-payment of interest, the annual interest shall every year be treated as principal and we shall pay interest and compound interest thereon also till the date of repayment.

Here again the words are so clear that it is impossible to hold that there was no covenant for payment of interest after the stipulated period. In this connexion Mr. Khurshaid Husnain has referred to a decision of the Judicial Committee in 17 All 511,¹ in which upon a construction of the terms of the mortgage bond before their Lordships it was held that there was no covenant for payment of interest after the stipulated period. The relevant provisions of that bond were as follows :

I promise that I shall pay the said money, with interest at the rate of Re. 1-4-0 per cent. per mensem, in two years; that interest shall be paid six-monthly; that in case of default in payment of interest on the expiry of any six months, it will be treated as principal and being included in the principal shall bear interest at the said rate; that the compound interest shall also be added six-monthly to the principal.

From these provisions, their Lordships held that the stipulation regarding payment of compound interest at the end of every six months applied to the period of two years which was fixed for the payment of the debt, and there was no provision for payment of any interest after the expiry of that period. In the present case, as I have already pointed out, there are clear provisions in both the bonds regarding payment of interest after the stipulated period. The next point raised by Mr. Khurshaid Husnain is that there is no legal proof of the attestation of the mortgage bonds, Exs. 5 and 5 (a). The bonds on their very face purport to be attested by more than two witnesses. One of the attesting witnesses to the first bond was Mahadeo Lal (P. W. 2). He proved its due execution and attestation and on his evidence it was marked Ex. 5 without objection. Jageshar Ram (P. W. 3), an attesting witness to the other bond, proved its due execution and attestation, and on his evidence it was marked Ex. 5 (a), without objection. Now, what happened was that Bansi Ram, another attesting witness to the first bond, Ex. 5 was examined as P. W. 4 and he did not formally prove attestation. The obvious reason is that it

¹ 1. Chajmal Das v. Brij Bhukan Lal, (1895) 17 All 511=22 I A 199=6 Sar 624 (P O).

was not thought necessary in view of the fact that the bond was already marked as Ex. 5 without objection on the evidence of P. W. 2. The point taken by Mr. Khurshaid Husnain is that because Bansi Ram (P.W. 4) did not speak of attestation of the bond, Ex. 5, it must be presumed that he did not in fact attest. There is no substance in this contention.

The last point raised is that under the provisions of S. 11, Bihar Money-lenders Act (III of 1938) which came into force in July 1938 was expressly made retrospective in its operation, the plaintiffs are not entitled to recover as interest any sum exceeding the principal amount secured by the mortgage bonds in suit. But it has been held by a Full Bench of this Court in 20 P L T 1,² that in view of the provisions of S. 107, Government of India Act, 1935, S. 11, Bihar Money-lenders Act, being repugnant to the provisions of the Usury Laws Repeal Act (28 of 1855), is void to the extent of the repugnancy. Mr. Khurshaid Husnain has further urged that in any event under S. 12, Bihar Money-lenders Act, the account should be re-opened and relief should be given to the defendants but that Section gives a complete discretion to the Court in the matter. Upon the facts of this case there is nothing which would justify the Court, in the exercise of its discretion, in re-opening the accounts. All the contentions raised by the appellants fail and I would therefore dismiss the appeal with costs. The learned advocate for the appellants prays for a certificate under S. 205 (1), Government of India Act, 1935. As this case involves a substantial question of law as to the interpretation of that Act, let a certificate be granted for leave to appeal to the Federal Court.

Harries C. J.—I entirely agree.

R.M./R.K. *Appeal dismissed.*

2. *Sadanand Jha v. Aman Khan*, (1939) 26 A I R Pat 55=179 I C 379=18 Pat 13=20 P L T 1.

A. I. R. 1939 Patna 559

HARRIES C. J. AND MANOHAR LALL J.

Ch. Bhuneshwar Prasad Singh —
Appellant.

v.

Brijmohan Singh and others —
Respondents.

Appeal No. 37 of 1937, Decided on 7th February 1939 from original decree of Sub. Judge, Arrah, D/- 10th October 1936.

Mortgage — Suit on — Person in possession without any title mortgaging it to pay off Government dues and to save it from being sold — Rightful owner subsequently establishing his title and obtaining possession — Mortgagee bringing suit on his mortgage against rightful owner is not entitled to mortgage decree against estate — Nor is he entitled to money decree against rightful owner on equitable principle of salvage—Principle does not apply to case of person who was never in possession of estate under any claim whatsoever and who is no more than mere lender.

There is an equity only in favour of a person who is in possession of an estate in good faith under a claim, which may afterwards turn out to be unfounded, provided he has saved the estate from destruction and has preserved it, upon the principle of salvage. But this principle can have no application in favour of a person who has never been in possession of an estate under any claim whatsoever and who is no more than a mere volunteer, a mere lender. [P 562 C 1, 2]

Where a person holding possession of an estate without any title to it borrows money by mortgaging the property for the purpose of paying off the Government revenue and cess due from the estate, the non-payment of which would have rendered it liable to be sold, and thus preserve the estate and subsequently the rightful owner establishes his title to the estate and obtains possession of it, the mortgagee bringing a suit on his mortgage against the true owner is not entitled to a mortgage decree against the estate, as the mortgage is not binding upon the estate, the mortgagor being a person having no title to alienate the property; nor is he entitled to a money decree against the true owner, who was not a party to the mortgage sued upon, and who never contracted with him (the mortgagee) to pay back the money, which he advanced to a trespasser in wrongful possession of the estate. The equitable principle of salvage does not apply to his case as he was never in possession of the estate under any claim but was a mere lender lending money to a trespasser: 21 Cal 142 (P C); (1892) A C 166; (1871) 6 C & P 712 and 2 I A 7 (P C), *Disting.* [P 563 C 1]

Dr. D. N. Mitter for Sir M. N. Mukherjee, Gopal Prasad and Harinandan Singh — *for Appellant.*

S. M. Mullick, C. P. Sinha and K. K. Singh — *for Respondents.*

Manohar Lall J. — This is an appeal by defendant 1 against the decision of the learned Subordinate Judge of Arrah, dated 10th October 1936, decreeing in part the suit instituted by the plaintiff-respondent to recover his dues on the basis of three mortgage bonds, all of the year 1929.

A brief narration of the facts is necessary to understand the points in controversy between the parties. One Tribeni Prasad, the admitted owner of the estate including the properties covered by the mortgages in suit, died on 13th January 1916, leaving behind him three widows Mt. Sahodra Kuer, Mt. Jageshra Kuer and

Mt. Dhana Kuer. In February 1916, the first two senior widows applied for registration of the name of the appellant in the Land Registration Office on the allegation that he was adopted by Tribeni Prasad just before his death. The application was opposed by Mt. Dhana Kuer who denied the story of adoption set up by the other two widows. In July 1916, the two senior widows put in a petition to the Land Registration Deputy Collector withdrawing their application under S. 42 alleging that in a summary procedure the claim of adoption cannot properly be adjudicated. The Court was struck with the peculiar position adopted by these two ladies but failed in inducing them to give evidence as to the actual adoption. The two ladies stated that they did not wish to give any evidence in support of adoption nor did they deny it in toto. In these circumstances the Court held upon the materials, as were available to him, that there had been no adoption, that the plea so set up was false, mischievous and vexatious and in the result ordered the registration of all the three widows as legal heirs of their deceased husband. No question of actual possession arose because the dispute as to succession had started immediately on the death of the last proprietor. The Court therefore in exercise of his power under S. 55, Land Registration Act, summarily determined the right of possession in favour of the three widows and ordered the entry of their names in the land registration department by his order dated 21st July 1916. The three widows then continued jointly in possession of the estate of their deceased husband, but by the year 1928 the two senior widows had died and Mt. Dhana Kuer was in sole possession. The appellant having come to age, instituted a suit (Title Suit No. 18 of 1929) on 25th February 1929, for a declaration of his status as an adopted son and for recovery of possession of the entire estate including the properties which are the subject of the mortgage bonds in this appeal. In that action he made as defendants Mt. Dhana Kuer and the reversioners of Tribeni Prasad, his alleged adoptive father. The suit succeeded and the Court declared on 4th June 1932 that the appellant was the duly adopted son of Tribeni Prasad as alleged by the senior widows in February 1916, that the appellant was entitled to recover possession of the properties in suit and that Mt. Dhana Kuer was only entitled

to recover maintenance from the appellant. The appellant was also given a decree for possession by dispossessing Mt. Dhana Kuer and future mesne profits from her, the amount to be determined subsequently. Against this decision there was an appeal to this Court on behalf of Mt. Dhana Kuer, but we are informed that as a result of a compromise arrived at between the parties, she withdrew her appeal.

In the meantime, on 12th January 1929, Mt. Dhana Kuer executed a mortgage in favour of the plaintiff-respondent to secure an advance to her of Rs. 800 on the security of certain properties which must now be held to have belonged to the appellant although wrongly in possession of Mt. Dhana Kuer. The consideration for this mortgage was made up in this way. On 28th September 1928, Mt. Dhana Kuer had taken Rs. 205 from the plaintiff on the basis of a handnote in order to pay the Government revenue for September kist due from this estate. A further advance of Rs. 580-11-0 was taken on 12th January 1929, to meet the January kist of the Government dues. This along with the interest which was due on the handnote made up the amount of Rs. 800. The plaintiff has been able to show by producing satisfactory documentary evidence that with the money borrowed from the plaintiff on this bond Government revenue was paid by Dhana Kuer. On 21st March 1929, Dhana Kuer borrowed from the plaintiff a further sum of Rs. 2,000 under the second mortgage bond in the suit on the security of a portion of the estate of the appellant. The learned Subordinate Judge has found that about Rs. 1500 was deposited on 23rd March 1929 by Dhana Kuer out of the loan which she took from the plaintiff on the second bond to pay the Government revenue due from the estate. Exs. 6 to 6 (g) and A (4) and A (5) show the total amount which was deposited on 23rd March 1929 through the plaintiff. The balance of Rs. 500 was said to have been advanced to Dhana Kuer by the plaintiff to meet litigation expenses and other expenses as stated in Ex. 2 (a).

On 5th June 1929 the plaintiff again advanced a sum of Rs. 2,000 to Mt. Dhana Kuer under the last mortgage bond in the suit to pay the Government revenue for June kist of 1929. Here again, the learned Subordinate Judge has found that more than Rs. 1900 was deposited by Exs. 3z(17) to 3z(40) to meet the Government revenue demand for June 1929 kist. The payment

was made through the plaintiff who has produced the chalans. It is therefore clear from reliable evidence adduced by the plaintiff that the Government dues from the appellant's estate were paid by Dhana Kuer with the moneys borrowed from the plaintiff on the basis of the three bonds in suit, that the name of the plaintiff was inserted as the person who paid the money in the chalans and he appears himself as the actual payer in the list of chalans. The learned Subordinate Judge was satisfied on the evidence adduced by the plaintiff as well as from circumstances elicited from the evidence of the defendants themselves that there existed an undoubted necessity for the loan and also that there was bona fide enquiry by the plaintiff as to the existence of such a necessity.

It was sought to be argued before us that Dhana Kuer had sufficient money in her hands at the time of the loans and that there was no necessity for her to borrow any money from the plaintiff, far less on the exorbitant rate of interest agreed upon. But I am satisfied from a perusal of the evidence and in particular from the non-production of the jama kharach account books of the defendant that the learned Subordinate Judge arrived at a right conclusion when he held that Mt. Dhana Kuer had undoubted necessity to borrow the money and that she had no funds in her possession on the relevant dates. The situation which then existed can easily be imagined. The evidence discloses that the appellant had then come to age and had been able to induce the raiyats to stop payment of rent to Mt. Dhana Kuer who in his view (and as determined judicially later) was undoubtedly a trespasser. Mt. Dhana Kuer was involved in fighting litigations with the appellant and money was required for that purpose also. In these circumstances it is natural to expect that the sources of revenue of Mt. Dhana Kuer from the estate had dried up.

The appellant produced four receipts Exs. B to B(3) purporting to have been granted by Mt. Dhana Kuer for collections remitted to her bearing dates 12th January 1929, 29th March 1929, 10th June 1929 and September 1929, showing that she had received from the Tahsildar Mathura Singh (D. W. 3) about Rs. 3700 as the rent collected by him. It was therefore argued by the learned counsel for the appellant that when Mt. Dhana Kuer was in possession of about Rs. 4000 on the relevant dates in

1929, there was no necessity for her to have taken the loans in question. But no reliance can be placed upon these receipts. These receipts were not filed in the trial Court before D. W. 3 came into the witness-box on 19th September 1936. Again, he produced the receipts without these being specifically called for from him. The learned Subordinate Judge has pointed out that he is unable to place reliance upon this witness specially because he did not inform either the defendants or anybody else that he was in possession of these receipts. I agree with the trial Court that no reliance can be placed on the evidence of this witness. It must therefore be held that the bulk of the money taken in loan from the plaintiff on the security of the mortgage bonds in suit was applied for the payment of Government revenue and cess due from the estate, the non-payment of which would have rendered the estate liable to be sold and that the deposit of the Government revenue and cess was for the preservation and benefit of the estate. The learned Subordinate Judge in these circumstances came to the conclusion that the mortgage bonds in suit could not be binding upon the estate because the mortgagor was a person who had no title to alienate the property of the appellant and therefore he refused to pass a mortgage decree in favour of the plaintiff. The plaintiff has preferred no appeal against this decision. In my opinion, this view of the learned Subordinate Judge is correct. This was not seriously contested on behalf of the respondent.

The learned Subordinate Judge however proceeded to pass a money decree in favour of the plaintiff upon his view of the law that as the money advanced by the plaintiff was advanced by him in good faith to Mt. Dhana Kuer and as the advances were made in the interest of and for the benefit of the estate of the appellant, the plaintiff was entitled to get back the money to be recovered from the estate in the hands of defendant 1 although his mortgage charges cannot be enforced. The learned Subordinate Judge professed to rely upon the decision of the Privy Council in 20 I A 160.¹ In that case the plaintiff was in possession of a certain estate regarding which litigation was pending between him and the defendant. Possession was decreed to him by the High Court of Calcutta and during the period of his possession the plaintiff

1. *Dakshina Mohan v. Saroda Mohan*, (1894) 21 Cal 142=20 I A 160=6 Sar 366 (P O).

had paid Government revenue to preserve the estate. It was also found that the defendant having actively interfered with the tenants of the estate, the plaintiff, as a result of the obstruction had received only trifling sum on account of rents and profits. After the decision of the High Court had been reversed by the Privy Council, the defendant obtained possession of his estate, of which he was the rightful owner at all times. The plaintiff then instituted a suit to recover from the defendant the amount of the Government revenue and other charges which he had paid during the period of his possession. The High Court held that the plaintiff though in possession in the relevant period under a decree of the Court was in wrongful possession and took the view that a person who is in wrongful possession is not entitled to recover sums paid on account of outgoings, although he may be able to use the payment for the purpose of reducing the mesne profits. Against this decision an appeal was taken to the Privy Council and their Lordships held :

Now it seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payment for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped that he has so paid by the person who ultimately benefits by the payment, if he has failed through any fault of his own to reimburse himself out of the rents. . . . The claim is in the nature of salvage, and it is to be observed that the law relating to sales for arrears of Government revenue recognizes the equity of repayment in the case of a person who not being proprietor pays the Government revenue in good faith to protect a claim which afterwards turns out to be unfounded.

The reference to the law relating to sales for arrears of Government revenue is obviously to S. 9, Revenue Sale Law of 1857. In my opinion, this case does not support the view taken by the learned Subordinate Judge. The respondent is not a person in the position of the plaintiff in the Privy Council case. There is an equity only in favour of a person who is in possession of the estate in good faith under a claim which may afterwards turn out to be unfounded provided he has saved the estate from destruction and has preserved it upon the principle of salvage. The present respondent has never been in possession of the estate under any claim whatsoever. He never paid the money on his own behalf to preserve the estate in order to protect his claim. He was a mere lender who lent the money to Mt. Dhana Kuer. The relation between him and her was that of a mere borrower and lender. He can only

look to Dhana Kuer and to her estate to pay him and to nobody else and to nothing else. I do not see what equity there can be in these circumstances in favour of the plaintiff against the estate of another person.

In the course of the judgment, just referred to, their Lordships of the Privy Council made reference to the case in (1892) A C 166.² At p. 173 Lord Macnaughten has reviewed a number of earlier cases upon the law of salvage which show that in every case the person who, while in possession with apparent bona fide title has preserved the estate, has been allowed either as a set off or as a claim the amount which had to be spent by him necessarily to preserve the thing which he has been ordered to hand back or has actually handed over to the real owner provided that he could not reimburse himself from the rents and profits of the estate while in possession. In (1871) 6 C & P 712,³ in an action of trover for goods belonging to the assignees of bankrupt, wrongfully seized and wrongfully sold by the Sheriff, the Sheriff was allowed the expenses of sale, because the goods must have been sold by the assignees if not sold by the Sheriff. The only condition which must be carefully insisted upon is to see that the person in possession, who is later on held to be wrongfully in possession, has accounted for mesne profits, for all rents and profits which he has received or which without wilful default he might have received, and if such a person can show that owing to circumstances beyond his control and still more that in consequence of some wrongful conduct on the part of his opponent he has received less than what he had to pay for the preservation of the estate, it would seem to be in accordance with justice, equity and good conscience that he should recover the amount which he paid on the final adjustment of accounts. In other words equity works in favour of such a person who is in possession under a bona fide claim which afterwards proves to be unfounded only to the extent to which he has been forced to make payment after accounting for the rents and profits. But as pointed out above this principle can have no application in favour of a person who has never

2. *Peruvian Guano Co., Limited v. Dreyfus Brothers and Co.*, (1892) A C 166=61 L J Ch 749=66 L T 536=7 Asp M C 225.

3. *Clarke v. Nicholson*, (1871) 6 C & P 712=1 C M & R 724=5 Tgr 233=4 L J Ex 66.

been in possession of an estate under any claim whatsoever and who is no more than a mere volunteer, a mere lender. The principle underlying S. 9 of the Revenue Sale Law is to the same effect.

The learned advocate for the respondent relied upon the case in 2 I A 7⁴ in support of his contention that the plaintiff is entitled to a decree in his favour in the terms as passed by the learned Subordinate Judge, but that case is entirely different. In that case a Hindu widow in possession of the estate of her husband sold a part of the ancestral land to a third person for a sum out of which Rs. 14,000 was devoted to pay up the mortgage validly subsisting upon the estate. The real reversioner instituted a suit against the purchaser and the widow for a declaration that his future right should be preserved unmolested and that his title to the land transferred may be declared and the deed of sale may be cancelled. The Privy Council held that the sale to the purchaser was invalid and therefore the reversioner was entitled to a decree to the effect that on the death of the widow the property belongs to him and that he may be put in possession thereof after the death of the widow on payment to the purchaser the sum of Rs. 14,000. It will be noticed that the purchaser was in possession under a bona fide title. He was entitled to remain in possession till the death of the widow and while in possession he paid the encumbrance validly existing upon the property in his possession. In these circumstances his claim to be recouped to the extent of Rs. 14,000 was upheld by their Lordships in these words :

It is equitable that, when the plaintiff claims the estate, credit should be given to the purchaser for the payment of the mortgage (which was subsisting on the estate at the time of the sale and which has been paid by the purchaser) which otherwise the plaintiff himself would have to meet.

It will also be seen that the person entitled to recoup was not in the position of a creditor, like the plaintiff in the present case, but he was a person actually in possession of the estate under a bona fide title.

I therefore have no hesitation whatsoever in holding that the learned Subordinate Judge was in error in giving a decree to the plaintiff against defendant 1 who is not a party to any of the mortgage bonds in the suit and who never contracted with the plaintiff to pay him back the money

which he advanced to Mt. Dhana Kuer, a trespasser in wrongful possession of the appellant's estate. The equities in favour of Mt. Dhana Kuer, now dead, and her representatives cannot be worked out in this proceeding but can be dealt with properly in the mesne profits proceedings if they are ever started. Mt. Dhana Kuer or her representatives are not made parties to this suit. I therefore do not see my way to grant any relief to the plaintiff against the representatives of Mt. Dhana Kuer in these proceedings.

It was argued by the learned advocate for the appellant that the mortgage bonds in suit are hit by the doctrine of *lis pendens* contained in S. 52, T. P. Act. The learned Subordinate Judge has held that the second and third mortgage bonds dated 21st March 1929 and 5th June 1929, being subsequent to the institution of the suit by the appellant on 25th February 1929, are hit by the doctrine of *lis pendens*. The suit of the plaintiff related to a declaration of title to immovable property, and therefore the doctrine of *lis pendens* would clearly apply. But this would not affect his mortgage bond of 12th January 1929, which was executed before the institution of the title suit.

It was then argued that the claim of the plaintiff was barred by limitation, because the suit has been instituted beyond six years of the date when the cause of action accrued to the plaintiff to recover his dues. It has already been pointed out that the first mortgage bond shows that the money was advanced on 12th January 1929, but the document itself states that the borrower will pay the loan on 30th Jeth 1337, which corresponds to March or April 1930. Similarly, the mortgage bond of 21st March 1929, contains a stipulation that the loan will be paid in March or April 1931. In my opinion the claim to recover the money due on these two bonds is not barred by limitation as the suit has been instituted on 1st May 1935, within six years of the date when the cause of action accrued on both these documents. The third mortgage bond is dated 5th June 1929, and is within six years of the date of the institution of the suit. In these circumstances the plea of limitation advanced on behalf of the appellant must be overruled.

For the reasons given above, the appeal is allowed, but in the circumstances as the estate of the appellant has been found to have been benefited by the loans covered by the mortgage bonds in suit each party

4. *Moulvie Mahomed Shumsool Hooda v. Shewukram*, (1874) 2 I A 7=22 W R 409=14 Beng L R 226=8 Sar 405 (P O).

will bear his own costs of this appeal and in the Court below.

Harries C. J. — I entirely agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1939 Patna 564

HARRIES C. J. AND ROWLAND J.

Nandamani—Petitioner.

v.

Hari Krishna Bhima Deo—

Opposite Party.

Application in Privy Council Appeal No. 32 of 1938, Decided on 23rd March 1939.

(a) Civil P. C. (1908), Ss. 109 (c) and 115 — Court refusing to try particular issues as preliminary issues before going into merits of case — Aggrieved party presenting revision petition against the order—High Court dismissing application summarily—Its decision does not give rise to any point of importance or difficulty so as to warrant grant of certificate under Section 109 (c).

Where a revision application is presented to the High Court against an order by a Court refusing to try particular issues in a suit as preliminary issues before going into the merits of the whole case and High Court refuses to entertain the revision application under S. 115, Civil P. C., and dismisses it summarily, having come to the conclusion that the lower Court had jurisdiction to pass the order complained against and that it had not acted illegally or with material irregularity, such a decision does not give rise to any point of importance or difficulty which would warrant the grant of a certificate under S. 109 (c). Considerations, such as that the case is of vital importance to the applicant and that the litigation would be protracted and expensive, cannot be allowed to influence the views of the High Court in the matter of granting a certificate under S. 109 (c).

[P 565 C 1]

(b) Civil P. C. (1908), S. 115—If Court has jurisdiction, even if it decides particular matter wrongly, it cannot be said to have acted illegally or with material irregularity.

If a Court has jurisdiction, it does not at all follow that, if it has decided a particular matter wrongly, it has acted illegally or with material irregularity in the exercise of its jurisdiction. The real question is, did the Court in the exercise of its jurisdiction act illegally or with material irregularity. If it did not, no revision application lies against an order passed by it : *11 Cal 6 (PC), Rel. on.*

[P 565 C 1]

R. V. Ramanamurti and G. C. Das —

for Petitioner.

D. V. Narasinga Rao and P. B. Ganguli

— for Opposite Party.

Order.—This is an application by the defendant in the suit for a certificate that this is a fit case for appeal to His Majesty in Council under S. 109 (c), Civil P. C. The plaintiff opposite party has brought a suit in the Court of the Subordinate Judge

of Berhampur claiming possession of a large estate and mesne profits. The plaintiff's case was that he was entitled to the estate by inheritance and that the defendant who was in possession was illegitimate and had no claim whatsoever to the property. The defendant inter alia pleaded that the plaintiff was illegitimate and that the question of the defendant's legitimacy had been decided once and for all by their Lordships of the Privy Council in an earlier suit. Accordingly, it was said that the question of the legitimacy of the defendant could not again be agitated as the matter was barred by the principle of *res judicata*. To meet this defence of *res judicata*, the plaintiff has alleged that the decree obtained by the defendant is tainted by fraud and collusion and that as he was not a party to that litigation, it is not binding upon him. Accordingly he contends that the matter is entirely at large and that as between the parties the legitimacy of the defendant is a matter to be decided in this particular suit.

In due course fifteen issues were framed and an application was made on behalf of the defendant under O. 14, R. 2 and O. 15, R. 3, Civil P. C., praying that the Court should hear and dispose of issues 3 to 7 and the second part of issues 8 and 9 as preliminary issues and further that the Court should try issue 1 on facts and dispose of it before going into the other issues of the case. The learned Subordinate Judge heard the parties and on 22nd September 1938, delivered an elaborate judgment in which he held that it was not a case in which he ought to direct that these issues be disposed of before going into the merits of the whole case. Against that order the defendant filed a revision application in this Court which was heard by this Bench at Cuttack. This Bench declined to interfere with the order of the Subordinate Judge and summarily dismissed the petition. As the application was dismissed summarily, no judgment was delivered, but we were of opinion then, and still are, that no case had been made out for interference in revision. The defendant has now preferred the present application praying that this Court should certify that the case is a fit one for appeal to his Majesty in Council.

It must be remembered that the application which was made to this Court was an application in revision and the applicant was bound to show that the learned Subordinate Judge had either exercised jurisdiction not vested in him or declined to

exercise jurisdiction vested in him or had acted illegally or with material irregularity in the exercise of his jurisdiction. As we have stated, the learned Subordinate Judge in his order dealt at great length with the contentions raised on behalf of the present applicant. There can be no question that the learned Subordinate Judge had jurisdiction to deal with the application and that he did deal with it on the merits and we fail to see in what manner the learned Subordinate Judge acted illegally or with material irregularity in dealing with the application. The whole of the argument on behalf of the applicant to-day has been directed to the question as to whether the learned Subordinate Judge decided this application correctly. If a Court has jurisdiction, it does not at all follow that if it has decided an issue wrongly that it has acted illegally or with material irregularity in the exercise of its jurisdiction. As pointed out by their Lordships of the Privy Council in 11 Cal 6¹ :

The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case and, even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

As we have stated, this Bench came to the conclusion that the learned Subordinate Judge had jurisdiction and had not acted illegally or with material irregularity and consequently dismissed the application summarily. When applications in revision are made to this Court, the Court is governed by the provisions of Sec. 115, Civil P. C. This Court refused to interfere with the order of the learned Subordinate Judge and we fail to see how that decision gives rise to any point of importance or difficulty which would warrant the grant of a certificate under Sec. 109 (c), Civil P. C. It is true that this case is of vital importance to the defendant and the present litigation may well be a protracted and expensive one. We fully realize the hardship that this litigation might cause to the defendant should the plaintiff's allegation prove wholly unfounded. Such however cannot be allowed to influence our views.

The preliminary issues which the Court was asked to try, are however as pointed out by the learned Subordinate Judge,

1. *Amir Hassan Khan v. Sheo Baksh Singh*, (1885) 11 Cal 6=11 I A 287=4 Sar 559 (P O).

mixed issues of law and fact. For example, the issue of *res judicata* is complicated by reason of the fact that the plaintiff alleges that the decree is not binding upon him by reason of fraud, collusion or negligence. Another important question arises whether or not the defendant in that earlier suit could be regarded as representing the present plaintiff. These matters were considered by the learned Judge, and he came to the conclusion that the preliminary questions of law could not be disposed of without going into the questions of fact. He has pointed out that as these questions are questions of difficulty, it may well be that if the case was decided upon any preliminary issues of law, such a decision might later be reversed and the parties again compelled to go into the facts.

The question of the legitimacy of the plaintiff could also not be decided conveniently without going into the whole of the facts of the case. If the evidence upon that issue was gone into, it would, in all probability, be just as convenient to dispose of the remaining evidence in the case. The issues of law in this case are not clear cut and are mixed up with questions of fact. In such a case it was impossible to say that the learned Subordinate Judge had acted illegally or with material irregularity in refusing to dispose of the issues suggested. It was pointed out by the learned Subordinate Judge that a number of witnesses who are likely to be called in this case are old men, and if this case is protracted, these witnesses might well die before they have an opportunity of deposing in the matter. Had the proceeding before the High Court been in the nature of an appeal, different considerations would arise; but in our view there is nothing in the refusal of this Court to entertain the revision application which would warrant the Court certifying that the case is a fit one for appeal. For the reasons which we have given, we reject this application and make no order as to costs. The stay order is vacated.

R.M./R.K. *Application rejected.*

A. I. R. 1939 Patna 565

VARMA J.

Kirpal Singh and others — Petitioners.
v.

Hari Choudhury and others —

Opposite Party.

Criminal Revn. No. 156 of 1939, Decided on 18th April 1939, against order of Sess. Judge, Monghyr, D/- 23rd January 1939.

Criminal P. C. (1898), S. 145 — Order of Magistrate under S. 145 dealing with larger area of land than that included in proceedings is liable to be set aside—What is proper course stated.

If in proceedings under S. 145 a Magistrate deals with a larger area of land in his order than what is included in the proceedings he would be deemed to have acted without jurisdiction and his order is liable to be set aside. The proper course for the Magistrate is to confine his order to the area mentioned in the proceedings : *A I R 1923 Pat 528, Rel. on.* [P 566 C 2]

Baldeo Sahay and Rajkishore Prasad —
for Petitioners.

S. N. Sahay, K. Sahay and S. M. Siddique
— *for Opposite Party.*

Order.—This is an application against an order passed under Sec. 145, Criminal P. C., against the present petitioners who happened to be first party to the proceedings. The proceedings were in connexion with plot Nos. 33, 72, 85 and 87-457 of village Parora, Police Station Balia, in the District of Monghyr. The area of the lands in dispute comes up to 37 bighas odd. Two pleader commissioners were appointed, who as a result of their measurements divided the lands in dispute into various blocks. Block No. 1 contained plot No. 33 and a few other plots. Block No. 2 contained plot No. 72 and some other plots and block No. 3 contained plot Nos. 85 and 87-457 and some other plots. The order of the learned Magistrate declaring possession is as follows:

Considering all facts, under S. 145 (6), Criminal P. C., I declare the persons named in col. 2 of the undermentioned table, to be entitled to possession of the lands mentioned against their names in col. 1 of the table, until evicted therefrom in due course of law :

Land (1)	In possession of (2)
(1) Twelve bighas out of Block 1, that is, the eastern and southern portions of Block 1	Basuki Chaduhury under the Malik Hari Pd. Chaudhry.
(2) Rest of Block 1	Borhan Singh, Baiju Singh and Dukhan Singh, Maliks.
(3) Block 2	Saudagar Singh, Uchit Singh and Shyambahadur Singh.
(4) Block 3	Basuki Chaudhry under the Malik Hari Prasad Chaudhry.

I further forbid all disturbance of such possession until such eviction.

Now, looking at the proceedings and the order of the learned Magistrate, it is clear that the order includes lands outside the proceedings, and as was held in 4 P L T 372,¹ in a proceeding under S. 145, Crimi-

nal P. C., as regards a dispute concerning land, a Magistrate acts in excess of his jurisdiction if he deals with a larger area of land in his order than what is included in the proceeding and his order is liable to be set aside. The proper course for the Magistrate was to confine his order to the plots mentioned in the proceedings. Evidently, at the time of passing the order, the learned Magistrate lost sight of the fact that the proceeding referred to the plot numbers and not to the block numbers and this has brought about the result which necessitates interference with the order passed by him. It appears that arguments were heard and judgment reserved in the case on 14th June 1938, and the judgment was delivered not earlier than 10th November 1938, and the learned Magistrate has observed at the foot of his order that for certain important administrative reasons the order could not be passed earlier. The delay in delivering the judgment might have led to the error of not conforming to the proceeding while passing the order about the disputed lands.

There is one more point, which has not been seriously contested by the learned advocate appearing on behalf of the opposite party, that the order relating to block 2 is not in order. Block 2, as will appear from the order quoted above, has been declared to be in possession of Saudagar Singh, Uchit Singh and Shyam Bahadur Singh; but it appears that by a petition dated 26th February 1938 Uchit disclaimed possession, and similarly Saudagar also disclaimed possession over any of the disputed lands. There is no mention of this matter in the judgment of the learned Magistrate but it appears from the judgment of the learned Sessions Judge that this point was agitated before him. If the petitions of Uchit and Saudagar were dealt with by the inquiring Magistrate, an order like the above could not be passed. In view of the order that I propose to pass, it is not necessary for me to deal with the other points raised by the learned advocate for the petitioners, namely that the inquiring Magistrate failed to notice an important document like Ex. 3 relied upon by the petitioners to show that Basuki (the second party) was a member of the joint family to which Hari Chaudhuri belonged. For the reason that the order passed by the learned Magistrate does not conform to the proceedings issued in the case inasmuch as it extends to lands outside the proceedings,

1. Sukhari Monia v. Ramkhelawan Thakur, (1928) 10 A I R Pat 528=72 IC 69=24 Cr LJ 309=4 P L T 372.

I would set aside the order of the learned Magistrate. The rule is made absolute.

N.S./R.K. *Rule made absolute.*

A. I. R. 1939 Patna 567

WORT J.

Uma' Prasad Singh — Defendant —
Appellant.

v.

Babu Shivakant Prasad Singh and
others — Plaintiffs — Respondents.

Appeal No. 459 of 1938, Decided on 23rd February 1939, from appellate decree of Sub-Judge, Chapra, D/- 16th February 1938.

Civil P. C. (1908), O. 8, R. 6 — Set-off is creature of statute and is unknown to rules of equity—Defendant's claim if barred by limitation at date of suit cannot be pleaded by way of set-off.

Set-off is a creature of statute and so far as India is concerned, it is governed by O. 8, R. 6, although the latter part of the Rule indicates that there may be a set-off other than that provided by the Rule. It is not known to the Common law, nor *eo nomine* to the rules of equity. The amount claimed by way of set-off under this Rule must be 'legally recoverable'. It follows from this that if the defendant's claim is barred by the law of limitation at the date of the suit, it cannot be pleaded by way of set-off under this Rule. The question whether transactions which were the subject-matter of the claim or subject-matter of the set-off were with regard to the same estate is immaterial: *Case law referred.* [P 567 C 2; P 568 C 2]

Brahmdeo Narayan — *for Appellant.*

Jaleshwar Prasad — *for Respondents.*

Judgment. — This is an appeal by the defendant in an action in which the plaintiffs claimed sums which had been paid by them for revenue and for public demands with regard to an estate which had been partitioned between the parties in the year 1931. The defendant admitted the claim but by way of defence stated that sums had been collected by the plaintiffs being rent with regard to the same estate and also decrees realized to which, in the circumstances, the defendant claimed to be entitled. That a portion of the rent or whole of it, the subject-matter of the so-called set-off, and the money realized under the decrees were those of the defendant is not disputed. The real question is whether in the circumstances of the case the set-off is barred by limitation. The matter can be shortly stated thus: had the defendant's claim been the subject of a separate action, it would have been barred by limitation. I make that general statement so as to avoid any confusion as to whether a part

or whole of the claim would be barred by limitation. The learned Judge in the Court below had held that it was so barred and that therefore the plaintiffs were entitled to the full amount claimed together with interest.

It is contended by the learned advocate appearing on behalf of the defendant-appellant that the Limitation Act does not apply to a case of set-off, alternatively that this was by way of an equitable set-off (whatever that may mean), and therefore in this particular case, there was no bar of limitation. In my judgment that contention cannot be acceded to for a moment. Set-off is a creature of statute and so far as India is concerned, it is governed by O. 8, R. 6, although the latter part of the Rule indicates that there may be a set-off other than that provided by the Rule. But with regard to the general proposition that set-off is a creature of statute, there can be no dispute. It is not known to the Common law, nor *eo nomine* to the rules of equity. The earliest case dealing with this matter is the case in 2 Stra 1271.¹ That has always been taken to be the law in England and in my judgment that is the law in India. Sir Dinshaw Mulla in his book on the Code of Civil Procedure observes that

the amount claimed by way of set-off under this Rule must be 'legally recoverable'. It follows from this that if the defendant's claim is barred by the law of limitation at the date of the suit, it cannot be pleaded by way of set-off under this Rule: Mulla's Code of Civil Procedure, Edn. 10, at p. 577.

His authority for that proposition is the well-known case in (1850) 15 Q B 1046.² There are cases, both in the English books and in India, which are relied upon for a different view. 3 Lah 200³ is the clearest authority in favour of the contention to be found in India. But it will be observed when analyzing the case that it is not an authority for the proposition put forward, as the case in substance is a case of accounts between mortgagor and mortgagee. The English case relied upon is the case in (1865) 1 Eq 418.⁴ That was not a case of a claim which could have been made the subject-matter of a suit by the defendant against the plaintiff. It was a petition in

1. Remington v. Stevens, 2 Stra 1271.

2. Walker v. Clements, (1850) 15 Q B 1046 = 81 R R 882.

3. Motan Mal v. Mohammad Bakhsh, (1922) 9 A I R Lah 254 = 66 I O 771 = 3 Lah 200 = 42 P L R 1922 (F B).

4. Edmunds v. Waugh, (1865) 1 Eq 418 = 12 Jur (N S) 826 = 35 L J Ch 234 = 13 L T (NS) 739 = 14 W R 257 = 149 R R 536.

an administration action in which a sum of £250 had been paid into Court for the contingent liability of the plaintiff in the administration action with regard to a mortgage of which the person whose estate was being administered was a mortgagee. The mortgagor either just before or during the pendency of the administration action had become bankrupt. No interest had been paid by the mortgagor and the question was whether the sum of £250 should be paid to the Official Receiver of the mortgagor's estate, and whether £250 could legally be reduced by the trustees on account of interest due by the mortgagor to the mortgagee. Interest had not been paid for over 20 years, and the question was whether in the accounting there should be deducted from the £250 the amount of interest due by the estate of the bankrupt mortgagor, and it was held that it could be. The learned Judges in that case were construing S. 42 of statute 3 and 4, Wm. IV, c. 27 and made this observation:

The intention of the Legislature, I think, was that if a man chose to let interest run into arrear for more than six years, and then come to a Court of justice to recover the interest, he should only be entitled to recover six years' interest; but it does not follow that the Legislature intended that a mortgagor who has lost his legal right, and comes to the Court insisting on his equity to redeem, should be allowed although he has failed to pay the interest which he ought to have paid for more than six years to redeem on payment only of six years' interest.

It is no authority for the proposition contended for, nor is the case in (1885) 34 Ch D 721,⁵ which raised a similar question and in which the decision in (1865) 1 Eq 418⁴ was followed. I have already stated the rule laid down by Sir Dinshaw Mulla, and it seems to me that the only case that has to be met by the respondent is the decision of Adami and Sen, JJ., in 7 P L T 158.⁶ There again, it was an accounting between the mortgagor and the mortgagee, and Adami, J. in the course of his judgment observed:

The learned Subordinate Judge was clearly mistaken in holding that the set-off of the rent of the years 1820 to 1823, inclusive, was barred by limitation,

and relied upon the decision in 32 Cal 576⁷ for that proposition. The defendant there who was the mortgagee and who was in

arrear as regards certain sum described as haq ajiri under the ijara deed claimed to set off sums which he had already paid to the plaintiff. It may be that had the claim not been put forward in that form, it would have been or could have been the subject-matter of a separate suit. But in the accounts between the parties the defendant merely stated that the sum which the plaintiff was claiming could legally be reduced by the sums which were paid by the defendant to the plaintiff in the circumstances. In my judgment it is not an authority for contending that limitation is not a bar to set-off.

It was suggested during the course of the case that limitation was not a bar to set-off if the transactions which were the subject-matter of the claim or subject-matter of the set-off were with regard to the same estate. That, in my judgment, is not a correct way of putting the case. It may very well be, and I think there are some indications in the case to which I have referred, that the bar of limitation does not apply when the question is an account between the parties with regard to the same transaction. The question whether the transaction was with regard to the same estate is, in my judgment, immaterial. Another matter was raised with regard to interest. The learned Judge in the Court below has allowed interest to the plaintiff apart from interest from the date of the decree. In my judgment there are no grounds upon which such a claim could be made or allowed, and therefore the decree of the learned Judge in the Court below must be modified to the extent of disallowing the interest claimed apart from interest from the date of the decree. With this modification, the appeal is dismissed with costs in proportion to the success of the parties. Application for leave to appeal is rejected.

D.S./R.K. *Decree modified.*

A. I. R. 1939 Patna 568

DHAVLE AND ROWLAND JJ.

*Bhubaneshwar Prasad Narain Singh
and others — Judgment-debtors —
Appellants.*

v.

*Khemchandra and others —
Decree-holders — Respondents.*

Appeal No. 260 of 1938, Decided on
17th April 1939, from order of Sub.Judge,
Motihari, D/- 14th July 1938.

5. In re Marschfield, (1885) 34 Ch D 721=56 L J Ch 599=56 L T 694=35 W R 491.

6. Nathan Prasad v. Kali Prasad, (1926) 13 A I R Pat 77=90 I O 785=7 P L T 158.

7. Sheo Saran Singh v. Mahabir Parshad, (1905) 32 Cal 576=2 C L J 73.

Execution — Decree against father — Joint family property attached—Father dying before sale actually held—Decree-holder can proceed against what would have been father's share when he died.

If in execution of a decree passed against the father alone, joint family property is attached and brought to sale, but before the sale actually takes place the father dies and his sons are brought on record as his legal representatives, the decree-holder is entitled to proceed against what would have been the father's share at the time of his death : 5 Cal 148 (P C) and A I R 1926 All 157, Rel. on. [P 569 C 2]

L. K. Jah and R. Choudhury —
for Appellants.

B. N. Mitter, Ajit Kumar Mitter and
K. P. Upadhaya — for Respondents.

Judgment. — We do not think that there is any substance in this appeal. It arises out of a proceeding in execution of a decree, which was passed against Lachmi Prasad Narain Singh on compromise after his son and two grandsons, who had originally been impleaded as defendants 2 to 4 and had put in written statements challenging the debt of Lachmi Prasad Narain Singh as immoral and not binding upon them, had been discharged from the suit. In March 1938 notices under O. 21, Rule 22, were served and attachment under O. 21, R. 54, effected. On the 30th of that month, the 6th June 1938 was fixed for the sale of the attached properties. On 17th April 1938, Lachmi Prasad Narain Singh died. The original defendants 2 to 4 were then brought on the record as Lachmi Prasad's representatives and objected to execution against the property attached, while the decree-holder went on urging that at least eight annas, the share of the deceased father in that property of the joint family, ought to be put to sale. Ultimately this contention of the decree-holder was accepted by the Court below. Defendants 2 to 4, who, as we have already stated, were brought on the record again after the death of Lachmi Prasad Narain Singh, appeal, and the first point urged on their behalf is that the attachment of the property in the lifetime of Lachmi Prasad Narain Singh ceased to be of any effect on his death, and that they, the appellants before us, took the whole of the property attached by survivorship. This contention must plainly be overruled. In somewhat similar circumstances it was decided by their Lordships of the Judicial Committee in 5 Cal 148,¹ that the execu-

tion proceedings under which a mauza belonging to the joint family had been attached and ordered to be sold had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the land to the extent of the judgment-debtor's undivided share and interest therein which could not be defeated by his death before the actual sale. Mr. Lachmi Kant Jha has urged that that decision is distinguishable because the decree in that case was a mortgage decree. But the property was attached in execution of the decree, and the decision plainly turns not on the interest created by the mortgage but on the attachment and possibly also the order for sale—elements which are both present in the case before us. See also 48 All 4,² where the attachment was in execution of a money decree and it does not appear whether the order for sale was made in the lifetime of the judgment-debtor in question.

It has also been contended on behalf of the appellants that if the father's interest continues to be available to the decree-holder by reason of the attachment, notwithstanding the judgment-debtor's death, what should be put up to sale in execution is not the father's specified share, but his right, title and interest, such as it may be, in the property attached. This is rested on the well-known dictum that in a joint Hindu family the share of no individual member can be predicated at any moment except at the time of partition. But that dictum has no application to the facts of the present case. The decree-holder is entitled to proceed against what would have been Lachmi Prasad Narain Singh's share at the time of his death, and it cannot be pretended that any subsequent happenings could, in view of the attachment and the death, either increase or reduce that share. It has also been urged on behalf of the appellants that as the decree-holder attached the entire property as the property of the joint family, it is not competent to him now to put up to sale the eight annas share of the judgment-debtor. But the greater includes the less, and it is impossible to accept the contention. The appeal is dismissed with costs.

N.S./R.K.

Appeal dismissed.

2. Faqir Chand v. Sant Lal, (1926) 13 A I R All 157=89 I C 291=48 All 4.

1. Suraj Bansi Koer v. Sheo Proshad Singh, (1980) 5 Cal 148=6 I A 88=4 O L R 226=4 Sar 1 (P O).

A. I. R. 1939 Patna 570

MOHAMAD NOOR AND CHATTERJI JJ.

Syed Razaur Rahman and others—

Petitioners.

v.

Udit Singh and others—

Opposite Party.

Civil Revn. Nos. 30, 52 and 59 of 1939, Decided on 11th May 1939, from order of Munsif Second Court, Patna, D/- 7th and 19th December 1938 and from order of Munsif, Second Court, Gaya, D/- 24th January 1939, respectively.

(a) Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (9 of 1938), S. 15 — Order proceeding to execute decree only after reducing decretal amount according to S. 15—Revision does not lie.

Revisional powers are not exercised in those cases in which a party entitled to appeal has not appealed. An order of executing Court refusing to execute the decree for the sum which was mentioned in it and proceeding to execute it only after reducing it according to the direction given in S. 15 relates to execution and comes under S. 47, Civil P. C. The order is therefore appealable and revision application does not lie. [P 571 C 1]

(b) Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (9 of 1938), S. 15—S. 15 applies to execution proceedings.

The directions given to Court in S. 15 apply to the proceeding for the execution of the decrees also. [P 571 C 1]

(c) Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (9 of 1938), S. 15 — S. 15 is not repugnant to any existing Indian law and is not void.

The Civil Procedure Code by itself does not apply to suits for rent. It is S. 143 of Bihar Tenancy Act which with certain reservations made in the Civil Procedure Code is applicable to rent suits and the procedure and regulation of rent Courts and Revenue Courts are exclusively within the purview of the Provincial Legislature. It was quite open to the Provincial Legislature to amend S. 143, Bihar Tenancy Act, and provide new procedure for the trial of rent suits. If by implication they authorized the Court not to execute decree beyond certain sum specified in Sec. 15, they had full power to do so. Hence S. 15 is not repugnant to any existing law relating to the Concurrent List No. III of the seventh Schedule of the Government of India Act. [P 571 C 1]

B. N. Mitter and R. S. Sinha (in No. 30)

A. H. Fakhruddin (in No. 52) and Raj

Kishore Prasad (in No. 59)—

for Petitioners.

Advocate-General and Govt. Pleader (for the Crown in No. 30), G. N. Mukherji, Advocate-General and Govt. Pleader (for the Crown in No. 52), and Kanhayaji, Advocate-General, and Govt. Pleader (for the Crown in No. 59) — for Opposite Party.

Mohamad Noor J.— These three applications in revision arise out of proceeding for execution of rent decrees. They are against three different orders of three different Courts in three different cases between different parties. They have been heard together as the question involved in all of them is the same. In each of them the executing Court has reduced the amount of decree for the purpose of execution according to the directions given in S. 15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938, (Act 9 of 1938). The decree-holders in each case have come up in revision. The Provincial Legislature by amending the Bihar Tenancy Act and the Chota Nagpur Tenancy Act have made provisions for reduction of rents of raiyats. The raiyats under certain circumstances have been authorized to apply for reduction of rents and the officer deputed for the purpose is directed to reduce rent on certain basis. Act 9 of 1938 provides among others that when rent has once been reduced under the provisions of S. 112 or S. 112-A, Bihar Tenancy Act or under S. 85, Chota Nagpur Tenancy Act, the landlord will not be entitled to recover in any proceeding rent at a rate in excess of the rate which has been fixed after reduction under the provisions mentioned above. It goes further and provides that even if no application has been made for reduction of rent and that rent has not been reduced by revenue authorities, the landlord in any suit or proceeding will not be entitled to realize more rent than would have been fixed after reduction if the raiyat had applied under S. 112-A, Bihar Tenancy Act, and S. 85, Chota Nagpur Tenancy Act. This however applies for arrears of rent due up to a certain year. Thus, on the one hand they have provided machinery for reduction of rent on the application of the raiyat and on the other by Act 9 of 1938 they have made it impossible for the landlord to realize for the previous years also rent at a higher rate than has been fixed after reduction or would have been fixed if the tenant had put in an application. In all these three cases the rent of the raiyat has been reduced and the learned Munsif in each case has reduced the decree on the basis of the reduced rent. In other words he has refused to execute the decrees for previous years for a sum in excess of the amount which was payable after the reduction of the rent.

In the first place in my opinion these applications are not maintainable. It is the settled practice of this Court that revisional powers are not exercised in those cases in which a party entitled to appeal has not appealed. In all these three cases, the orders of the learned Munsifs were appealable. They obviously came under S. 47, Civil P. C. Mr. B. N. Mitter who appears for one of the petitioners contended that the learned Munsif amended the decree and that the order of amendment was not appealable. In whatever form the order of the Munsif may be, in fact the effect was that he refused to execute the decree for the sum which was mentioned in it and proceeded to execute it only after reducing it according to the direction given in S. 15 of Act 9 of 1938. It was really a question of execution, satisfaction and discharge of decree and as I have said obviously come under S. 47 and an appeal lay to the District Judge. The petitioners not having appealed cannot invoke the revisional powers of this Court.

I now come to the merits of the applications. Mr. Mitter argues (1) that S. 15 had no application to execution proceedings, and (2) that if it did apply, it was repugnant to S. 38, Civil P. C., an existing Indian Law and to the extent of that repugnancy it was void under Sec. 107, Government of India Act. Now, as to the first part of the argument, S. 20 makes it perfectly clear that the directions given to Court in S. 15 apply to the proceeding for the execution of the decrees also. No doubt the word "decree" is not mentioned in the Section, but the execution proceedings can refer to no other proceedings than proceedings for execution of a decree. Then the Civil Procedure Code by itself does not apply to suits for rent. It is S. 143, Bihar Tenancy Act, which, with certain reservations, makes the Civil Procedure Code applicable to rent suits and the procedure and regulation of rent Courts and Revenue Courts are exclusively within the purview of the Provincial Legislatures. It was quite open to the Provincial Legislature to amend S. 143, Bihar Tenancy Act, and provide new procedure for the trial of rent suits. If by implication they authorized the Court not to execute decrees beyond a certain sum specified in S. 15, they had full power to do so. In my opinion, this provision is not repugnant to any existing law relating to the Concurrent List No. 3 of the Sch. 7, Government of India Act. For these reasons the petitions fail.

I would reject them. There will be no order for costs.

Chatterji J.—I agree.

D.S./R.K.

Petitions rejected.

A. I. R. 1939 Patna 571

JAMES AND ROWLAND JJ.

Gorakh Sahu and others — Plaintiff — Appellants.

v.

Sheo Nandan Singh and others — Defendants — Respondents.

Second Appeal No. 78 of 1936, Decided on 30th January 1939, from decision of District Judge, Muzaffarpur, D/- 13th February 1935.

(a) Civil P. C. (1908), O. 21, R. 63 — Suit under—Prayer for injunction does not take plaint out of operation of Art. 17 (1), Court-fees Act.

In a suit under Order 21, R. 63, Civil P. C., the fact that the plaintiff prays for an injunction cannot take the plaint out of the operation of Article 17 (1), Court-fees Act. A single court-fee is sufficient : 35 Cal 202, Rel. on. [P 572 C 1]

(b) Court-fees—Appeal — Question whether plaint or appeal sufficiently stamped — Difference between value of stamp on plaint and amount demanded by Court is value for appeal.

In a suit under O. 21, R. 63, Civil P. C., Court demanded ad valorem stamp on the value of the property and rejected the plaint which bore a stamp of Rs. 15. Plaintiff filed an appeal and affixed a stamp of Rupee 1 to the memorandum which was also rejected by the District Judge who demanded ad valorem court-fee on the value of the property. Plaintiff filed second appeal :

Held that in cases where the only point raised was the question whether the plaint or memorandum of appeal was sufficiently stamped, the reasonable method of assessing valuation of court-fee was that it should be paid ad valorem on the difference between the value of the stamp on the plaint and the amount of court-fee demanded by the Subordinate Judge : A I R 1929 Pat 615, Disting.; (1882) A W N 244, Rel. on. [P 572 C 2]

S. K. Mitter and Sambhu Barmeshwar Prasad — *for Appellants.*

A. K. Mitter and Govt. Pleader — *for Respondents.*

Judgment. — This second appeal arises out of a suit which was instituted under O. 21, R. 63, Civil P. C. The plaint bore a stamp of Rs. 15; but the Subordinate Judge called upon the plaintiff to pay a court-fee ad valorem on the value of the property. The plaintiff did not pay and the plaint was rejected. The plaintiff appealed to the District Judge stamping his memorandum of appeal as for an appeal against an order; but the learned District Judge required him to stamp his memorandum with a

court-fee stamp of the value of Rs. 15 granting him time for the purpose. Later on the same day the District Judge cancelled this order and required the plaintiff to pay court-fee ad valorem on the value of the property. The plaintiff failed to pay and his memorandum of appeal was rejected. When the second appeal came before the High Court, the Taxing Officer referred to the Taxing Judge the question of what court-fee should be demanded from the appellant. It was held by the Taxing Judge that court-fee should be paid ad valorem on the difference between the value of the stamp on the plaint and the amount of court-fee demanded by the Subordinate Judge.

Mr. S. K. Mitter on behalf of the appellant points out that after the decision of the Judicial Committee in 35 Cal 202¹ it cannot be argued that a plaint under O. 21, R. 63, requires a higher court-fee stamp than Rs. 15. In the case before the Judicial Committee, the plaintiff had prayed for an injunction which had been granted, and he paid court-fee separately for the declaration and for the injunction; but the Privy Council pointed out that a single court-fee was sufficient under Art. 17 (1) of Sch. 2, Court-fees Act. In the present case the Subordinate Judge demanded ad valorem court-fee because the plaintiff prayed for an injunction; but the prayer for an injunction cannot after the decision in 35 Cal 202¹ be treated as taking the plaint out of the operation of Art. 17 (1).

On the question of what was the proper stamp for the memorandum of appeal, the learned Government Pleader argues that this should be the same as the stamp on the plaint; and the learned advocate for the respondents suggests that this should be ad valorem on the value of the property. The memorandum bore a stamp of one rupee; but the appellant's pleader in the Court of the District Judge accepted the view that stamp of Rs. 15 was payable. In 10 P L T 545² it was held that a memorandum of appeal of this kind must be stamped ad valorem; and it appears to have been assumed that this necessarily meant ad valorem on the value of the suit. That decision would be applicable to this case if any attempt had been made to

defend the treating of the appeal to the District Judge as an appeal from an order; but the question remains of what we should take to be the value of the appeal in the District Judge's Court for the purposes of assessment of court-fee. In the High Court the value for that purpose has been taken to be difference between the value of the stamp on the plaint and the value of the stamp demanded by the Subordinate Judge. That appears to us to be a reasonable method of assessing valuation of court-fee in cases where the only point raised is the question of whether the plaint or the memorandum of appeal was sufficiently stamped. This was the view taken by Straight and Oldfield, JJ., in (1882) A W N 244.³ The appellant must make good the deficit of Rs. 36.8.0 on the memorandum of appeal in the District Judge's Court within fourteen days. If he does this within time, this appeal be allowed with costs payable by the defendant-respondents for this Court and the Court below. If he fails to make good the deficit within the time allowed, the memorandum of appeal to the District Judge will stand rejected, and the appeal to this Court will stand dismissed.

S.G./R.K.

Order accordingly.

3. Durga Prasad v. Raghubar Dial, (1882) A W N 244.

A. I. R. 1939 Patna 572

JAMES AND ROWLAND JJ.

Kishori Lal Marwari — Appellant.

v.

*Kumar Chandra Narain Deo, Plaintiff
and another, Defendant —*

Respondents.

Appeal No. 100 of 1938, Decided on 27th April 1939, from original order of Sub-Judge, Bhagalpur, D/. 19th March 1938.

(a) Court-fees — Valuation of suit — Decree alleged to be collusive and void—Suit restraining decree-holder from executing decree—Suit must be valued at amount of decree and court-fee paid on such amount.

In a suit for injunction restraining a decree-holder from executing his decree, on the ground that the decree is collusive and obtained by fraud and therefore void and incapable of execution, the plaintiff must value his suit according to the amount of decree and must pay ad valorem court-fee on such amount : *AIR 1920 Pat 656, Rel. on.*

[P 574 C 1]

(b) Pleadings—Allegations in plaint — Value of — Mortgage decree passed against adoptive mother as administratrix of her deceased husband — Suit by adopted son for restraining decree-holder from executing decree — Decree

1. Phul Kumari v. Ghanshyam Misra, (1908) 35 Cal 202=35 I A 22=12 C W N 169=7 C L J 86 (P C).

2. Munshi Mahton v. Lachman Lal, (1929) 16 A I R Pat 615=120 I C 765=10 P L T 545,

alleged to be collusive and void—Son held not precluded from maintaining suit — Allegations in plaint held not however sufficient to raise presumption of truth.

Proceedings of the Courts on their face are considered *prima facie* to be sound and not *prima facie* unsound and invalid, but the fact that an allegation is made in the plaint is not at all sufficient to establish a *prima facie* case of that allegation being true. [P 574 O 2]

Upon a mortgage executed by a deceased husband, a suit was filed against the widow in her capacity as administratrix representing the estate of her deceased husband. A compromise decree was passed against the estate. The pleader for the widow assured the Court that the decree had been admitted by the widow. Subsequently, the adopted son of the widow filed a suit against the decree-holder restraining the latter from executing the decree on the ground that the decree had been obtained by fraud and collusion and was not capable of execution :

Held that the adopted son was not precluded from maintaining that the proceedings taken by and suffered by his adoptive mother were collusive and invalid against him but the fact that he had made these allegations in the plaint was not by itself sufficient to raise a *prima facie* case that these allegations were true. [P 574 C 2]

Sir M. N. Mukherji and K. P. Sukul —
for Appellant.

Dr. Sultan Ahmad, Murari Prasad, A. P.
Upadhyaya and Govt. Pleader —
for Respondents.

Rowland J.—The order under appeal was an injunction issued at the instance of the plaintiff restraining defendant 1 from putting up to sale certain properties in execution of a mortgage decree obtained by him for the sale of those properties. The mortgage had been executed on 27th February 1911, in favour of the appellant for one lakh of rupees with interest by Thakur Pratap Narain Deo, the proprietor of the Lachmipore estate. This gentleman died on 23rd November 1913, childless and leaving several widows. By a will he appointed his senior widow, Thakurain Kusum Kumari to be administratrix of the estate and to have authority to adopt a son to him. She obtained a grant of Letters of Administration to the estate on 5th August 1915. The mortgage suit of the appellant was instituted on 25th April 1928, the claim being laid at Rs. 2,00,000 after remitting Rs. 15,000; and the defendant was the administratrix representing the estate. On 27th May 1928 the lady executed a compromise agreement under which the suit was to be decreed for Rs. 13,4,000 with future interest and costs. The agreement was filed in Court on 6th June 1928, but the lady resiled from it by a petition which she presented on 4th September 1929.

Later she reconsidered her position and on 25th January 1930, presented a petition withdrawing her petition of withdrawal.

Then on 28th February 1930 a final decree was passed in accordance with the compromise and it is this decree that defendant 1 as decree-holder seeks to execute. The lady on 2nd June 1930 reopened her challenge to the compromise by a fresh petition which was dismissed by the Subordinate Judge on 29th August 1931. Against that order she brought Miscellaneous Appeal No. 259 of 1931 before the High Court. Among the interlocutory proceedings in that appeal were an order of remand under O. 41, R. 25, dated 15th November 1934, by which the Subordinate Judge was directed to enquire into some alleged payments and to send a finding on that point; and also as to whether in view of S. 6 of the Santhal Parganas Regulations, the decretal amount was in excess of what was permissible under the *damdupat* rule. The finding of the Subordinate Judge was returned to the High Court on 17th April 1935, and was to the effect that legally the plaintiff's dues amounted to Rupees 1,23,680.10.5, whereas the compromise decree was for Rs. 1,38,804.0.9, this including Rs. 3,872.8.0 as costs. The decree-holder however challenged these findings asserting that the accounts presented by him were correct and the amount decreed was not in excess of that due. On 19th March 1937 Appeal No. 259 of 1931 was disposed of in this Court. It was noted :

The appellant does not now challenge the correctness of the judgment and decree of the Court below, but accepts the correctness of the decree passed by that Court.

It was ordered therefore that the appeal be dismissed. Thereafter the decree-holder took out execution and the lady objected under S. 47, Civil P. C., on grounds similar to those taken before. These objections were disallowed on 17th December 1937. Against that order the lady preferred Miscellaneous Appeal No. 18 of 1938 which was dismissed by this Court on 25th February 1938. The present suit is instituted by the plaintiff who is said to have been adopted on 28th February 1929 by Thakurain Kusum Kumari as a son to her deceased husband; and he attacks the decree of defendant 1 and seeks to restrain him from executing it against the properties of the estate. The suit was instituted on 14th February 1938. Before its institution, the plaintiff had on 9th December 1937, moved

the High Court under S. 301, Succession Act, to remove Thakurain Kusum Kumari from her position as administratrix. A formal petition of objection was presented by the lady, but the Court passed an order discharging the lady and directing her to make over the property to the plaintiff. It was observed in that order that the lady was representing the estate hitherto in the capacity of administratrix and not in any other capacity. She had claimed that under the will she was the sole owner of the estate so long as she lived and the estate would not vest in the son till after her death. This was negatived.

The suit has been instituted on a valuation of Rs. 10,000 with the prayer that defendant 1 be restrained by a permanent injunction from executing the decree, the decree was said to be void and incapable of execution, obtained by fraud and collusion. A prayer for interim injunction restraining execution of defendant 1's decree was made and this prayer was allowed by the Subordinate Judge in face of objection by defendant 1. The objections pressed in this Court are three: first, it is said that the suit cannot proceed on a valuation of Rs. 10,000 when the decree has amounted to over two lakhs; secondly, it is said that practically all the objections taken by the plaintiff against the validity of the decree were taken by his adoptive mother and had failed, and it is said that these objections are no longer open to the plaintiff; thirdly, it is said that on the balance of convenience the defendants ought rather to be allowed to execute his decree than the plaintiff to delay its execution. On the first point, the defendant's contention appears to be right. The position is covered by the authority in 4 Pat L J 703.¹ The plaintiff must be required to value his suit according to the amount of the decree which he seeks to avoid; and he must pay the court-fee ad valorem on this amount before he can be permitted to proceed further with the suit. The amount appears in the papers before us to be stated as Rs. 2,06,368-2-3.

On the second point the appellant contends that Thakurain Kusum Kumari as administratrix was the sole and proper person to represent the estate in all litigation and in all transactions up to the date of her removal from that position by the order of this Court on 9th December 1937.

Any decree obtained against her before that date therefore binds the estate. Prima facie that argument would appear to be in accordance with law. But the plaintiff retorts that acts of the administratrix in order to be binding on him must have been done in the bona fide exercise of her powers and within their limits, whereas the compromise decree which she suffered to be passed against the estate was collusive and fraudulent and therefore in no way binding on him. It was beyond her powers in a compromise to suffer a decree for more than was legally payable on the mortgage. A reference in this connexion was made to the finding of the Subordinate Judge dated 17th April 1935. No doubt, it is the plaintiff's case that the compromise is collusive and invalid; but it is to be noted that the Subordinate Judge on 29th August 1931, had found the compromise to be a good one and had rejected the lady's attack on it in a decision on the merits. The appeal from this decision was eventually dismissed by this Court on 19th March 1937, the Judges being assured by the advocate that the correctness of the decree of the Court below was now admitted by the appellant. It will not be presumed that the advocates or the parties were acting corruptly or against the interest of the estate, though of course it will be open to the plaintiff to establish any such thing if he is in a position to do so. The fact that an allegation is made in the plaint is not at all sufficient to establish a prima facie case of that allegation being true. Proceedings of the Courts on their face are considered prima facie to be sound and not prima facie unsound and invalid. My view therefore on the second ground is that whereas the plaintiff is not precluded from maintaining the suit to show that the proceedings taken and suffered by his adoptive mother were collusive and invalid against him, the fact that he has made these allegations in the plaint is not in itself sufficient to raise a prima facie case that these allegations are true.

The third ground to be seen is the balance of convenience and in this case it is to be noticed that the original mortgage which was created by the last full owner of the estate himself, was dated as far back as February 1911; that the suit to enforce the mortgage was commenced on 25th April 1928, more than 11 years ago, and that the execution has now been pending for about two years. I am of opinion that the balance of convenience in the circumstances of this

1. *Brij Krishna Das v. Chowdhury Murli Rai*, (1920) 7 A I R Pat 656=56 I O 316 = 4 Pat L J 703.

case is in favour of permitting the execution to proceed. I would allow the appeal with costs and discharge the injunction. The plaintiff-respondent undertakes to make good the deficit court-fee in the Court of the Subordinate Judge within two months from this date. Should the execution proceedings result in any change in the circumstances or position of the parties, it will be open to the plaintiff to apply to the Subordinate Judge for necessary amendment of the plaint as occasion may arise.

James J.—I agree.

N.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 575

MOHAMAD NOOR AND ROWLAND JJ.

Ajab Narain Singh

Accused — Appellant

v.

Emperor.

Criminal Appeal No. 124 of 1938, Decided on 22nd August 1938, from decision of Sess. Judge, Saran, Chapra, D/- 1.6.1938.

Penal Code (1860), Ss. 96, 100 and 103—Accused's brother lessee of island within certain river—Party of Ahirs going there cutting grass and when returning pursued by accused party trying to get bundles back—Ahirs resisting and assaulting accused party—Two of accused party receiving grievous hurt—Accused party returning to their boat—Assault by Ahirs continuing—Accused firing at them with shotgun causing death of one—His act held came within exception in S. 96.

Accused's brother was a lessee of an island within a river. A number of Ahirs had gone to this island, had cut a quantity of grass and were returning to their village in a boat. The accused party went in their own boat in pursuit and tried to seize the bundles of grass. The Ahirs resisted and party of accused failed to recover the bundles. They were driven off and two of them received injuries amounting to grievous hurt. The accused party took to their boat. The Ahirs followed them and assault by them on the party of the accused had not ceased but continued in the form of pelting with brickbats and was likely to assume the form of physical seizure of the boat and further attack with lathis. During this time, the accused fired at the Ahirs causing death of one of them:

Held that the right of private defence did not cease to be available to the accused up to and including the time when he fired the three shots. His action was done in exercise of the right of private defence and was within the general exception in S. 96. On that finding and in view of the fact that injuries on two of the accused party were grievous, there was a right of private defence of property which under S. 103 might extend to the causing of death to the wrong-doers, the offence being not merely theft but robbery within the definition of S. 390 because the offenders in carrying away property obtained by theft for that end had voluntarily caused hurt. There was likewise a right of private defence of the person which

under Sec. 100 might extend to the voluntary causing of death the assault being such as might reasonably cause the apprehension that death or grievous hurt would otherwise be the consequence of such assault. [P 576 C 1, 2]

Nageshwar Prasad and R. J. Bahadur —
— *for Appellant.*

Asst. Govt. Advocate — *for the Crown.*

Rowland J.—In this case fourteen persons were put on their trial on charges of murder, riot and other offences before the Sessions Judge of Saran with four assessors. All the assessors were of opinion that all the accused were not guilty and should be acquitted. Thirteen of the accused were acquitted but one only Ajab Narain Singh has been convicted under Ss. 304 and 326, I. P. C., and is the appellant before us.

It has been found by the Sessions Judge that the appellant's brother Shivanandan Singh is a lessee of an island called Jazira No. 36 which is a Government estate in Ballia District within the river Sarju, otherwise known as Gogra. The island produces a sort of thatching grass called kusaila. A number of Ahirs of Semaria had gone with a boat or boats to this island, had cut a quantity of the kusaila and were taking it back to their village which is on the north bank of the river Sarju and is in Saran District. The accused party came in their own boat in pursuit and tried to seize the bundles of grass. The Ahirs resisted and were reinforced by others from Semaria village which is inhabited by about two thousand houses of that caste. The party of the accused failed to recover the bundles. They were driven off and six of their number received injuries those on two persons amounting to grievous hurt. The accused party took to their boat from which shots were fired with a shotgun taking effect on three persons Dipa, Bilas and Ratan of the party of the Ahirs. The injuries on Dipa, though 116 pellets are said to have hit him, amounted only to simple hurt; Bilas was struck by 14 pellets but among the injuries was one amounting to grievous hurt. Ratan received injuries to which he succumbed.

The trial as usual in such cases was embarrassed by neither side making an altogether candid disclosure of the facts. The prosecution witnesses manifestly were out to exaggerate and make the most of the case against the accused and in particular were interested to maintain that they had rights in the kusaila grass. They were interested to conceal or minimize acts of

violence done by their own party such as might afford justification or extenuation for the firing by the accused's side. On the accused's side it must have been well enough known to the whole of the accused party who fired the shots from the gun; but this has not been disclosed. Ajab Narain, who, according to all the direct evidence, himself fired the gun, had stated that after firing one blank shot in the air, he dropped the gun and some other person may have taken it up and fired it. He had however on the same day sent a telegram to the District Magistrate at Chapra in which he said: "I had to open firing in self defence." The Sessions Judge has found on the evidence that the gun was fired by the Appellant Ajab Narain, and there is no doubt that the evidence fully supports this finding.

In appeal Mr. Nageshwar Prasad could not seriously press his objections against it and was more concerned to maintain that on the facts found the Sessions Judge should have acquitted this appellant on the ground that whatever he did was within the right of private defence both of person and of property. The learned Judge in a somewhat lengthy and undoubtedly careful judgment has disclosed the difficulty that he felt in coming to a conclusion on this point. Examining the matter with reference to the several stages of the occurrence, he has held that the diara men (i. e., accused's party) would have been too late to save their property had they waited to have recourse to the protection of the public authorities.

It seems to be therefore his view that the diara men had a right of private defence of property which entitled them to use all necessary force for the purpose of recovering the grass bundles from the Ahirs in the small boat. As to the lathi fight that then followed, he has pointed out that six persons of the accused party received injuries and three on the Semaria side received very trivial injuries. On that finding and in view of the fact that injuries on two of the accused party were grievous, there was a right of private defence of property which under S. 103, I. P. C., might extend to the causing of death to the wrong-doers the offence being not merely theft but robbery within the definition in S. 390 because the offenders in carrying away property obtained by theft for that end had voluntarily caused hurt. There was likewise a right of private defence of the person which under S. 100, I. P. C., might extend to the voluntary causing of death, the assault being

such as might reasonably cause the apprehension that death or grievous hurt would otherwise be the consequence of such assault. When grievous hurt to two persons was actually caused, it cannot be disputed that grievous hurt was to be apprehended. But the prosecution witnesses in their evidence have set up allegations tending to show that the firing by Ajab Narain was not done in the course of a free fight which was continuing right up to the time of the firing, but that the rioting on the part of the Ahirs had ceased and the accused party had retired to the safety of their boat and were not being further molested or in danger of molestation when Ajab Narain, perhaps for revenge, fired on the Ahirs. The majority of the witnesses examined for the prosecution are of the Ahir caste, and this itself raises some presumption of their being not impartial witnesses, a presumption which is by no means dispelled by a perusal of the tenor of their depositions.

There is no defence evidence and the argument for the appellant rests in the main on admissions made by one or other of the prosecution witnesses at earlier stages of the investigation and commitment inquiry. The Sessions Judge applied himself to the question whether the boat of the accused was still in danger, but he seems to have found a difficulty in making up his mind. At one place he says:

It is clear that the boat had not gone into deep water and was not beyond the reach of the Ahirs who were standing in the water

and he refers to the evidence of Deyali Ahir (P. W. 9) as showing that the distance from which firing was opened could not have been more than twenty-five feet. Elsewhere however he expressed himself as not convinced that the Ahirs were within striking distance of the boat. He also expressed a doubt whether there had been throwing of brickbats. That the Ahirs were so near the boat as to be able to strike with lathis, is not, I think, the case even of the accused whose argument here has been that the Ahirs were advancing towards the boat and that if Ajab Narain waited till they were so near as that, it would have been too late. If the accused can establish that much, the right of private defence must be conceded. Now, it appears in the evidence before the committing Magistrate of Sheopujan Pathak (P. W. 45) that about ten of the Ahirs had gone knee-deep in the water, seven or eight of them

being armed with lathis and that those chairs might have gone into the water to catch the men in the boat with whom they had a quarrel. Sheopujan resiles from this in Court, but what he has said in the commitment proceedings is evidence.

As regards statements by other witnesses in the main, the defence has to rely on admissions to the Sub-Inspector; Mahesh Singh (P. W. 44) told the Sub-Inspector that the fat man (Ratan) was advancing towards the boat with a lathi. This witness has also admitted that he saw brickbats being thrown at the boat by persons on the bank. If that is so, assault on the accused party was in fact continuing right up to the moment of the firing of the gun. Similarly, Abdul Aziz (P. W. 18) when asked by the police what the injured men were doing, has said that they were running towards the boat of those men in water. Bilas, son of Khobari, who is one of the injured men, said that the Semaria men had rushed into the water to assault the diara people; and Sundar Ahir had told the Sub-Inspector that Ratan and other injured persons had gone into knee-deep water to assault the accused persons. Dipa, another injured person, had said that Ratan, Bilas and himself had gone ahead in the water to assault the accused. Dipa had also said that brickbats were thrown. There are other similar admissions by other witnesses to the Sub-Inspector, but it is not necessary, I think, to make an exhaustive list of them. I think these admissions, taken with the circumstances, are sufficient to establish that in fact the assault by the Ahirs on the party of the accused had not ceased. It was apparently continuing in form of pelting with brickbats and was likely to assume the form of physical seizure of the boat and further attack with lathis. That being so, I think that the right of private defence did not cease to be available to Ajab Narain up to and including the time when he fired the three shots.

It is suggested for the prosecution that assuming the right of private defence might have been extended to firing one shot, the accused should not have continued firing when perhaps one shot might have been sufficient. It is impossible to say that one shot or two shots would have been sufficient to drive off the mob. The injuries on Dipa and Bilas are all in the region between the right hand and the right shoulder and the neck, and the doctor has said that such injuries might have been received

from a gunshot if the person injured had been holding up his arm to throw a brickbat. As regards Ratan, the point is not quite so simple, for his injuries appear to have come not from front but from behind, the left buttock being apparently the central point. Had Ratan been the only assailant or possible assailant, one might infer from this that he had turned back on seeing the injury on Bilas or Dipa and that there was no further excuse for firing on him. But he was a member and a leading member of the mob which might still have been advancing, and I am not, in the circumstances, prepared to hold that the right of private defence was exceeded in firing on Ratan. In my opinion, the appellant ought to be acquitted on the ground that his action was done in exercise of the right of private defence and is within the general exception in S. 96, I. P. C. I would allow the appeal and acquit the appellant.

Mohamad Noor J.—I agree.

D.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 577

VARMA AND ROWLAND JJ.

Emperor

v.

Mayadhar Pothal — Accused.

Death Ref. No. 1 and Criminal Appeal No. 1 of 1939, Decided on 16th March 1939, made by Sess. Judge, Cuttack, in his letter D/- 17th January 1939.

(a) Criminal P. C. (1898), S. 162—Statement by accused in circumstances provided for by S. 27, Evidence Act, is admissible even if made to police officer during investigation.

Statements made to a police officer by accused in the circumstances provided for by Sec. 27, Evidence Act, are admissible in evidence notwithstanding that they might have been made to an investigating officer during the progress of an investigation: *A I R 1928 Mad 1028 and A I R 1939 Mad 391 (F B), Rel. on.* [P 579 C 1]

(b) Criminal P. C. (1898), S. 235—Evidence to prove one offence identical with that by which other is to be established — Acts can be regarded as one transaction.

The test for applying Sec. 235 is to see whether the acts alleged form a series that can be regarded as one transaction. It is difficult to see how this question can be answered in the negative when the evidence to prove the one offence, is identical with that by which the other is to be established.

[P 579 C 2]

(c) Evidence Act (1872), S. 114 — Robbery committed along with murder—Stolen articles discovered with accused as result of statement made by him to police — Possession not explained by accused — Question whether presumption of graver offence or of lesser offence should be drawn — It is for prosecution to establish graver presumption.

Where robbery has been committed along with murder and articles alleged to have been robbed from the body of the deceased have been discovered in the house of the accused as a result of a statement made by him to the police and the accused gives no explanation for the possession of these articles, one may presume under S. 114 that the accused was either involved in the murder and robbery or at least received the stolen property knowing it to be the proceeds of the robbery. This presumption is within the terms of Sec. 114, illustration (a); but when the question arises whether the presumption of the graver offence or of the lesser offence is to be drawn, it is for the prosecution to establish the graver presumption rather than for the graver presumption to be drawn in the absence of an explanation from the accused.

[P 580 C 1]

(d) Criminal Trial — Index — Notes in index embodying statements regarding things said to have happened at various points — It is not proper to put them before jury.

The notes in the index embodying statements regarding things said to have happened at the various points referred to are not properly to be put before the jury and where the index contains such objectionable material, the better course is to have a fresh index prepared with the objectionable material eliminated : *A I R 1936 Pat 11, Ref.*

[P 580 C 2]

Public Prosecutor of Orissa —

for the Crown.

Muralidhar Mahanty — *for Accused.*

Rowland J.—This is a reference by the Sessions Judge of Cuttack under S. 374, Criminal P. C., for confirmation of the sentence of death passed by him on Mayadhar Pothal who has been convicted under Sec. 302, Penal Code, on a charge of the murder of an old woman named Fula Bewa who used to live alone in her house in Krishnaraipur. The murder is said to have been committed on the night of 21st October 1938, in the angan of the deceased. There is a chula or a raised hearth with a hole in the top. The body was found on the morning of 22nd October 1938, with the head thrust into the mouth of the chula. Death had been caused by a number of incised wounds on the back of the neck and the back. The lobes of the ears had been cut by some cutting instrument and the ear-rings removed from them. Robbery is naturally the motive ascribed. There is evidence of several neighbours that the deceased used to wear two pairs of gold ear-rings.

There is no eyewitness and the case against the accused rests entirely on circumstantial evidence consisting in the recovery from his house of certain suspicious articles on a statement made by him to the Investigating Sub-Inspector; the recovery of a weapon proved to be blood-stained,

from the house of his neighbour Danai or Danadar Khatua as a result of a statement made by this accused and the finding of some marks of injury on the person of the accused which suggest that he may have taken part in some sort of a struggle at about the time of the crime. As to the statement made by the accused and leading to the recovery of the articles we have it only in a fragmentary form. P. W. 12, Mayadhar Jena, one of the search witnesses, says: "The accused told the Sub-Inspector of Police, that he had got the ear-rings of the deceased." Sub-Inspector Narayan Prasad Prija says that accused told the witness that he had got the ear-rings of the deceased hidden in his thatch. The note as to accused's statement made in the search list Ex. 5 is :

Mayadhar Pothal having produced the ear-rings from the bundles of straw of the lowest layer of the thatch of his house over the eaves four rafters from the corner beam towards his bari (garden) side to the south saying that Janardan Khatua of Krishnaraipur after killing Fula Bewa had handed them over to be kept, they were seized.

If it was intended to admit under S. 27, Evidence Act, the statement made by the accused regarding these ear-rings, the correct course was to use "so much of the information as relates distinctly to the fact thereby discovered" and no less. The question arises whether a proper reading of S. 162, Criminal P. C., prohibits the use of a statement made by an accused person to a police officer in the course of an investigation when it is made under the special circumstances provided for in Sec. 27, Evidence Act. It has recently been laid down by their Lordships of the Judicial Committee of the Privy Council in *A I R 1939 P C 47*,¹ that S. 162 is not confined to statements made to the police by witnesses but applies equally to statements made by accused persons; but their Lordships expressly abstained from deciding the question whether a statement followed by a discovery of fact such as is contemplated by Sec. 27 is rendered inadmissible or still remains admissible on the ground that S. 27, Evidence Act, is a special law within the meaning of Sec. 1 (2), Criminal P. C., and is not specifically repealed by S. 162. Undoubtedly it has long been an unquestioned practice in all the High Courts that statements made to a police officer in the circumstances provided for by S. 27, Evi-

1. *Pakala Narayan Swami v. Emperor*, (1939) 26 *A I R P C 47*=180 *I C 1*=18 *Pat 234*=1 *L R* (1939) *Kar 123* (P C).

dence Act, have been treated as admissible in evidence notwithstanding that they may have been made to an investigating officer during the progress of an investigation. And in 55 Mad 903² Reilly, J. has adopted the line of reasoning by which in 51 Mad 967³ S. 27, Evidence Act, and S. 162, Criminal P. C., were both given effect to, S. 162 having effect in every case except those to which Sec. 27 applies by way of exception or proviso.

In the absence of a definite pronouncement of the Judicial Committee to the contrary, I think it is permissible to follow that reasoning and to admit proof of a statement made by an accused person to an investigating officer in the special circumstances provided for in Sec. 27, Evidence Act. Three ear-rings, said to be the property of the deceased, were recovered in consequence of this statement of the accused and they have been identified as the property of the deceased by P. W. 2, Surji Dibya, P. W. 4, Bela Dei, P. W. 5, Bhaban Bewa, the above three being neighbours of the deceased woman and P. W. 6, Lakhi Das, the deceased's nephew. As against the reliability of the identification by Bhaban Bewa, it is pointed out that in the Committing Magistrate's Court she said that during the police investigation she had failed to identify the ear-rings. For the purpose of this case, I shall assume the articles to have been correctly identified as the property of Fula Bewa, but this is not to be regarded as a definite finding because that very point will be for the Sessions Court to determine in the subsequent trial of the appellant on the charges connected with the property. This reservation is necessary in consequence of the procedure followed by the Sessions Judge at the outset of the trial.

The case had been committed for trial in his Court on charges under Ss. 302, 392 and 411, I. P. C. It was the case of the prosecution that the murder of the deceased and the robbery were parts of one transaction and were simultaneously done and that the alleged stolen property found in the possession of the accused was property stolen in that very robbery done at the time

of the murder, but the learned Judge tried the charge under S. 302 only. In the circumstances stated, there was ample authority in S. 235 and the succeeding Sections of the Criminal Procedure Code for the trial of the accused, at one trial for all the offences with which he was charged. The reason given in the order sheet for not trying all the charges together is that "the *corpus delicti* in each case is not the same." I do not find *corpus delicti* in any part of the Code of Criminal Procedure and the course of criminal trials in India is to be governed by the provisions of the Indian statute and not by a criterion derived from the law of some other country. The test for applying S. 235 is to see whether the acts alleged form a series that can be regarded as one transaction and it is difficult to see how this question can be answered in the negative when the evidence to prove the one offence is identical with that by which the other is to be established. The procedure followed in taking up one charge only has the result that we are unable to deal with the whole case, and the inconvenience of holding two trials instead of one on the same evidence will be obvious to the learned Judge. In addition to the recovery from his house of the ear-rings, there is the further statement made by the accused and recovery in consequence of it of a katari in the house of Donai. As to this statement, we have it from P. W. 12, Mayadhar Jena that accused pointed out the katari in the house as having been used by Donai for the murder. The Sub-Inspector only says: "The accused took us to the house of Donai and pointed out the katari." The Sessions Judge appears to think that the recovery of these articles directly connects the accused with the crime, he having at the trial given no explanation or a false explanation about them.

Now the prosecution in order to establish a charge of murder has to prove that the accused is something more than a receiver of stolen property and so much of the evidence as I have thus far set out would appear to be equally consistent with his being a murderer or a receiver; and the position is the same whether the statements by Mayadhar to the Sub-Inspector regarding the articles found are taken into consideration or are excluded. If they are excluded, there is this to be noted, that accused is a goldsmith, and experience suggests that the nearest goldsmith is a person likely to be resorted to by a thief for the disposal of

2. Emperor v. Syama Mahapatro, (1932) 19 A I R Mad 391 = 1932 Cr O 355 = 137 I C 9 = 38 Cr L J 418 = 55 Mad 903 = 62 M L J 742 (F B).

8. Ohinna Thimmappa v. Talu Kunto Thimmappa, (1928) 15 A I R Mad 1028 = 112 I C 682 = 29 Cr L J 1098 = 51 Mad 967 = 55 M L J 351 (F B).

stolen jewels. No doubt it has been held in 13 Mad 426⁴ that when persons have been tried at one trial for robbery and murder possession of recently stolen property, if unexplained, such as would be presumptive evidence against the prisoners on the charge of robbery, was similarly admissible in evidence against them on the charge of murder. And in this Court in 19 P L T 801⁵ it is observed by Khaja Mohamad Noor, J., that one may presume under S. 114, Evidence Act, that the accused was either involved in the murder and robbery or at least received the stolen property knowing it to be the proceeds of the robbery. This presumption is within the terms of Sec. 114, Illustration (a); but when the question arises whether the presumption of the graver offence or of the lesser offence is to be drawn, it is for the prosecution to establish the graver presumption rather than for the graver presumption to be drawn in the absence of an explanation from the accused. So we have to see what further material there is to show that the accused was not merely a receiver of stolen property but was himself the murderer or actively concerned in the murder. The materials relied on are first, the finding of a sack at his house which contained a katari and a blood-stained rag. The katari had no blood stains on it. The stains on the rag may have had some other origin and as to the sack the accused says it is not his and has said in his statement before the Magistrate that it has the name of Jagabandhu written on it. No question was asked of any witness as to whether this is so and the Sessions Judge has not made any note as to whether any such name was found on the sack. The sack itself has not been sent to this Court and we are unable to say whether it has Jagabandhu's name on it. There seems to be room for doubt whether the sack is the property of the accused or not.

Then there are the injury marks found on the person of the accused which are consistent with his having taken part in some sort of scuffle at about the time of the alleged occurrence. The accused had an incised wound on the right thumb, two incised scratch marks on the left cheek and four scratch marks on the right hand besides some older marks. It is pointed out

in argument that he could have received this cut in the course of his occupation as a goldsmith and the other injuries could have been caused in many ways. There is also the fact that accused's lantern was found broken. It was for the prosecution to show circumstances which could not be explained on any view consistent with the innocence of the accused; and in my opinion what has been found, while sufficient to give rise to very grave suspicion, is not (whether we regard the pieces of evidence individually or collectively) sufficient conclusively to demonstrate the guilt of the accused on the charge of murder.

Before leaving the case, I may refer to the map and index. The notes in the index embody statements regarding things said to have happened at the various points referred to. Such notes are not properly to be put before the jury and where the index contains such objectionable material the better course is to have a fresh index prepared with the objectionable material eliminated. In the present index the entries against F. G. H. I. and J. should be substituted by entries free from objectionable matter. The learned Judge may for guidance in such matters refer to 16 P L T 730⁶ and the cases there cited.

In the result, I would accept the unanimous opinion of the assessors and set aside the decision of the learned Sessions Judge. I would discharge the reference and acquit the accused of the charge of murder. The Sessions Judge will take the necessary steps for his trial on the other charges which were framed against him.

Varma J.—I entirely agree.

D.S./R.K.

Order accordingly.

6. Emperor v. Lalji Rai, (1936) 23 A I R Pat 11 = 1936 Cr C 6 = 160 I C 181 = 36 Cr L J 235 = 16 P L T 730.

A. I. R. 1939 Patna 580

MOHAMAD NOOR AND DHAVLE JJ.

Baraboni Coal Concern Ltd. —

Appellant.

v.

Ram Chandra Marwari — Respondent.

Appeals Nos. 211 and 232 and Civil Revn. No. 606 of 1936, Decided on 20th January 1939, from order of Addl. Sub. Judge, Dhanbad, D/- 14th July 1936.

(a) Legal Practitioner — Admission by, on point of law is not binding on party but decree on basis of the admission is binding unless set aside.

4. Queen-Empress v. Sami, (1890) 13 Mad 426 = 1 Weir 290.

5. Emperor v. Sadasibo Majhi, (1939) 26 AIR Pat 35 = 178 I C 180 = 39 Cr L J 997 = 18 Pat 82 = 19 P L T 801.

An admission by an advocate on point of law is not binding upon a party, but if on the basis of such admission a decree is passed, the decree is binding unless it is set aside under the procedure prescribed by law. [P 583 C 1]

(b) Civil P. C. (1908), O. 41, Rr. 23 and 25 — Remand — Matters finally decided by order of remand while remanding case cannot be reopened afterwads when case comes back from lower Court.

If a Bench remands a case to the lower Court either under O. 41, R. 23 or under O. 41, R. 25 or under the inherent powers of the Court, the matters finally disposed of by the order of remand cannot be reopened when the case comes back from the lower Court; but if at the time of remand, no final decision is given on a point though some observations only are made in respect of it, it is open to another Bench when finally determining the case to come to its own conclusions on it. [P 583 C 2]

Objector to attachment, a company, which was respondent in a miscellaneous appeal before a Bench of the High Court admitted that if the assets of the judgment-debtor company which passed in their hands on amalgamation of both companies were not accounted for by them they would be personally liable to satisfy the decree. The Bench remanded the case for inquiry into the matter to lower Court which found that the assets were not accounted for and consequently the objection was rejected and the case again came before another Bench of the High Court :

Held that the order of remand finally determined the question of liability to account and it could not be reopened: *AIR 1923 Pat 226, Rel. on.* [P 583 C 2]

(c) Civil P. C. (1908), S. 52—Scope of—S. 52 is applicable to a case of company taking assets and liabilities of another company under liquidation on the ground of justice, equity and good conscience.

Section 52 (2) simply enacts a rule of procedure in accordance with natural justice; and even in the absence of that Section (and of any provision of law to the contrary) Courts would be justified in applying the principle embodied in it as a rule of justice, equity and good conscience to a case where, for the liabilities of a company under liquidation, a decree is passed against another company which on amalgamation had taken the assets and liabilities of the former, and the liability is expressed in the form adopted in decrees against legal representatives of deceased persons; because for all intents and purposes the latter company is the representative in interest of the former : *AIR 1931 All 806 and AIR 1935 Cal 713, Disting.* [P 584 C1; P 586 C 2]

Sir M. N. Mukharji (in Nos. 211, 232 and 606), N. N. Roy (in Nos. 211 and 232 and K. N. Moitra (in No. 606)
— for Appellant.

S. M. Mullick, Bhubaneshwar Prasad Sinha, J. M. Ghosh and K. K. Sinha
— for Respondent.

J. M. Ghosh (in No. 606)—for Opposite Party.

Judgment. — These two miscellaneous appeals and the civil revision application arise out of two applications for the execution of a decree obtained by the respondent,

Ramchandra Marwari, against the appellant, the Baraboni Coal Concern Ltd. One Economic Coal Co. Ltd., (now defunct) worked among others a colliery called Ganeshpur. Half of this coalfield belonged to the respondent-decree-holder and the other half to one Mr. Forbes. The latter sub-leased his half to the Economic Coal Co. Ltd., and the former entered into a partnership with that company in respect of the other half, and thus the company worked the whole of the Ganeshpur coalfield. This company went into voluntary liquidation, and the liquidator amalgamated it with the Baraboni Coal Concern Ltd., with effect from 1st April 1926. (The effect of this amalgamation will be dealt with later.) The decree-holder, Ramchandra Marwari, instituted a suit, No. 54 of 1927, against the Economic Coal Co. Ltd., the Baraboni Coal Concern Ltd., and others for dissolution of the partnership and accounts. The suit was decreed and the amount due to the plaintiff was ascertained at a sum of over Rs. 88,000. The order portion of the decree runs thus :

For the amount that would be found due to the plaintiff on rendition of account defendants 1 and 2 (that is the Economic Coal Co. Ltd., and the Baraboni Coal Concern Ltd.,) would be liable to the extent of the assets of the Economic Coal Co. in their hands.

This is the decree under execution. In one of the two executions the decree-holder attached a decree obtained by (1) the Baraboni Coal Concern Ltd., (2) Chandanmal Indra Kumar, the petitioner in the civil revision application, and another, in Suit No. 66 of 1930, against the proprietor of one C. M. & Co. for an encroachment by the latter on the coal lands of the Phularitand Coal Co. Ltd., which company among others had also been amalgamated with the Baraboni Coal Concern Ltd. Two objections were preferred against this attachment. One was by the Baraboni Coal Concern Ltd., and was to the effect that the decree which was attached was not a part of the assets of the Economic Coal Co. Ltd. but was the property of the Phularitand Coal Co. Ltd. and was not therefore attachable in execution of the decree of the decree-holder-respondent. The second was a claim under O. 21, R. 58, Civil P. C., made by Chandanmal Indra Kumar, who alleged that he was also a decree-holder of the attached decree and that as he was under no liability to pay the decree of the respondent, Ramchandra Marwari, the decree could not be attached. The objection and the claim were allowed by the learned Subordinate Judge. The decree-holder preferred an appeal and

a civil revision application to this Court (Miscellaneous Appeal No. 107 of 1934 and Civil Revision No. 450 of 1934). These were heard by a Division Bench (Agarwala and Varma, JJ.) before which it was admitted on behalf of the Baraboni Coal Concern Ltd., a respondent in the miscellaneous appeal, that

if they are unable to account for any part of the assets of the Economic Coal Co. Ltd., which passed into their hands at the amalgamation, they are personally liable to satisfy the decree.

It was however contended on their behalf that this could be effected only after the appellant-decree-holder had first proceeded against the assets of Economic Coal Co. Ltd. The Court held that for the purpose of determining whether the right, title and interest of the Baraboni Coal Concern Ltd. in the decree was liable to attachment, it was necessary to ascertain whether they had accounted for the assets of the Economic Coal Co. Ltd. which passed into their hands at the amalgamation. The cases were therefore remanded and the Court below directed to institute an enquiry on the lines indicated above, and the miscellaneous appeal and the civil revision application were allowed on these terms. In pursuance of the aforesaid order of remand, the Court below has instituted an enquiry and found that the Baraboni Coal Concern has failed to account for the assets of the Economic Coal Co. Ltd. which came into their hands. It has accordingly allowed the attachment to stand, and Miscellaneous Appeal No. 211 of 1936 is directed against this order. The lower Court has also disallowed the claim of Chandanmal Indra Kumar as to his being a part holder of the decree against C. M. & Co. and Civil Revision Application No. 606 of 1936 is directed against this order.

In the meantime, after the objection of the Baraboni Coal Concern Ltd., and the claim of Chandanmal Indra Kumar were allowed, the decree-holder-respondent took out another execution of his decree. In this execution he attached another decree — a decree for costs in favour of the Baraboni Coal Concern obtained on the Original Side of the Calcutta High Court against Sri Gopinathji Thakur, amounting to about Rs. 10,000. To this also, the Baraboni Coal Concern raised the same objection, namely that the decree attached was their personal property and was no part of the assets of the Economic Coal Co. Ltd. This objection was heard along with the cases remanded

by the High Court, and with a similar result, namely that the Court held that though the decree attached was the personal property of the Baraboni Coal Concern, this party had not accounted for the assets of the Economic Coal Co. which came into their hands and were therefore personally liable to satisfy the decree of Ramchandra Marwari. Miscellaneous Appeal No. 232 of 1936 is directed against this order.

Sir Manmatha Nath Mukharji who appears on behalf of the appellant company — the Baraboni Coal Concern — has attacked the order of the Court below on the following grounds : (1) The decree under execution, on a proper construction, only means that it was executable against such specific properties of the Economic Coal Co. as might be found in the hands of the Baraboni Coal Concern, and that there is no obligation on the latter to account for the assets of the defunct Economic Coal Co. It was contended that the Court below was wrong in applying the principle of S. 52, Civil P. C., to the present case, as the Economic Coal Co. was not a deceased person within the meaning of the Section nor the Baraboni Coal Co., its legal representative. (2) The reasoning of the learned Subordinate Judge in holding that the Baraboni Coal Concern had failed duly to account for the assets of the Economic Coal Co. is wrong. The learned advocate urged that the appellant had duly accounted for all the assets that came into their hands, and that as regards various items in the accounts dealt with by the learned Subordinate Judge, his conclusions were based upon wrong premises.

Mr. S. M. Mullick, who appears on behalf of the decree-holder-respondent, has, on the other hand, contended that the Baraboni Coal Concern was accountable and that this matter was concluded by the order of remand of this Court and could not be reopened. He supported the main findings of the learned Subordinate Judge as to the value of the assets of the Economic Coal Co. which were not duly accounted for by the Baraboni Coal Concern, Ltd. He also urged that the decree under execution, so far at any rate as it relates to costs, is a personal decree against the Baraboni Coal Concern Ltd., and that to that extent the Baraboni Coal Concern are personally liable in any event. It may be mentioned here that the decree obtained by the Baraboni Coal Concern and others against the proprietors of C. M. and Co., which was attached in the earlier execution case, no longer

subsists. It has on appeal been set aside by this Court, and an appeal against the decree of this Court is pending before the Privy Council. The attachment is therefore notional, and will be of no value unless the decree of the trial Court is restored with or without modification by the Privy Council. Let us now consider the points raised by Sir Manmatha Nath Mukharji on behalf of the appellants in the order in which they have been stated.

The first question to be considered is whether it is open to the appellants to take up the position that under the terms of the decree under execution they are not liable to account for the assets of the Economic Coal Co. which came into their hands and that they are not personally liable to satisfy the decree even to the extent of assets not accounted for. In other words, the question is whether the only remedy of the decree-holder-respondent is to attach such actual assets of the Economic Coal Co. as may be found in the hands of the appellants. We have already stated that it was admitted before Agarwala and Varma, JJ., that the Baraboni Coal Concern were personally liable in case they failed to account for the assets of the Economic Coal Co. The learned advocate for the appellants, however, contended that this was a wrong admission by the advocate who then appeared for his clients, that being an admission on a point of law, only his clients were not bound by it, and that he was entitled to question it before us. Now, it is true that an admission by an advocate on a point of law is not binding upon a party, but if on the basis of such an admission a decree has been passed, the decree is binding upon the party unless it is set aside under the procedure prescribed by law. In other words, even though an admission may not be binding, a decision on the basis of that admission will bind the party. Sir Manmatha Nath Mukharji, however, contended that the order of remand did not finally determine the question of the liability to account and did not finally decide that on failure to account for the assets, the appellant Company would be personally liable for the decree under execution. He placed before us a number of authorities, some of which are at first sight not reconcilable. We do not propose to examine them in detail, but consider it sufficient to refer to a decision of this Court, 4 P L T 35,¹ in which it was held that

when one Bench set aside the decision of the lower Court and remanded the case after laying down the law to be followed, the decision of the Bench on the point of law is final and another Bench, a Court of co-ordinate jurisdiction, cannot go behind it in appeal against the decision passed after remand. The authorities on the whole establish the proposition that if a Bench remands a case to the lower Court either under O. 41, R. 23 or under O. 41, R. 25 or under the inherent powers of the Court (the remand in this case comes neither under R. 23 nor under R. 25), the matters finally disposed of by the order of remand cannot, any of them, be reopened when the case comes back from the lower Court, but if at the time of remand no final decision is given on a point though some observations only are made in respect of it, it is open to another Bench when finally determining the case to come to its own conclusions on it. Applying this principle, the appellants are, in our opinion, precluded from raising the question now.

We have said before that the lower Court had allowed the objection of the Baraboni Coal Concern, holding that the decree attached not being a part of the assets of the Economic Coal Co. was not liable to be attached. The issue therefore before the Bench which at first heard the appeal of the decree-holder was whether that decree was attachable. On the admission of the legal position the Court decided that the personal properties of the Baraboni Coal Concern were liable to attachment in case the company failed duly to account for the assets of the Economic Coal Company which came into their hands. But as the lower Court had not determined this point, the case was remanded only for investigating and deciding it. The liability of the Baraboni Coal Concern personally to satisfy the decree of Ramchandra Marwari, if they failed to account for the assets of the Economic Coal Co., was, in our opinion, finally determined by the former Bench, and the question cannot be reopened before us. The appellants in substance ask us to hold that the order of remand was wrong, inasmuch as it was passed under misapprehension of the legal position, plainly, we cannot do so. Assuming however that it is open to us to enter into this question, the result will be exactly the same. The admission made by the advocate of the Baraboni Coal Concern before Agarwala and Varma, JJ. as regards the legal position—in res-

¹ Brijraj Krishna v. Chathu Singh, (1929) 10 A I R Pat 226=76 I C 186=4 P L T 35.

pect of the liability of the company—was correct.

Sir M. N. Mukharji argued that the liability of the personal properties of a judgment-debtor for a decree passed against him as a representative of a deceased person, in case he fails to account for the assets of the deceased which came into his hands, is a creation of S. 52, Civil P. C., and that the Section being in terms inapplicable to this case, the Baraboni Coal Concern is not liable to satisfy the decree on that footing. This contention cannot, in our opinion, be accepted. S. 52 (2) of the Code simply enacts a rule of procedure in accordance with natural justice; and even in the absence of that Section (and of any provision of law to the contrary) Courts would have been justified in applying the principle embodied in it as a rule of justice, equity and good conscience. If a debtor dies and his properties are taken by his legal representatives, they are bound to pay his debts to the extent of the assets they have taken, unless it can be said that the debts are extinguished by the death. The liability of these assets of the deceased to be taken in satisfaction of his debts can be enforced by bringing a proper suit against the representatives who have taken them; and if between the death of the debtor and the execution of the decree these representatives have converted any of the assets of the deceased debtor to their own use, it would be a strange system of law and equity under which it could be held that they are not liable to satisfy the decree to the extent to which they are unable properly to account for the assets of the debtor. For, that would enable the representatives to take the assets and yet easily defeat the creditors, and thus, in effect, mean that if not realized in the lifetime of a debtor, his debts are not realizable from his properties after his death. We cannot conceive of any system of law which would allow the representatives of a deceased debtor to take his assets and nevertheless resist the execution of decrees to be satisfied out of those assets without duly accounting for them and thus leave the decree-holders to remain content with infructuous decrees. This is how we arrive at the principle of procedure embodied in S. 52 (2) as regards "enforcement of decree against legal representative" (to quote the marginal note to the Section). If a creditor has obtained a decree for the payment of money out of the property of the deceased, and proves in the

execution proceedings that the debtor died leaving properties which came into the hands of his representatives, then it is for these representatives to account for those properties, and if they fail to do so, they become personally liable to the extent of the assets not accounted for. The personal liability of the representatives in such a case seems to us to be implicit in the very decree passed against them for payment of money out of the property of the deceased. For, the only other view that need be considered on this point is that the question of personal liability must be gone into in the suit itself—a course which has little to recommend it and which is definitely negatived by S. 52 (2) in cases of natural death. In the present case the decree was passed against the appellants, on the finding they took over the entire assets and liabilities of the Economic Coal Company when the latter went into voluntary liquidation, and their liability was expressed in the form adopted in decrees against legal representatives of deceased persons. As regards the mode of execution of such a decree we are unable to see that in principle it differs from a decree passed against the legal representatives of a person who has died a natural death.

Sir M. N. Mukharji has cited two decisions in support of his contention that the principle of S. 52, Civil P. C., cannot be applied to cases which do not come within its terms. These are 53 All 529² and A I R. 1935 Cal 713.³ It seems to us that neither of the cases definitely lays down any such proposition as is contended for. In the first place they are not cases in which the decrees were passed against the legal representatives. In 53 All 529² there was a decree passed against a man who after the decree-holder's application in execution for attachment of his properties moved the Collector, on the ground of his having become a sanyasi, for the mutation of his son's name in the revenue records. The attachment was granted by the Civil Court, and then the son objected to execution on the ground that as his father had taken *sanyas*, the properties no longer belonged to the father but had devolved upon him, and that execution could not proceed without his being made the heir of his father. The objection was disallowed by the executing Court, and this order was upheld by the

2. Madho Rao v. Gur Narain, (1931) 18 A I R All 306=131 IC 598=53 All 529=1931 A L J 263.

3. Sudhamoyee Basu v. Bhujendra Nath, (1935) 22 A I R Cal 713=159 IC 370.

High Court. The learned Judges were addressed on S. 50, Civil P. C., and observed that the question before them was one of procedure and that

Section 50 uses the word 'dies' apparently in its natural sense, as distinguished from a civil death (e. g. by taking *sanyas*) 'which is in some ways different from natural death'.

It may be noted however that the decree-holder did not admit that in fact his judgment-debtor had taken *sanyas*, and the learned Judges said that it was not proved in the case that the judgment-debtor had become a *sanyasi* either before or after the attachment, or at all. It is clear therefore that their observations about civil death are merely obiter. It is true that the word "dies" in the Section may refer to natural death only, but with the utmost respect for the learned Judges, the principle underlying the Section would not seem to be inapplicable to the case of a man taking *sanyas*; otherwise, it will be impossible to execute a decree obtained against him before he took *sanyas*. The Hindu law is that if a man takes *sanyas*, he becomes civilly dead and incapable of continuing to hold any interest in his properties, which therefore devolve upon his heirs. What then would be the remedy in such a case open to a party who had already obtained a decree against him? If he attempted to execute it against the *sanyasi*, he could get little satisfaction since the latter has no longer any saleable interest in any property. The only course therefore open to the decree-holder would seem to be to proceed against the heirs of the *sanyasi*, and the Court would have to apply the principle embodied in S. 50, Civil P. C. It certainly cannot be said that though civilly dead under the Hindu law, a *sanyasi* is capable of holding property for the purposes of the execution of a decree properly passed against him.

In the second case the facts were different, but the Allahabad case was cited in support of the view that the word "dies" in S. 50 has been used in its natural meaning and does not include civil death. The decision of the case proceeded on its own facts. A decree had been obtained against the daughters of the last male holder of a tenure for the rent that had accrued due since his death. Two of the daughters died and the surviving daughter surrendered her life interest. The decree-holder then wanted to proceed in execution against the reversioners as under a money decree, not under a rent decree. The learned Judges held that

he could not do so, though it was open to him to bring the tenure to sale under the Bengal Tenancy Act: the daughter was no party to the execution, and if she was personally liable, that liability was not shown to have passed to the reversioners. The Allahabad case was referred to without any discussion, but the point actually decided was that the personal liability of the daughter had not passed to her father's reversioners. The decision is entirely inapplicable to a case like the present where a decree has been passed against the appellants themselves, but we may also observe that unlike a *sanyas* the self-effacement of a Hindu female by surrender does not render her incapable of being proceeded against in execution for her personal liabilities.

The two cases cited by the learned advocate thus have no bearing on the question before us, viz. whether the appellants who have taken the assets of the late Economic Coal Co. can be allowed to defeat the decree passed against them on the ground that by the time the decree-holder proceeds in execution for the satisfaction of his decree, the assets of the late company—for whatever reason—are no longer with them. If it had been the appellant's case that they had utilized the assets of the late company in the discharge of its debts or on other legitimate purposes and the present decree-holder had come late in the field, the position would of course have been quite different. In our opinion, it was rightly conceded before Agarwala and Varma, JJ. on behalf of the Baraboni Coal Concern that they would be "personally" liable if they failed to account for the assets; they could not have been allowed to take up the position that they were not going to give any account of what they had done with the assets of the late company but that it was for the decree-holder to go and find the assets of the late company and execute his decree against such assets as he might find out. Sir M. N. Mukharji has also contended that the Baraboni Coal Concern are not the legal representatives of the Economic Coal Co., and that though they acquired the assets of the latter, they are not liable for anything beyond such liabilities of the company as may have been taken into consideration at the time of the amalgamation. The learned advocate has taken us into various Sections of the Companies Act, 1913, but in our opinion they do not help the appellants. S. 191 which applies to a winding-up by the Court, only shows that a

creditor will be excluded from the benefit of any distribution made before he proves his debt. S. 203 prescribes the circumstances in which a company may be wound up voluntarily, and S. 207 prescribes the consequences of a voluntary winding-up, such as the application of assets, the powers of the liquidator, and the conditions in which the Court may appoint a liquidator. S. 209 defines the rights of creditors in a voluntary winding-up and prescribes the issue of notice to them, thus making it possible for them to determine whether an application shall be made to the Court for the appointment of another or a joint liquidator. The next Section to which we have been referred is S. 213, corresponding to S. 208.C of the present Act, on the "power of liquidator to accept shares, etc., as a consideration for sale of property of the company." It was pointed out that this Section substantially covers the amalgamation of companies. The Section on which Sir M. N. Mukharji laid great stress is S. 228 which runs thus :

In every winding-up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, shall be admissible to proof against the company, a just estimate being made so far as possible, of the value of such debts or claims as may be subject to any contingency. . . .

There is nothing in all this to support the main contention of Sir M. N. Mukharji that as the decree-holder did not come forward to make his claim in the winding-up proceedings, he cannot now call upon the appellants (the transferee company) to show what they have done with the assets of the transferor company. The respondent, Ramchandra Marwari, brought his suit in 1927 and obtained the decree under execution in 1929. The balance sheet as at 31st March 1926 shows Ramchandra Marwari as a creditor of the Economic Coal Co. He thus had a debt due to him from that company apart from the decree under execution which was obtained in a suit brought after the amalgamation. The learned advocate therefore argued that it was open to Ramchandra as a creditor of the Economic Coal Co. to object to the transfer of the assets of this company to the Baraboni Coal Concern by applying to the Court and that as he did not do so the arrangement is binding upon him. This proposition was supported by a passage from Stiebel's Company Law, Vol. II (Edn. 3, p. 1154):

A creditor who lies by . . . and omits to present a petition will not be able to go behind the scheme (of reconstruction or amalgamation) and will be bound by it.

But all this has no bearing whatsoever on the issue before us. The decree-holder does not question either the voluntary liquidation or the action of the liquidators in transferring the assets of the Economic Coal Co. to the Baraboni Coal Concern. We are now only concerned with the mode of execution of a decree passed against the appellants on the footing that they had taken over the entire assets and liabilities of the Economic Coal Co. This finding of the trial Court (see the judgment, lines 5 to 35 on p. 276 of part III of the paper-book)—to say nothing of the form of the decree—makes it unnecessary to consider what the position would have been if the amalgamation or reconstruction had been effected, as it could have been effected, (1904) 2 Ch 268⁴ at page 286, cited by the learned advocate, without the entire liabilities of the transferor company passing to the appellants. As they took over all the assets and liabilities of the Economic Coal Co., they are, in our opinion, to all intents and purposes, representatives-in-interest of the latter company; and the lengthy arguments that were addressed to us on the Companies Act cannot get over the decree actually passed and now under execution, nor over the fact that the appellants took over the entire assets and liabilities of the defunct company. We cannot therefore decline to extend the principle of S. 52 (2) to the appellants on the ground suggested, viz. that under the Companies Act the transferee company cannot be said to be the legal representative of the transferor company.

Sir Manmatha Nath Mukharji asked us to construe the decree as if it allowed realization only from such assets of the Economic Coal Co. as may be found in the possession of the appellants. Apart from the question that the decree has already been interpreted in the previous judgment of this Court and held to be executable against the Baraboni Coal Concern personally to the extent to which the assets of the Economic Coal Co. remain unaccounted for we take the same view of the plain meaning of the decree. The contingent admission of personal liability on the previous occasion was no doubt made when the

4. In re South African Supply and Cold Storage Co., (1904) 2 Ch 268=73 L J Ch 657=52 WR 649=91 L T 447=12 Manson 76.

attachability of the decree in suit No. 66 of 1930 only was in question. But the interpretation of the decree with reference to the applicability of the principle underlying S. 52 (2) must plainly govern the execution in respect also of the Calcutta decree attached later on by the respondent.

The next branch of the argument on behalf of the appellants is that the assets of the late company have been accounted for and we must now proceed to examine it. The Economic Coal Co. had four coal fields, viz. Babisole, Rana, Chinchuria and Ganeshpur. All these admittedly came into the possession of the Baraboni Coal Concern, Ltd. (After considering the facts and evidence their Lordships concluded.) We thus see that the appellants have not accounted for immovables worth about Rs. 5,50,000 and cash or stock of coal corresponding to Rs. 47,000 and not Rs. 80,000, as found by the lower Court which was with the Ganeshpur Colliery and came into the hands of the appellants at the amalgamation. These assets were much more than sufficient for satisfying the decree under execution, and the learned Subordinate Judge has rightly disallowed the objection of the appellants in the two execution cases, and the appeals fail. We are also of opinion that the decree under execution so far as it relates to costs is a personal decree against the appellants. This part of the decree runs:

That the sum of Rs. 8864-10-6 be paid by defendants 1 and 2 to the plaintiff on account of the costs of this suit with interest thereon at 6 per cent. per annum from this date to the date of realization.

Defendant 2 was the Baraboni Coal Concern and the liability for these costs is unrestricted, unlike the liability for the substantive claim which was decreed at Rs. 88,961-4-3 limited to the assets of the Economic Coal Co. (defendant 1) in the hands of defendant 2. We cannot therefore accept the appellants' contention that the costs stand on the same footing as and should go with the other amount.

Coming to the civil revision application it is enough to say that the claim of Chandanmal Indra Kumar is unfounded. The decree attached, as we have already stated, was obtained by the Baraboni Coal Concern and others against the proprietors of C. M. & Co. in respect to an encroachment upon the Phularitand Coal Co.'s lands. This last company was also amalgamated with the Baraboni Coal Concern and was later on brought to sale for arrears of cess and purchased by the claimant, Chandan-

mal Indra Kumar. His interest in Phularitand however accrued after the period for which the damages were claimed against C. M. and Co. as is clear from the judgment in suit No. 66 of 1930 (Ex. B). Though the claimant, Chandanmal Indra Kumar, was among the plaintiffs in the suit he has thus no right or interest in the decree; and the civil revision application was in fact not pressed.

The appeals must therefore be and are dismissed with costs and also the civil revision application. Hearing fee ten gold mohurs.

S.G./R.K.

Appeals dismissed.

A. I. R. 1939 Patna 587

MOHAMAD NOOR AND ROWLAND JJ.

Jagadish Chandra Deo Dhabal Deb—
Plaintiff — Appellant.

v.

Pratap Chandra Deo Dhabal Deb and
others — Defendants — Respondents.

Appeal No. 30 of 1936, Decided on 12th April 1939, from original decree of Sub-Judge, Chaibassa, D/- 12th September 1935.

Limitation Act (1908), Sec. 28 — Khorposh grant giving only abadi income to grantee—Grantee enjoying not only usufruct of jungle and waste land but also leasing out the right — Grantee enjoying the right adversely and openly for more than twelve years—S. 28 held applicable and grantor lost his right to timber by adverse possession.

A tenant may, while pleading prescriptive title without pleading general ownership in a suit for ejectment, successfully plead his adverse possession to the extent of the interest claimed by him.

[P 590 C 2]

Predecessor of D made a grant by way of khorposh by which he assigned only the rent income of the abadi lands of the villages to the grantee. The grant did not include the jungle and waste land of the villages but the khorposhdar and his successors all along enjoyed not only the usufruct of the jungle portion of the mouzas but also the cutting, removing and sale of timber, and had also been leasing out the right to cut and remove the timber from time to time adversely to the knowledge of D or his predecessor for more than 12 years:

Held that D had lost his right to the timber of the jungle under Section 28 : (1802) 1 Sch & Lef 8 and A I R 1923 P C 118, Disting. ; A I R 1931 P C 186 and 2 C L J 125, Rel. on ; F. A. No. 156 of 1936, Ref.

[P 590 C 2]

S. M. Mullick and G. C. Mukherji —

for Appellant.

B. C. De, U. N. Banerji and N. N. Roy

— for Respondents.

Rowland J. — The plaintiff, who is the appellant here, is the proprietor of Dhalbhum Pargana. The claim was to recover damages for the wrongful cutting and sell-

ing of timber in two villages Bhitaramda and Kuraluka and for a permanent injunction restraining the defendants from committing similar acts of waste in future. Defendants 1 to 11 were the descendants of Kinu Dhal, a kinsman of a predecessor of the plaintiff. The plaintiff's predecessor had made a grant by way of khorposh in favour of Kinu Dhal. The grant gave to the grantee certain rights in respect of 18 villages of which we are concerned only with the two mentioned above. One of these villages, Bhitaramda, was leased out in mokarrari by defendant 1 acting on behalf of himself and the other descendants of Kinu Dhal to defendant 12. Thereafter defendant 13 took a timber cutting lease from defendant 12 in respect of Bhitaramda and from the other defendants in respect of the timber of village Kuraluka.

The case made by the plaintiff was that the grant was a grant for maintenance of the rent income of the mauzas. In the patta it was stipulated that the grantee should enjoy 36 aras of paddy on account of bhaoli rent valued at Rs. 72 and the cash rent arising within the mauzas of Rs. 58.8.0, in all Rs. 130.8.0. The grantee was to supply annually to the grantor one he-goat for sacrifice and four annas instead of one she-goat in respect of each village year after year. The plaintiff submitted that Kinu and his descendants had and have no other right and interest in the mauzas except enjoyment of khorposh by realizing rent, etc., therefrom. In particular the grantees had and have no right to cut or appropriate or sell or settle the jungles existing in the said mauzas. It was admitted that at the time of the last settlement operations, the jungles had been recorded in the name of the khorposhdars, but it was pleaded that the entry was made by mistake and thereby the right of the plaintiff cannot be affected; nor can the defendants have any right to cut and appropriate the trees in the jungle. It was further stated that within the three years before suit, something more than 4000 poles had been cut and appropriated for which Rs. 6000 odd was claimed as damages, and as stated a permanent injunction was asked for.

Defendants 12 and 13 filed separate written statements and defendants 2 to 6 filed a joint written statement. But substantially all the defences raised are the same. It was pleaded firstly that the grant was a permanent heritable and transferable grant of all

the rights in the villages including the right of cutting, appropriating and selling timber. In the alternative it was pleaded that ever since the time of the grant, Kinu and his descendants had been possessing and exercising full rights in respect of the entire villages including the jungles and including the cutting, appropriating and selling of timber from the jungles. In short, the defence was in the first instance that the defendants had a good title, and failing that, that the defendants by long possession adversely to the plaintiff and his predecessors had acquired a good title and the plaintiff's right to sue was barred.

The plaintiff put in evidence Ex. 5, a certified copy of the grant. After some discussion as to whether it was to be accepted as a certified copy of the original grant, the Subordinate Judge answered this point in the affirmative and this finding has not been contested in appeal, that is to say, before us both parties are content to accept Ex. 5 as being a true copy of the original grant. The Subordinate Judge has set forth in his judgment the principal contents of the document and has held that the document did not convey any right to timber. He also observed that he found nothing in the terms of the patta to give rise to the inference that the settlement was a permanent or heritable one. He was of opinion that the jungle area was not at all transferred by the patta. He also observed that even if the trees were included in the grant, the defendants or their predecessors had no right to cut and appropriate the trees and that such conduct would amount to damage or waste of the jungle. But he found that from the time of Kinu onwards, the grantee and his successors had been enjoying not only the usufruct of the jungle portion of the mauzas but also the cutting, removal and sale of timber from the jungle openly and as of right, and at least since 1894 to the knowledge of the plaintiff, who, in that year, had in settlement proceedings objected to an entry in the settlement record with regard to the right of Madhusudan Dhal, son of Kinu, to use and sell the timber and other forest produced from the jungle. The claim of the Dhalbhum estate on that occasion was "that Babu Madhusudan Dhal is only entitled to the cultivated area and to no part of the jungle." In the result, the Subordinate Judge dismissed the suit as being barred by limitation, observing that had the plaintiff succeeded, he would have awarded damages at

annas 8 per tree in respect of the 4000 trees cut by defendant 13.

The finding as to the number of trees cut and their value has not been contested by either party in this appeal and the objections against the Subordinate Judge's findings are on the one hand by the plaintiff-appellant that the suit should not have been held to be barred by limitation because the cutting and appropriation of timber from the jungle was an act of waste giving rise to a separate cause of action on every occasion on which a tree was wrongfully cut and therefore although the rule of limitation might debar the plaintiff from recovering damages in respect of any particular tree cut more than three years before the suit, no lapse of time could give the defendants by prescription the right to cut trees generally or could take away the property in the trees which remained with the plaintiff so long as the trees were in the possession of his lessees as his tenants. On the other hand the respondents questioned the finding of the lower Court that the full rights in the villages, including the right to timber, were not included in the grant. It will be convenient first to deal with the point raised by the respondents, for once the terms of the grant are construed, it will be a less complicated matter to apply the law to the resultant position. The patta Ex. 5 is addressed to Kinu Dhal and recites that

after granting your application the sum of Rs. 130-8-0 is granted for your maintenance according to compromise. In lieu of this amount you will enjoy within Taraf Atkosi Touzi Rs. 3 and paddy rent 3 aras in respect of Mouza Kundalukar and Touzi Rs. 3 and paddy rent 3 aras in respect of Mauza Bhitaramda Enhancement and reduction rests with you.

There are similar entries regarding the other 16 villages. No boundaries are given. The grant on its face appears to be an assignment of the rent income of the abadi lands of the villages. It seems to me on a reading of the grant that the jungle and waste lands were not at all granted to the khorposhdar. We were shown in the course of the hearing a map from which it appears that there is a jungle block quite separate from the portion of the mauza within which the village site and cultivated lands are situated and the plain reading of the grant does not suggest at all that the jungle block was intended to be included in the grant. The grant appears to have given to the khorposhdars no rights at all in respect of the jungle area.

That being the effect of the grant, I will next state what has been found regarding the enjoyment of the village and of the jungle included within the boundaries of the mauzas. The Subordinate Judge has found, and his finding has not been contested in appeal, that it is shown by documents going back to about 1869 that the khorposhdar and his successors have all along been both enjoying the usufruct of the jungle block and the receipts obtained by cutting and selling timber and by leasing out the right to cut and remove timber from the jungle from time to time. Whether these rights were enjoyed and exercised openly as of right and to the knowledge of the plaintiff or his predecessor from the beginning, the Subordinate Judge has not stated. But he is clearly of opinion that at least from 1894 and earlier the right claimed was claimed adversely and to the knowledge of the plaintiff and his predecessors because of the dispute in the settlement proceedings to which I have already referred. As I have pointed out, the claim of the plaintiff at that time was that Madhusudan Dhal was only entitled to the cultivated area and to no part of the jungle. My reading of the grant leads me to the view that the contention of the plaintiff at that time was in agreement with the purpose of the grant. The defendants and their predecessors were however all along possessing adversely the usufruct of the jungle as well as the timber rights. Now, it is contended for the plaintiff that no length of adverse possession can give a tenant a right to create waste in the property which is the subject of his lease, and in support of this principle we are referred to (1802) 1 Sch & Lef 8.¹ In that case the tenant had been appropriating and selling peat which he was entitled to take for his household use but not to carry to the market and sell. The peat was of his own tenancy. The case is therefore not strictly in point here. We have been referred to 50 I A 202.² Here a tenant while in possession of his tenancy had asserted in a judicial proceeding that his status was that of an under-proprietor and not merely an occupancy title-holder; it was held that the assertion and continued possession of the tenant while asserting that title, could not, by lapse of time, create any prescriptive higher title than the tenant had a right to.

1. Lord Courtown v. Ward, (1802) 1 Sch & Lef 8.

2. Mohammad Mumtaz Ali Khan v. Mohan Singh, (1923) 10 A I R P O 118=74 I O 476=50 I A 202=45 All 419=26 O O 231 (P O).

It was pointed out that S. 28, Limitation Act, extinguishes the right of a person to any property at the determination of the period limited to him for instituting a suit for possession of such property and that there was no other Section which would have the effect of extinguishing a right of property which is vested in one person and transferring it by the mere lapse of time to the person actually in possession. It would seem then that a plaintiff will not lose his title on the ground of adverse possession, unless he has been in a position to sue to recover possession of the property in respect of which title by prescription is set up against him.

On the other hand, it has been stated in several decisions that the principles governing rights to timber and rights to minerals in leasehold properties are governed by similar, if not identical, considerations and there are undoubtedly cases in which a tenant, while in possession of demised premises, has been allowed to set up successfully that he has acquired a title by prescription to minerals underlying those premises and to defeat by a plea of limitation the claim of the landlord to property in the minerals. I may refer to the well-known case in 10 Pat 407.³ If that be the rule regarding minerals, it would seem logical to apply the same rule to timber. It may be questioned whether the observations of their Lordships of the Judicial Committee in 50 I A 202² were intended to lay down a rule which would debar a tenant from prescribing against his landlord for rights either in minerals or in timber on land leased out to him. The precise position does not arise here; for on the view that I take, it was open to the predecessor of the plaintiff to take action against Kinu or his successors and to recover from them possession of the jungle block, thereby excluding the khorposhdars both from the usufruct and from the corpus of the trees. That being so, when the khorposhdars continued to hold and enjoy both the fruits, etc., and the timber by cutting and sale, I can see no reason why the Courts should not accept the position that in respect of both these rights they were prescribing and obtaining title by adverse possession at the same time.

It is argued that because the khorposhdar's original entry into the villages was

by virtue of a lease, he should be deemed, if and when he encroached beyond the area given him in his lease, to take the encroached area on the same terms as those in the original grant. I do not think this position agrees with the law as explained in 2 C L J 125,⁴ where Mookerjee, J., examined the law regulating encroachments made by a tenant upon the property of his landlord :

An encroachment made by a tenant from the adjoining waste of his landlord is *prima facie* made by him in his character as tenant; but it is open to the landlord to repudiate the relation, to treat him as a trespasser and to evict him as such ; on the other hand, it is open to the tenant to indicate at the time he encroaches, that he intends to hold the encroached lands for his own exclusive benefit and not to hold them as he held the lands to which they are adjacent.

A little further on it is said :

The extent of the dispossession depends on the extent of the claim of right under which possession by the trespasser is obtained and kept ; where such claim is restricted to a limited interest in the property, the dispossession is limited to that extent only.

Thus a tenant may, when pleading prescriptive title without pleading general ownership, in a suit for ejection successfully plead his adverse possession to the extent of the interest claimed by him. Again it is said :

The nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it.

If that is the principle, and with great respect, I would like to express my agreement with what the learned Judge there said, then the khorposhdars have been found to assert throughout that they had complete rights in respect of the timber as well as the jungle produce in the waste area of the mauza. As they have consistently asserted and exercised these rights for much longer than twelve years openly and to the knowledge of the plaintiff, I am of opinion that S. 28, Limitation Act, is applicable to this case and that the right of the plaintiff in the timber of the jungle has been lost to him by adverse possession.

It has been argued for the appellant that this view of the grant and of the nature of defendants' possession is inconsistent with the pleading of the defendants, and that they should not be allowed to succeed on a case not raised in their pleading. I have at an earlier place in this judgment summarized the pleadings and I consider it

3. Nageshwar Bux Roy v. Bengal Coal Co. Ltd., (1931) 18 A I R P C 186=180 I C 315=58 I A 29=10 Pat 407 (P O).

4. Ishan Chandra Mitter v. Raja Ramrajan Chakarbutty, (1905) 2 C L J 125.

enough to say here that I find no substance in the argument advanced. I may mention that if we had been disposed to hold that in circumstances such as the present no case of limitation could arise against the plaintiff, our decision would have been in conflict with a recently decided and unreported case of this Court in First Appeal No. 156 of 1936.⁵ The legal position was not perhaps argued there on the same lines as before us, but the conclusion to which we are led by a different course of reasoning is similar to that reached in that case. I would dismiss the appeal with costs.

Mohamad Noor J. — I agree.

S.G./R.K.

Appeal dismissed.

5. Kamakhaya Narain Singh v. Gauri Prasad Singh, First Appeal No. 156 of 1936 decided on 8th February 1939.

A. I. R. 1939 Patna 591

AGARWALA J.

Khedu Mahto and others — Appellants.

v.

Khonka Mahto and others —

Respondents.

Appeal No. 747 of 1938, Decided on 11th August 1939, from appellate decree of Sub-Judge, Purulia, D/. 26th May 1938.

Evidence Act (1872), S. 35—Suit to eject defendants on ground that they were under-raiyats of plaintiffs—In Khanapuri proceedings, preceding finally published Record of Rights, one of plaintiffs stated in decision of Khanapuri officer to have admitted on behalf of all jointly interested that predecessors-in-interest of defendants were cosharers—Admission held admissible in evidence.

In a suit to eject the defendants on an allegation that they were under-raiyats of the plaintiffs, the defence was that the defendants were not under-raiyats but cosharers with the plaintiffs. In the finally published Record-of-Rights the predecessors of the defendants were recorded as under-raiyats in respect of the disputed land. But in the Khanapuri proceedings which preceded the finally published Record-of-Rights, J, who was one of the plaintiffs, was stated in the decision of the Khanapuri officer to have admitted before him on behalf of all jointly interested in the land that the predecessors-in-interest of the defendants were cosharers :

Held that the admission contained in the decision of the Khanapuri officer was admissible: 9 Cal 586; 18 Mad 73; A I R 1934 P C 157 and A I R 1924 Pat 248, Rel. on; A I R 1916 P C 256, *Disting.*

Held further that even if the decision of the Khanapuri officer were inadmissible for proving the truth of the admission made by J before Khanapuri officer it would still be admissible for the purpose of proving that J made such a statement.

[P 592 C 1, 2]

R. S. Chatterji — *for Appellants.*

N. N. Roy — *for Respondents.*

Judgment.—This is an appeal by the plaintiffs from a decision of the Subordinate Judge of Purulia reversing a decision of the Munsif. The appeal arises out of a suit to eject the defendants on an allegation that they were under-raiyats of the plaintiffs. The defence was that the defendants were not under-raiyats but cosharers with the plaintiffs. The Court below has accepted the defence and dismissed the plaintiffs' suit. This decision is challenged by the appellants on the ground that the Court has acted on inadmissible evidence. The evidence objected to is a decision of the Khanapuri officer in the course of the settlement in 1903. In the finally published Record-of-Rights the predecessors of the defendants were recorded as under-raiyats in respect of the disputed land. But in the Khanapuri proceedings which preceded the finally published Record-of-Rights one of the present plaintiffs, Jhari Mahto, is stated in the decision of the Khanapuri officer to have admitted before him that the predecessors-in-interest of the present defendants were cosharers. It is this admission contained in the decision of the Khanapuri officer which is challenged as inadmissible. In 9 Cal 586¹ the plaintiff who was sued for possession of a fishery sought to put in evidence an admission alleged to have been made in a previous suit by the defendants' predecessors-in-title in a written statement filed in that suit. The only evidence of the admission was the recital from the pleadings contained in the preliminary portion of the decree in the final suit. It was held that the statement in the decree was evidence of the admission under S. 35, Evidence Act. The next case on the point is 18 Mad 73.² That was a suit for partition of family property in which it became necessary for the plaintiff to prove that his grandfather had been adopted by A. He sought to prove this fact by judgments in which it was stated that A's brother who was the grandfather of defendant 1 had sued to recover moneys due to A, alleging that the adopted son was an infant living under his protection. It was held that these judgments were admissible in order to prove the statement made by the predecessor-in-title of the party against whom they were sought to be used. This case was referred to by the Privy Council in A I R

1. Parbutty Dassi v. Purno Chunder Singh, (1883) 9 Cal 586.

2. Krishnasami Ayyangar v. Rajagopala Ayyangar, (1895) 18 Mad 73.

1934 P C 157³ at p. 165. With reference to the Madras case, their Lordships said:

In 18 Mad 73² a statement amounting to an admission which was contained in a judgment was received in evidence under S. 35 as an entry in a record made by a public servant in the course of his duty. There is much to be said for this view of S. 35. In India judgments have to be in writing and signed by the Judge and the original judgments and decrees are records of the Court and retained in the record room the parties being supplied with certified copies only.

Now, the question before the Privy Council was whether an admission contained in a pedigree attached to a decree in a former suit was admissible against the successor-in-interest of the person on whose behalf the pedigree had been admitted in the former suit. Their Lordships held that the pedigree attached to the decree was admissible for the purpose of proving the admission relied upon. On behalf of the appellants reference was made to the decision of the Privy Council in 43 I A 73.⁴ The question in dispute between the parties in suit case related to the right to succeed to an aethal, it being alleged that one of the claimants was debarred by reason of his being a married man. This was sought to be proved by a statement with regard to it in the judgment of the Criminal Court. The Privy Council held that the judgment was inadmissible for this purpose. That case was distinguishable from the cases already referred to in this respect that the person who made the statement in that case was a stranger to the parties before the Privy Council. Their Lordships, therefore, there said that the criminal proceedings were irrelevant in the case before them. In the case that is before me not only is Jhari Mahto himself the plaintiff, but from the decision of the Khanapuri officer it appears that he was, at the time, acting on behalf of all the persons jointly interested in the land in dispute. I, therefore, hold that the decision of the Court below cannot be challenged on the ground of inadmissibility of evidence. Furthermore, even if the decision of the Khanapuri officer were inadmissible for proving the truth of the admission made by Jhari Mahto before the Khanapuri officer it would still be admissible for the purpose of proving that Jhari Mahto made such a statement, and

when that fact is admissible, the further fact, that Jhari Mahto himself being the plaintiff in the present litigation did not venture into the witness-box in support of his case that the defendants are under-raiyats could not but impress the Court of fact unfavourably with regard to his claim. It is evident from the judgment of the Court below that that Court was very unfavourably impressed by the fact that Jhari Mahto did not offer himself for cross examination. Under these circumstances, even if the evidence objected to were inadmissible, I am not prepared, in second appeal, to hold that the rejection of that evidence would have made any difference to the decision of the Court below.

Finally, reference may be made to the decision in 2 Pat 814⁵ that the proceedings before the survey authorities prior to the publication of the Record of Rights are admissible for the purpose of rebutting the presumption which attaches to the finally published record. The appeal is dismissed with costs.

D.S./R.K.

Appeal dismissed.

5. Chand Ray v. Bhagwati Charan, (1924) 11 A I R Pat 248=81 I C 326=2 Pat 814.

A. I. R. 1939 Patna 592

HARRIES C. J. AND FAZL ALI J.

Bishun Singh — Judgment-debtor — Appellant.

v.

Palakdhari Singh and another — Decree-holders — Respondents.

Appeal No. 345 of 1938, Decided on 10th August 1939, from original order of Sub-Judge, Muzaffarpur, D/- 21st November 1938.

(a) Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939), S. 13 — Application under Sec. 16 of unamended Act rejected — During pendency of appeal to High Court Amending Act of 1939 coming into force — S. 13 of Amending Act applies.

Where an application under S. 16, Bihar Money-lenders Act of 1938, has been rejected and during the pendency of appeal from it to the High Court the Amending Act of 1939 has come into force, S. 13 of the Amending Act applies. The fact that after rejection of application under S. 16 no stay was ordered and sale took place makes no difference and does not affect rights of parties in appeal: AIR 1939 FC 74, Applied. [P 593 C 2; P 594 C 1]

(b) Practice — Precedent — Federal Court decision.

High Court is bound to follow Federal Court decision. [P 593 C 2]

T. N. Sahi — for Appellant.

A. N. Lal — for Respondents.

3. Collector of Gorakhpur v. Ram Sundar Mal, (1934) 21 A I R P C 157=150 I C 545=56 All 468=61 I A 286 (P C).

4. Ram Parkash Das v. Anand Das, (1916) 3 A I R P C 256=33 I C 583=48 Cal 707 = 48 I A 73 (P C).

Harries C. J.—This is a judgment-debtor's appeal from an order of the learned Subordinate Judge of Muzaffarpur allowing in part the judgment-debtor's application. In his application, the judgment-debtor prayed that the Court should convert the decree into a decree for instalments under S. 15, Bihar Money-lenders Act, 1938, and value the judgment-debtor's property under S. 16 of that Act. The learned Subordinate Judge was prepared to grant instalments provided the judgment-debtor paid a sum of Rs. 3000 within a week. The learned Subordinate Judge however did not indicate what the further instalments would be if this sum of Rs. 3000 was paid. With regard to such part of the application as was concerned with S. 16, Bihar Money-lenders Act, 1938, the learned Subordinate Judge was of opinion that this Section was repugnant to the general law and accordingly could not be enforced. The learned Subordinate Judge was in fact following a decision of this Court, namely 1938 P W N 765.¹ The judgment-debtor failed to pay the sum of Rs. 3000 within the stipulated time, and accordingly the whole of the property was put up for sale and was purchased in the main by third parties though a small portion was purchased by the decree-holders. Against the order of the learned Subordinate Judge dismissing the application in so far as it was concerned with S. 16, Bihar Money-lenders Act, 1938, the judgment-debtor has appealed to this Court. The only point for consideration is whether or not S. 13, Bihar Money-lenders (Regulation of Transactions) Act, 1939, has any application to the case. S. 16, Bihar Money-lenders Act, 1938, is in these terms:

(1) When an application is made for the execution of a decree passed in respect of a loan or the interest on a loan by the sale of the judgment-debtor's property, the Court executing the decree shall, notwithstanding anything to the contrary contained in any other law or in anything having the force of law, hear the parties to the decree and estimate the value of such property and of that portion of such property the proceeds of the sale of which it considers will be sufficient to satisfy the decree:

Provided that the Court may order the whole property of the judgment-debtor to be sold if it is satisfied that by reason of the nature of such property or any other special circumstances such property cannot reasonably and conveniently be sold in part.

(2) Any person aggrieved by an order passed under sub-s. (1) may appeal to the Court to which

appeals from the Court executing the decree ordinarily lie.

Section 17, which followed, directed that only so much property should be included in the proclamation of the intended sale as the Court considered the proceeds to be sufficient to satisfy the decree. The application, as it originally stood, was under S. 16 of the 1938 Act and was rejected. While this appeal was pending in this Court, the Amending Act of 1939 was passed, and Ss. 16 and 17 were repealed and were replaced by Ss. 13 and 14 of the Amending Act. Sec. 13 (1) of the Amending Act in terms applies to applications made before or after the commencement of the Act, and it has been held by the Federal Court in 20 P L T 473² that S. 13 of the Amending Act of 1939 is retrospective in the sense that it applies to proceedings pending at the time when the Act came into force.

It has been argued by counsel on behalf of the appellant that S. 13 of the Amending Act must be given effect to by this Court. He has argued that this Section applies to pending applications, and his application, which was rejected by the learned Subordinate Judge, is still pending in this Court. We are bound to hold that the application of the judgment-debtor is pending, and accordingly it must now be decided in the light of the provisions of the Amending Act of 1939. In my view this case cannot be distinguished from the case in 20 P L T 473² to which I have already referred. In that case an application under S. 16, Bihar Money-lenders Act, 1938, had been dismissed by the learned Subordinate Judge. On appeal this Court had upheld the decision of the learned Subordinate Judge upon the ground that this Section being repugnant to the general law was null and void. During the pendency of the appeal to the Federal Court, the Amending Act of 1939 came into force, and the Federal Court unanimously held that the provisions of S. 13 of the Amending Act applied to the application, and their order is based upon this view. In my judgment this Court is bound to follow the Federal Court decision and to give effect in the present appeal to the provisions of Sec. 13 of the Amending Act.

It has been argued that there is one very material difference between the present

1. Vishwanath Narayan Singh v. Harihar Glr, (1939) 26 A I R Pat 90=178 I O 279=17 Pat 714=1938 P W N 765=19 P L T 760. 1939 P/75 & 76

2. Shyamakant Lal v. Rambhajan Singh, (1939) 26 A I R F C 74 = 182 I O 161 = 20 P L T 473.

case and the case in 20 P L T 473² decided by the Federal Court. In the present case after the rejection of the judgment-debtor's application the properties were put up to sale and purchased and possession given. In the proceedings which terminated in the Federal Court case the property was apparently not put up for sale because of a stay order, presumably, given by this Court during the pendency of the appeal. In my view there is no difference in principle between the two cases. In the present case, if we hold that the learned Judge was wrong in not valuing this property as directed by Sec. 16, Bihar Money-lenders Act, 1938, and S. 13 of the Amending Act, 1939, then the whole of the proceedings taken thereafter are liable to be set aside when the order of the learned Subordinate Judge is reversed. The sale took place subject to the result of this appeal, and the fact that no stay was granted and that the sale took place cannot affect the rights of the parties in this Court. In my judgment, the order of the learned Subordinate Judge cannot now be sustained and must be set aside. The case must be sent back to the learned Subordinate Judge to be decided according to law. He will bear in mind that Ss. 13 and 14 of the Amending Act now apply. We make no order as to costs of this appeal.

Fazl Ali J.—I agree.

D.S./R.K.

Case remanded.

A. I. R. 1939 Patna 594

FAZL ALI AND CHATTERJI JJ.

Court of Wards representing Narhan Estate through W. W. M. Murray — Plaintiff — Appellant.

v.

Sumrit Rai and others — Defendants — Respondents.

Appeal No. 179 of 1934, Decided on 26th August 1938, from original decree of Sub-Judge, Monghyr, D/- 29th September 1934.

(a) Bihar Tenancy Act (8 of 1934), Ss. 116 and 120—No evidence to show that lands were under cultivation before they were let out or that they were proprietor's private lands by local custom—Lands recorded as zirat but person in possession recorded as having non-occupancy right therein—Lands held not proved to be of zirat character.

Certain lands were recorded as zirat but there was no evidence on the record to show that these lands were ever under cultivation before they were let out or that they were proprietor's private land by local custom or that they were especially let out as proprietor's private land before 2nd March 1898 as required by sub-s. (2) of S. 120. The entry

in the Record of Rights also was a curious one, because while on the one hand it recorded the lands as zirat, on the other hand, the person, who was in possession of them, was recorded as having a non-occupancy right therein and a number of persons who held under him were shown as shikmidar tenants :

Held that it was not proved that the disputed lands bore the character of zirat lands.

[P 596 C 1]

(b) Bihar Tenancy Act (8 of 1934), S. 21 — Kabuliyat purporting to be lease of land and amount payable to lessor described as annual jama—No clause that besides cutting wild khar lessee would have no right to land—Lease held cultivating lease and settled raiyat acquired occupancy rights under S. 21.

In a kabuliyat regarding kharhaur lands there was no clause that "besides cutting the wild khar the lessee would have no right to the land and that he would not cultivate the land or alter the same." The kabuliyat purported to be a lease of land and the amount payable to the lessor was described as "annual jama" and it was stated that the lessee should, up till the term of the lease, remain in possession and occupation of the leasehold property and appropriate the produce thereof:

Held that the kabuliyat created an interest in the land and not merely in the khar growing on it. The lease was not a cultivating lease merely because the lease did not state in so many words that the land was let out for cultivation. Hence the lessees who were settled raiyats of the village acquired an occupancy right in the lands in question under Section 21.

[P 597 C 1]

Dr. D. N. Mitter, Sir Sultan Ahmad and B. N. Ray — *for Appellant.*

S. N. Bose, K. Dayal, M. K. Mukherjee and G. P. Singh — *for Respondents.*

Fazl Ali J.—This appeal arises out of a suit instituted by the appellant to eject the defendants first party from 351 bighas 9 kathas 13 dhurs of land situated in mauza Narain Pipra appertaining to Narhan estate which belonged to the appellant. The lands are described in the plaint as kharhaur, that is to say lands upon which thatching grass grows wild and are recorded in khata No. 358 which consists of 501 bighas odd. The previous history of these lands, so far as it is disclosed in the evidence, may be briefly stated here. It appears that on 14th December 1893, 359 bighas odd of kharhaur land and 40 bighas of khudkasht lands were settled on behalf of the Narhan estate with two persons named Raja Choudhury and Rupan Mahto at an annual jama of Rs. 1204 : *vide* kabuliyat Ex. 1. Meanwhile the lands of the estate were surveyed and the lessees were found to be in possession of a larger area than that recorded in the kabuliyat, Ex. 1. This mistake was rectified in the next kabuliyat Ex. 2 which was executed on 14th November 1898 by one

Bachha Mistry in respect of 462 bighas of kharhaur land and 38 bighas odd of khud. kasht land. The settlement under this kabuliyat and the kabuliyat, Ex. 1 were to last for a period of five years each. Between 31st December 1903 and 3rd March 1929, a number of settlements were made by the Narhan estate, each settlement being for a period of five years with slight variations in the annual jama.

The first of these settlements was made with Bachha Mistry alone [Ex. 2 (a)]; the second and the third with Bachha Mistry and Ram Prasad Mistry [Exs. 2 (b) and 2 (c)]; the fourth and fifth with Paglu Rai (ancestor of defendants 1 to 8) and Bachha Mistry [Exs. 3 and 3 (a)] and the sixth with Paglu Rai alone [Ex. 4]. In all these settlements it was stated that the

proprietor was exclusively entitled to the land and on the expiry of the lease, the lessee or his heirs and representatives shall have no kasht right or any other right of possession and occupation in the lands

and further that the lessee

shall keep the kharhaur and the zirat lands in the same condition as at present and shall not alter the same by cultivating them and growing crops thereon.

In the kabuliyat which was executed by Bachha Mistry and Ram Prasad Mistry in 1909 [Ex. 2 (b)] it was further stated that "besides cutting the wild khar, the lessee shall have no right to the land" and this new proviso was repeated in all the subsequent kabuliyats.

On 17th May 1929 the manager of the Narhan estate invited bids for the settlement of 350 bighas, 17 kathas and 5 dhurs only out of khata No. 358 and this area was ultimately settled with Paglu Rai who offered an annual jama of Rs. 2262 for the period extending from 1st Jeth 1336 to 1st Baisakh 1337. The plaintiff has adduced evidence to prove that as Paglu Rai made the best offer, the lands were settled with him for one year and Paglu Rai accordingly executed a kabuliyat (Ex. 14) on 17th May 1929 agreeing to pay the above mentioned jama. Some difference however arose between Paglu Rai and the Narhan estate with the result that the Narhan estate settled these lands (350 bighas odd) with defendants second party for a period of three years on 15th July 1930. But the new lessees were unable to get possession and certain criminal cases which followed were decided against them. The plaintiff accordingly brought the present suit in which he asserts that after the expiry of

the term stated in the kabuliyat executed by Paglu Rai on 17th May 1929 the defendants were not entitled to remain in possession of the land and are therefore liable to be ejected. The plaintiff's case further is that the defendants could not acquire occupancy right in the lands in suit, firstly because they are proprietor's zirat and secondly, because none of the leases granted to the defendants was a cultivating lease. Defendants 1 to 8 who are the direct descendants of Paglu Rai alone contested the suit, their main defence being that the lands are not zirat and that they have acquired a right of occupancy therein. Their case also is that Bachha Mistry [the lessee under kabuliyats Exs. 2 (b), 2 (c) etc.] was their farzidar and that they have been in occupation of the land for a much larger period than 12 years before the institution of the suit.

The learned Subordinate Judge has accepted the defendants' case except so far as it related to Bachha Mistry being their farzidar and dismissed the suit and the plaintiff has accordingly appealed. The main questions which arise in this appeal are (1) whether the disputed lands are proprietor's private lands or zirat; and (2) whether the plaintiff ever inducted the defendants or their ancestor Paglu Rai as tenants on the land or in other words whether the leases granted to Paglu Rai or any of them can be regarded as a cultivating lease. So far as the first question is concerned, the plaintiff relies mainly on certain admissions made in the kabuliyats executed by Paglu Rai and the entry in the Record of Rights. The so-called admissions however are by no means clear and it is difficult to hold on the basis of the somewhat loose statements made in the kabuliyats that the lands are zirat. The passages in the kabuliyats which are relied upon are:

(1) The said lands exclusively belong to the proprietor,

and

(2) We shall keep the kharhaur and zirat lands in the same condition as at present and shall not alter the same by cultivating and growing crops thereon.

The first statement is a very general one and might simply mean that the lands belonged to the lessor alone, and nobody else was entitled to settle them. As to the second statement I am not prepared to accept the suggestion made on behalf of the appellant that the expression "kharhaur and zirat" refers to the same land. Anyone who is familiar with the language in which

the document is written will find it difficult to adopt this interpretation. In my opinion by "zirat land" in this passage is meant the khudkasht land and it was due to bad drafting that the passage which followed—"shall not alter the same by cultivating," etc., was inserted there, though it was clearly intended to refer only to kharhaur lands. What is really in favour of the appellant is that the entire lands in khata No. 358 are recorded as zirat, but I agree with the learned Subordinate Judge that the presumption arising from the record of rights has in the present case been rebutted. This point has been fully dealt with by the learned Subordinate Judge in his judgment and it is unnecessary for me to reproduce his arguments. I agree with the learned Subordinate Judge that there is no evidence on the record to show that these lands were ever under cultivation before they were let out or that they were proprietor's private land by local custom or that they were especially let out as proprietor's private land before 2nd March 1883 as required by sub-s. (2) of S. 120, Ben. Ten. Act. The estate was under the management of the Court of Wards since 1877 and it is remarkable that no papers are forthcoming to show that these lands are proprietor's zirat within the meaning of Secs. 116 and 120, Ben. Ten. Act. The entry in the Record of Rights also is a curious one, because while on the one hand it records the lands as zirat, on the other hand, Raja Choudhury, who was in possession of them is recorded as having a non-occupancy right therein and a number of persons who held under him are shown as shikmidar tenants. As it is now well settled that no non-occupancy right can accrue in zirat land, the entries with regard to the character of the land and the status of the tenant are not consistent with each other. The point, however, which the appellant has not been able to meet is that he has not stated anywhere in the plaint that the lands in question are zirat. This omission is notable because in the criminal litigation which preceded the institution of the suit the defendants had repeatedly asserted that they had acquired a right of occupancy in the disputed land. On the whole therefore I am inclined to agree with the learned Subordinate Judge that the appellant has failed to show that the disputed lands bear the character of zirat lands.

The next question is whether the leases by which Paglu Rai was inducted on the

land were cultivating leases or merely documents enabling him to cut and appropriate the thatching grass growing thereon. So far as the leases other than the lease executed on 17th May (Ex. 14) is concerned, it is distinctly stated in them that "besides cutting the wild khar, the lessees shall have no right to the land." The learned Subordinate Judge is of the view that this statement was merely a device adopted by the landlord to prevent the right of occupancy accruing in the land. The reasoning of the learned Subordinate Judge in this connexion has been assailed before us as being highly speculative but it is substantiated to this extent that although each successive lease recites that the area of kharhaur land is 462 bighas and that of khudkasht land 38 bighas odd, yet the real fact seems to have been that the area of kharhaur land continued to diminish and the area of the culturable land continued to increase as time went by. As early as in 1898, the area of culturable land was much more than 38 bighas odd as will appear from the settlement records and yet in all the kabuliyats which were executed between 1898 and 1929 the area of khudkasht land was stated to be only 38 bighas odd. It has been conceded on behalf of the appellant before us that by 1929 the area under cultivation had become 150 bighas. Thus, although the tenants who were inducted on the land by various leases were gradually bringing the kharhaur land under cultivation, yet the fiction that besides cutting the wild khar they had no right to alter the land or cultivate them was kept up by inserting a proviso to this effect in all the leases. The learned Subordinate Judge considers that this was deliberately done to prevent the right of occupancy accruing and it appears to me that there is a good deal to be said for this view, especially as the lands being measured at the time of each fresh settlement, the proprietor must have been aware of the actual area of cultivated lands. However that may be, for the purpose of deciding this appeal it is not necessary for us to go beyond Ex. 14, that is to say the kabuliyat of 17th May 1929. It must be noted that in this kabuliyat there is no clause similar to the clause in the earlier kabuliyats providing that "besides cutting the wild khar the lessee shall have no right to the land and that he will not cultivate the land or alter the same." The annual jama was raised from Rs. 1650 which was paid by Paglu Rai up till March 1929

for 501 bighas of land to Rs. 2262 which was payable for an area of 351 bighas. The kabuliyat purports to "be a lease of land" and the amount payable to the lessor is described as "annual jama" and it is stated that

I the lessee should, up till the term of the lease, remain in possession and occupation of the leasehold property and appropriate the produce thereof.

Upon the terms of the kabuliyat it is fairly clear that it created an interest in the land and not merely in the khar growing on it. If this is so, it is somewhat difficult to hold that this was not a cultivating lease merely because the lease does not state in so many words that the land was let out for cultivation. There is difference in law between a lease and a license and though generally speaking it is true that the thatching grass grows spontaneously, yet it was treated by the settlement officer who surveyed the disputed land as a form of crop and it has been held in this Court that in order to make the best use of this grass the tenant must have recourse to certain processes of cultivation. But even apart from this aspect of the case, it appears to me on the language of the lease itself that it was a cultivating lease and so the defendants who are admittedly settled raiyats of the village acquired an occupancy right in the lands in question under S. 21, Bihar Tenancy Act. It was pointed out on behalf of the appellant that the contesting defendants had tried to repudiate the kabuliyat, Ex. 14. But the plaintiff's own case in para. 9 of the plaint is that Paglu took settlement of the land on 17th May 1929 and appropriated the khar from Jaith 1336 to Baisakh 1337. The evidence also shows that the plaintiff realized the entire rent for the year according to this kabuliyat Ex. 14. The defendants have also adduced very little reliable evidence to support the allegations made by them in their written statement with regard to this kabuliyat and their advocate has frankly conceded before us that he could not support these allegations. I would therefore dismiss the appeal, but having regard to all the circumstances of the case, I would make no order as to costs.

Chatterji J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 597

HARRIES C. J. AND FAZL ALI J.

Tejpal Marwari and others —

Defendants — Appellants.

v.

Kedarnath Himatsingka and others —
Plaintiffs — Respondents.

Appeal No. 10 of 1938, Decided on 8th August 1939, from original order of Sub-Judge, Dumka, D/- 9th December 1937.

(a) Civil P. C. (1908), S. 104 (c)— In appeal under Sec. 104 (c) validity of award itself cannot be challenged.

The scope of an appeal under Sec. 104 (c) is a limited one, and the party appealing can attack the order of the Court only in so far as it modifies the award and must confine himself to points which have a bearing on the modification made in the award. S. 104 does not entitle a party to appeal against the award itself; nor can he in appeal under this provision attack the proceedings before the arbitrator after a decree has been passed on the basis of the award. Hence in an appeal under Sec. 104 (c) an award cannot be challenged on the ground that arbitrator was not justified in allowing certain amendment in plaint: *17 C W N 617, Rel. on.* [P 598 C 1, 2]

(b) Arbitration—Arbitrator can allow amendment of plaint even if such amendment had been refused by Court before referring suit to arbitration.

Where an entire suit has been referred to arbitration, the arbitrator has power to allow amendment of plaint in respect of certain wrong date stated in it even if such amendment had been refused by the Court before suit was referred to arbitration. [P 598 C 2]

L. K. Jha and K. K. Banarji —

for Appellants.

Baldeva Sahai and C. P. Sinha —

for Respondents.

Fazl Ali J. — This is an appeal by the defendants against an order modifying an award in a suit brought by the respondents in the Court of the Subordinate Judge of Santal Parganas for recovery of a certain sum of money. The plaintiffs' case was that the defendants used to take certain articles on credit from them and they referred in their plaint to certain adjustments of account between them and the defendants, one of them being alleged to have taken place on 1st Baisakh 1337. On 11th February 1935, before the suit was referred to arbitration, the plaintiffs applied to the Subordinate Judge to allow them to amend their plaint by changing 1st Baisakh 1337 into 16th Kartick 1337 on the ground that the former date had been mentioned by mistake. The Subordinate Judge at first allowed the amendment, but afterwards on objection by the defendants he recalled his previous order

and disallowed the amendment with these observations :

The plaintiffs by their amendment now want to shift the date to 16th Kartick 1337 B. S. This changes the position materially. How far this will affect the accounts is another point, and will come up for consideration in due course.

It appears that after the suit was referred to arbitration the plaintiffs again prayed for amendment of the plaint by inserting the new date, and the arbitrator allowed the prayer. Thus when the award was submitted by the arbitrator to the Subordinate Judge, one of the objections raised by the appellants to the award was that the arbitrator had no power to allow an amendment which had previously been refused by the Court. The Subordinate Judge overruled not only this objection but all the other objections put forward by the defendants but as he found that the arbitrator had made certain mistakes in calculating interest, he made slight modifications in the award. These modifications are in favour of the defendants, and the learned advocate appearing for them has clearly stated before us that they have no grievance in so far as the award has been modified with regard to interest. He limits his appeal to one question only, namely that the arbitrator was not justified in allowing the amendment of the plaint on a point on which amendment had been refused already by the Subordinate Judge. Now, a preliminary question arises here as to whether it is open to the appellants to attack the award on such a ground in the present appeal. This appeal has been preferred under Section 104 (c), Civil P. C., which gives a right of appeal "from an order modifying or correcting an award." It is clear that the scope of such an appeal is a limited one, and the party appealing can attack the order of the Court only in so far as it modifies the award and must confine himself to points which have a bearing on the modification made in the award. Under para. 12 of Sch. 2, Civil P. C., the Court has power to modify or correct an award :

(a) Where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred ; or (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ; or (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Thus it is clearly open to the party attacking the order to show that none of the conditions mentioned in this paragraph

applied and the award could not have been modified ; but S. 104, Civil P. C., does not entitle a party to appeal against the award itself ; nor can he in appeal under this provision attack the proceedings before the arbitrator after a decree has been passed on the basis of the award. This view is fully supported by the decision of the Calcutta High Court in 17 C W N 617.¹ It was clearly pointed out in that case that cl. (c) of S. 104, Civil P. C., does not confer an unrestricted right of appeal ; in other words, when an order has been made by which an award has been modified or corrected, in an appeal preferred against that order the validity of the whole award cannot be called in question, the true effect of the clause being to allow an appeal against the order only in so far as it modifies or corrects the award. The scope of the appeal being limited, it is clear that the award cannot be challenged by the appellants on the ground urged in this appeal.

Although this appeal fails on the preliminary ground, it must be stated that there is also no merit whatsoever in the objection put forward by the appellants. The learned advocate for the appellants concedes that if the Subordinate Judge himself tried the suit, he had power to allow the plaint to be amended even if he had refused such amendment on a previous occasion. As however the entire suit has been referred to arbitration, I do not see why a similar power could not be exercised by the arbitrator. The arbitrator has pointed that the plaintiffs had made a mistake in stating the date of the adjustment of the accounts in the plaint, and, in my opinion, the arbitrator was justified in allowing amendment in these circumstances. In my opinion there is no merit in this appeal and it must be dismissed with costs.

Harries C. J. — I agree.

D.S./R.K.

Appeal dismissed.

1. *Rajbans Sahay v. Soorja Lal*, (1913) 17 C W N 617=15 I C 519.

A. I. R. 1939 Patna 598

JAMES AND ROWLAND JJ.

Ganjhu Upendra Singh — Appellant.

v.

Ganjhu Meghnath Singh — Respondent.

Appeal No. 257 of 1938, Decided on 9th February 1939, from appellate order of Judicial Commissioner, Chota Nagpur, D/- 29th July 1938.

(a) Civil P. C. (1908), S. 60 — Crown grant containing prohibition against alienation —

creditor can proceed only against profits and not against tenure itself.

When a Crown grant contains a prohibition against alienation of the estate that prohibition must take effect in accordance with its terms. The rule in such a case is that the measure of liability to involuntary alienation is the power of voluntary transfer. The latter is taken away from the holder by statute so far as sale or attempted sale of the property is concerned and the exercise of it is rendered void. Full ownership is cut down and the holder's power of alienation is restricted to profits accruing during his lifetime. Hence the creditor can proceed only against the profits and not the tenure itself : *AIR 1938 Mad 623 and AIR 1931 Pat 364, Foll.* [P 601 C 1, 2]

(b) Transfer of Property Act (1882), Section 111(f)—Lessee accepting new lease during continuance of former lease — Former lease is impliedly surrendered.

Where a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the previous lease, this is an implied surrender of the former lease which is thus determined. [P 601 C 1]

K. K. Banarji and S. N. Bose —

for Appellant.

S. M. Mullick, S. N. Banarji and L. K. Chaudhury — *for Respondent.*

James J.—The appellant is a judgment-debtor who holds a jagir under Government in Ranchi District. His ancestor enjoyed a tenure which was created in 1842 by the proprietor of the Barkagarh estate, granted in consideration of services to be rendered as barkandaz. The estate was subsequently forfeited to Government, and in 1881 there was a formal dispensation with the services which the jagirdar had to render as barkandaz, and a new grant was created of the tenure freed of those services, at an annual rent of Rs. 48.8.0. The new grant created a jagir for the descendants of an earlier jagirdar Ratan Singh to enjoy, so long as any descendants of Ratan Singh should survive. There was a stipulation that the jagirdar had no power to transfer by sale or by creation of mokarrari tenures any part of the tenure, with a liability to resumption if unauthorized transfer should be made. The opposite party sought to bring this tenure to sale in execution of his money decree: but the jagirdar objected that his jagir could not be brought to sale. The Subordinate Judge dismissed this objection on the ground that the tenure in favour of the petitioner's ancestor did not come into existence by the grant of 1881, and on the general ground that where there is a stipulation in a lease restricting the right of transfer by the lessee, his interest can be sold in execution of a decree. The judgment-debtor appealed to the Judicial Commis-

sioner who maintained the order of the Subordinate Judge and dismissed the appeal.

Mr. S. N. Bose on behalf of the appellant argues that this is a grant of the same tenure as the Crown grant which was the subject-matter of proceedings before the High Court of Madras in *I L R (1938) Mad 767*,¹ where it was held that the actual interest possessed by the decree-holders was merely a right to enjoy the rents and profits during their lives, and that the tenure enjoyed under a grant from the Government of Madras with a prohibition against alienation could not be sold in execution of a decree. Mr. Bose also refers to the decision of the Judicial Committee in *59 Cal 1*,² but there the conditions of the enjoyment of the estate of the Nawab of Murshidabad had been determined by formal legislation and there could be no question regarding the inalienability of the immovable property affected by that legislation. Mr. Bose also lays some stress upon the decision of Sir Stewart Macpherson and Dhavle, J. in *10 Pat 582*,³ wherein the basis of the decision, to use the language of Macpherson, J., was that

property is not liable to sale by the Court unless the judgment-debtor has a disposing power over it for his own benefit. The measure of liability to involuntary alienation is the power of voluntary transfer.

This part of the decision of the Division Bench of this High Court was cited with approval by Sir Owen Beasley, C. J. in *A I R 1937 Mad 864*.⁴ Mr. S. M. Mullick on behalf of the respondent argues in the first place that this jagir ought not to be regarded as a Crown grant at all because it was originally created by a private landlord as a service tenure. He suggests also that the restriction on transfer merely renders the purchaser liable to find that the grant may be resumed by the superior landlord after purchase, but that it cannot prevent the tenure from being brought to sale in execution by a Court. In *20 Cal 273*,⁵ which is cited by Mr. Mullick, it was held that a restriction on assignment in the

1. *Sundararajulu Naidu v. Pappiah Naidu*, (1938) 25 AIR Mad 623=182 I O 587=I L R (1938) Mad 767=(1938) 1 M L J 686.

2. *Nawab Bahadur of Murshidabad v. Karnani Industrial Bank Ltd.*, (1931) 18 A I R P O 160=132 I O 727=59 Cal 1=58 I A 215 (P O).

3. *Khitnarain Sahi v. Sarju Seth*, (1931) 18 A I R Pat 364=132 I O 868=10 Pat 582=12 P L T 508.

4. *Janaki Ammal v. Marudal Chetti*, (1937) 24 A I R Mad 864=175 I O 305.

5. *Golak Nath v. Mathura Nath*, (1893) 20 Cal 273.

lease did not apply to an assignment by operation of law taking effect against the will of the lessee by a sale in execution proceedings. Mr. Mullick also cites the decision in 19 C W N 1182,⁶ where it was held that the condition in a permanent lease that the landlord would re-enter if the tenant made any transfer of the land demised did not prevent a sale by the Court. The learned Judges in this latter case distinguished the lease before them from the lease which was under discussion in 7 Bom 256,⁷ on the ground that in the Bombay case there was a distinct prohibition on the tenant's permitting his tenure to be attached or sold in execution; and Mr. S. M. Mullick argues generally that prohibition against transfer in a grant or a lease does not affect the liability of the tenant to have his estate brought to sale against his will.

Now in the first place it appears to us that it cannot be reasonably held that the tenure which is here in question is not a Crown grant, or that it is not a grant which is affected by the Crown Grants Act of 1895 in such a manner that the provisions of the Transfer of Property Act do not apply to it, so that it takes effect according to its tenor whatever may be the conditions laid down. It is possible that the ancestors of the jagirdar enjoyed this tenure on different terms before the grant was made in 1881; but there is nothing to indicate that the ancestors of the tenureholder ever at any time enjoyed a tenure which could be transferred or could be brought to sale in execution of a decree. The tenure for which services had to be rendered as barkandaz could certainly not be alienated without the consent of the grantor to whom the services were to be rendered. When in 1881 these special services were commuted for an increased money rent payable by the jagirdar, the jagir would have become transferable if no restriction had been made in the grant; but the grant did make a clear restriction and it granted a limited interest which was not transferable. In the cases of the Calcutta High Court cited by Mr. S. M. Mullick, it was remarked that involuntary alienation would not be a breach of a covenant not to assign; but we are not here concerned with a covenant not to assign, but with a grant by the Crown of a limited interest which

was not assignable either by operation of law or by voluntary alienation. Mr. Mullick criticizes the view expressed in 10 Pat 582,³ that "the measure of liability to involuntary alienation is the power of voluntary transfer" pointing out that a Mitakshara coparcener may have his interest brought to sale in execution although he has no power of making a voluntary transfer; but the Mitakshara coparcener can always, by separating himself from the joint family, obtain a disposing interest over his own share; and where involuntary transfer is allowed in this way, the creditor is merely compelling the coparcener to do what he himself has power to do by applying for a partition.

The interest enjoyed by virtue of the grant of 1881 is a strictly limited interest in this way, that it is to be enjoyed by the heirs of Ratan Singh and by nobody else; and that what is granted is not a property which the heirs are to treat as their own in the sense that they may, if they please, transfer it to somebody else: it is a property created in the manner in which so frequently jagirs in India are created by the Crown which can be enjoyed only by the heirs of the grantee and cannot be alienated or assigned. No more can be brought to sale in execution of the decree than the judgment-debtor himself enjoys; and the judgment-debtor here possesses no right in the corpus of the property which can be assigned or which can be brought to sale. The only manner in which the decree-holder can utilize for his own benefit the interest of the jagirdar in this property is by obtaining the appointment of a receiver of the rents and profits until his decree is satisfied during the lifetime of the judgment-debtor whichever might be the shorter period. I would set aside the decisions of the Courts below and allow this appeal with costs. This jagir cannot be brought to sale in execution of the respondent's decree.

Rowland J.—I agree and would like to add a few observations. The Subordinate Judge rested his decision on the view that the Crown Grants Act did not apply to this tenure, and secondly, he was of opinion that if it did apply, it was of no advantage to the judgment-debtor. His view that the Crown Grants Act did not apply was entirely erroneous. He thought that the tenure was not to be considered to be a tenure created by and held under the terms of the grant of 1881 but an older tenure which had merely been continued by that grant. The true

6. Keshab Chandra Pramanik v. Ajahar Ali Biswas, (1916) 3 A I R Cal 175=28 I C 837=28 C L J 428=19 C W N 1182.

7. Vyankatraya v. Shivrambhat, (1883) 7 Bom 256.

position was that the lessee by accepting a new grant had made an implied surrender of the former lease. That is the position contemplated in S. 111(f), T. P. Act. Where a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the previous lease, this is an implied surrender of the former lease which is thus determined. The observation of the Subordinate Judge that the Government having only stepped into the shoes of Thakur Biswanath Sahi Deo on account of the confiscation of his estate, was not entitled to impose a fresh condition as regards the transferability of the tenure in question is plainly unsupportable. The Crown Grants Act was passed in order to prevent the Courts from saying that the Crown could not grant lands on such and such terms. Then the Subordinate Judge in construing the restrictions imposed on transfer has proceeded on a view which is supported by some authority in respect of grants made by private persons to private persons containing covenants against alienation.

Now such covenants are referred to in S. 10 of the T. P. Act. The restriction on alienation is void except in a lease where the condition is for the benefit of the lessor or those claiming under him; and the validity of the condition has generally come in question in connexion with the claim of the lessor to forfeit the lease. The Courts have generally been reluctant to enforce such a forfeiture: but the principles of those decisions do not seem to me to be applicable in the other class of cases where the restriction on alienability is expressed either in a Statute as in 59 Cal 1² and 10 Pat 582³ or in the case of a grant from the Crown. In 27 All 634⁸ the Judicial Committee of the Privy Council considered the case of an estate granted by a sanad in which provision had been made for descent by primogeniture which was said to be at variance with the custom of the family. It was held that the Crown Grants Act was a complete answer to the contention that it was not open to the Crown in making a grant to alter the ordinary rules of succession in respect of the estate. When a Crown grant contains a prohibition against alienation of the estate that prohibition must take effect in accordance with its terms as held in I L R (1938) Mad 767.¹ In all this class of

cases the rule in my view is that laid down by Macpherson, J. in 10 Pat 582³:

The measure of liability to involuntary alienation is the power of voluntary transfer. The latter is taken away from the holder by the statute so far as sale or attempted sale of the property is concerned and the exercise of it is rendered void. Full ownership is cut down—the holder's power of disposition for his own benefits is restricted to the profit accruing within his lifetime.

That being so, the creditor can only proceed in execution against the profits accruing and not against the estate or tenure itself.

D.B./R.K.

Appeal allowed.

*** A. I. R. 1939 Patna 601**

MOHAMAD NOOR AND ROWLAND JJ.

Ratan Prasad Marwari — Appellant.

v.

Bridhi Chand Shroff and others —

Respondents.

Appeal No. 138 of 1938, Decided on 19th April 1939, from original order of Sub-Judge, Deoghar, D/- 16th May 1938.

* Civil P. C. (1908), Order 32, R. 3 — Suit against minor represented by guardian ad litem — Defendant becoming major after preliminary decree—Final decree passed without removing guardian ad litem and without describing defendant as major is not nullity — Same considerations apply to execution proceedings.

The effect of O. 32, R. 3 is that a guardian ad litem does not cease to function automatically on a minor defendant attaining his majority. He is to be discharged, and as the minor who has attained majority is the best person to know the date of his attaining majority, it is for him to come to Court and apply for the discharge of the guardian and to take up defence of the suit personally. It is not incumbent upon a plaintiff to keep himself informed as to the date when a minor defendant, who was sued as such became a major and then to apply to have the guardian discharged and to proceed with the suit against the defendant as a major. Hence, where at the time when the suit was instituted the defendant was a minor and was properly represented through a guardian and this state of affairs continued up to the time of the passing of the preliminary decree, the final decree, which is passed without the removal of the guardian ad litem and without describing the defendant as major is not a nullity. The same considerations apply to the validity of the execution proceedings as under the amended R. 3 of O. 32, the guardian ad litem appointed in the suit continues even in the execution proceedings: *A I R 1926 All 387, Disting.*; *A I R 1928 Mad 294* and *A I R 1926 Cal 1053, Rel. on.* [P 602 C 2; P 603 C 1]

A. P. Upadhaya and Ch. Mathura Prasad
— *for Appellant.*

S. C. Chakravarty — *for Respondents.*

Mohamad Noor J.—This miscellaneous appeal arises out of a proceeding for execution of a mortgage decree for sale obtained by the respondent Bridhi Chand Shroff

8. Sheo Singh v. Raghubans Kunwar, (1905) 27 All 634=32 I A 203=8 O O 817=8 Sar 791 (PC).

against Baijnath Marwari and his two sons, one of them being the appellant Ratan Prasad Marwari, who was admittedly a minor when the suit was instituted and attained majority after the passing of the preliminary decree but before the date of the final decree. He was represented in the suit by his guardian ad litem Babu Baidyanath Banerji who continued to act as such till the final decree was passed, though, as I have said, the appellant was a major then. The decree-holder took out execution describing the appellant as minor. The execution record is not before us, but from the fact that the notice under O. 21, R. 22 for the appellant was served on Babu Baidyanath Banerji it is clear that the appellant was proceeded against under the guardianship of that gentleman. It appears that later on Babu Rati Nath, a pleader, was appointed guardian ad litem. As the whole record is not before us it is not clear how the guardian was changed; but it must have been done because Babu Baidyanath Banerji did not enter appearance and perhaps the decree-holder or the Court thought it desirable to discharge him and appoint a new guardian. The execution proceeded against all the judgment-debtors, the appellant being represented through Babu Rati Nath, pleader. Later on, the appellant appeared and filed objection under Sec. 47, Civil P. C., in which he questioned the validity of the final decree and of the execution proceeding. He urged that the final decree was a nullity inasmuch as at the time when it was passed the appellant had already attained majority and therefore could not be represented at that stage through a guardian ad litem. On the same ground he questioned the validity of the execution proceeding, that is to say, he urged that as he was a major, the execution proceeding in which he had been described as a minor was ineffective and the properties could not be sold in such a proceeding. The objection was disallowed and he has preferred this appeal.

It appears that after the institution of the appeal the appellant applied for an order staying the sale of the mortgaged properties. That application was rejected and we are informed that the properties have been sold and purchased by the decree-holders. The objection raised by the appellant before the learned Subordinate Judge has been repeated before us in appeal. The first contention of the learned advocate for the appellant has been that the final decree

was a nullity on account of the misdescription of the appellant. No authority has been placed before us in support of this contention. The learned advocate referred us to the case in 48 All 362.¹ That case has absolutely no application to the present one. There, a defendant who was a minor, was described as a major, and the case proceeded against him without the appointment of a guardian ad litem. It was held that the decree passed under such circumstances was a nullity. But here when the suit was instituted the appellant was admittedly a minor and was properly represented through a guardian and this state of affairs continued up to the time of the passing of the preliminary decree. The question is whether the final decree, which was passed without the removal of the guardian ad litem and without describing the appellant as major is a nullity. Now, there is no provision in law which makes it incumbent upon a plaintiff to keep himself informed as to the date when a minor defendant, who was sued as such became a major and then to apply to have the guardian discharged and to proceed with the suit against the defendant as a major. Sub-r. (5) of O. 32, R. 3, as amended by this Court, runs as follows:

(5) A person appointed under sub-r. (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceedings in the execution of a decree.

The effect of this Rule is that a guardian ad litem does not cease to function automatically on a minor defendant attaining his majority. He is to be discharged, and as the minor who has attained majority is the best person to know the date of his attaining majority, it is, I think, for him to come to Court and apply for the discharge of the guardian and to take up defence of the suit personally. I am supported in this view by the authority of two decisions which have been relied upon by the learned Subordinate Judge. The first is A I R 1928 Mad 294² where it was laid down that no provisions have been made in the Civil Procedure Code in respect of a minor defendant attaining majority. Therefore the minor defendant who comes of age may, if he thinks fit, come on the record

1. Daulat Singh v. Raja Ramji, (1926) 13 A I R All 387=93 I C 376=48 All 362=24 A L J 379.

2. Sanyasi v. Yerran Naidu, (1928) 15 A I R Mad 294=118 I C 294=51 Mad 763=55 M L J 374.

and conduct the defence himself. If however he does not do so and allows the case to proceed as though he was still a minor without bringing to the notice of the Court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the time. A similar view has been taken by the Calcutta High Court in A I R 1926 Cal 1053.³ Therefore I am clearly of opinion that the final decree for sale was a perfectly good decree.

Coming to the validity of the execution proceedings, the same considerations arise. As I have stated before, under the amended R. 3 of O. 32 the guardian ad litem appointed in the suit continues even in the execution proceedings. Therefore the execution was rightly taken out against the appellant through the guardian who was appointed in the suit and notice was properly served upon him. Then, I presume, that on the guardian not appearing in the execution for some reason which is not clear from the record, a fresh guardian was appointed. Then apart from all these considerations the appellant himself appeared in the execution proceedings and beyond questioning the validity of the execution he raised no objections about the merits of the execution itself. Had he any objection to raise about the merits of the case it was open to him to assert it. He could have taken up the conduct of the case in his own hands and could have raised any objections which he wanted to raise. He did not do so, and as I have said, the only thing he did was to raise some technical objection about the execution. The debt for which the decree was passed was incurred by the appellant's father, and though he was made a defendant in the suit, the only defence that he could raise in the suit was that the debt was incurred for illegal or immoral purposes or that the mortgage was not executed for legal necessity. No such defence seems to have been raised in this case. In my opinion, the objection was taken simply with a view to gain time and put off the satisfaction of the decree. There is no merit in it. I may also mention that the decreeholder who has purchased the mortgaged property is willing to give up his rights under the sale if the decretal amount be paid to him within a short time. To this

the learned advocate for the appellant did not seem to agree. I would dismiss this appeal with costs.

Rowland J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Patna 603

WORT J.

Smt. Mohadevi — Petitioner.

v.

Motiram Roshan Lal Coal Co. —

Opposite Party.

Company Case No. 20 of 1938, Decided on 20th February 1939.

(a) Companies Act (1913), S. 38—Mere delay in applying is no ground for refusal of rectification.

Mere delay in applying is itself not a ground to refuse to order the register to be rectified : (1893) 17 Eq 273, *Rel. on.* [P 604 C 2]

(b) Companies Act (1913), S. 38—Discretion regarding costs is wide.

Section 38, Companies Act, in India gives a wide discretion regarding costs. [P 607 C 2]

L. K. Jha and N. C. Ghosh —

for Petitioner.

Mahabir Prasad and Phulan Prasad Verma — *for Opposite Party.*

Judgment.—This, in my judgment, is a very clear case excepting on one point. There is an application under S. 38, Companies Act, primarily directed against the company itself for the rectification of the share register. In the first place I should like to observe that on 1st December of last year, I made the following order on the first application of Srimati Mohadevi :

The following issue will be tried under S. 38, Companies Act—Whether the document dated 22nd April 1927, purporting to be a transfer of shares in the Motiram Roshan Lal Coal Co., Ltd., was executed by the Hindu firm Sagar Mall Subhakaran or by one of them on behalf of the said Hindu firm?

This order in a sense has become infructuous as the parties, although they expressed the desire to examine witnesses, have now failed to do so, and I am thrown back to the position of deciding the original application on affidavit evidence. I have mentioned the facts set out above in connexion with the argument addressed to me by Mr. Mahabir Prasad appearing on behalf of the company to the effect that my powers under S. 38 are discretionary, and that in the circumstances of the case, which will appear from the observations I am about to make, I should refuse to exercise my discretion in favour of the applicant, and refuse to decide the points at issue and leave the applicant to her remedy in a suit.

3. Drupad Chandra v. Bindumoyi Dasi, (1926) 13 A I R Cal 1053=97 I C 209=48 O L J 606.

Whether I should or should not exercise my discretion in the sense of the argument advanced is the one point of difficulty which I find in the case. When once I have decided that question, the matter becomes very plain. When I made the order in December 1938, it was stated by the parties that they intended to call witnesses, as I have already stated, and that the petitioner Srimati Mohadevi was to be examined on commission. The respondents intimated, as I understood, that they proposed to call witnesses in the ordinary course and stated (as my memory goes) they had not yet decided and could not put the Court into possession of the list of witnesses. Now, when once the order was made that witnesses should be examined orally, the parties were entitled to call such witnesses as they thought proper in the circumstances. At a later date it was stated that the petitioner could not be examined on commission and that reliance was going to be placed upon affidavits only. At a very late stage, in fact the date before the case came on for hearing, the respondents asked for time in order to ascertain what witnesses they should call. This application was refused because, as I have already indicated, there was no obligation to the parties to give a list of witnesses and the respondent company had ample time to make up its mind as to the witnesses which they desired to call. As I have already said, the respondents' application was refused, and I have very grave doubts about the bona fides of that application. That is all I propose to say as regards that.

It is in those circumstances that Mr. Mahabir Prasad contends on behalf of the company that I should refuse to exercise my discretion under S. 38, Companies Act, in favour of the applicant or refuse to decide the question of title as between the transferor of these shares and the transferee. It was intimated on the last occasion, and I think that intimation was sufficiently brought out by the order which I made in December last, that there was some sort of coercion or forgery or some circumstances which, if established, would entitle the respondents to argue that the signature on the transfer was not that of the firm; but, as it will appear from the affidavits filed, there is no dispute that it was the signature of the firm, that is to say, one member of the firm. The only matter in dispute is the circumstances under which the transfer was executed. My mind has

changed very considerably during the course of the argument; but I have now quite clearly come to the conclusion that I should exercise my discretion under Sec. 38 of the Act, and I am assisted in that conclusion by a number of authorities. I decline to follow the Calcutta decision to which reference was perhaps made. I think it will sufficiently appear from the statement of facts that the matter of title is abundantly clear. The further fact which I should have mentioned in connexion with the point as to exercise of my discretion is that the transfer was made in the year 1927.

As far as the facts of this case go, it appears that nothing was done, apart from perhaps certain oral requests, until the year 1931, calling upon the company to register the shares. It is on this long delay, and the fact that the application to this Court was not made until the year 1938, that reliance is also placed for the suggestion that I should not decide the matter under S. 38, but leave the parties to a suit. That is a delay which needs some explanation. There are various explanations given such as the company was paying at the time no dividend and that certain persons had asked the managing director to register the shares but they were told to wait. But there is the remarkable fact, that although this transfer had taken place in 1927 (I am assuming for the moment that it did take place in the circumstances), nothing was done by the transferor to get the transfer (which had been executed) back from Srimati Mohadevi, the lady, because on the respondent's own showing it was a transfer made for a contingency which did not arise. Therefore, quite clearly, if the facts are true, the respondent company were entitled to get back the certificate within a very short time of the date upon which it was executed. Their case is that they trusted the lady and therefore there was no reason why they should demand the certificate back. Frankly speaking, I do not accept this explanation offered by the respondents, and my not accepting it gives some sort of support to the applicant's story. The mere delay in itself is not a ground why I should refuse to order the register to be rectified. It may very well be that, had it not been for the fact that the unacceptable explanation was put forward by the respondents—I am referring to their explanation why they did not demand the certificate back—the fact of delay might have led me to say that it was a case in which the applicant

should have brought a suit. But I am of opinion that the case is so clear that I think that I should decide the matter under Sec. 38, Companies Act.

Section 38 of the present Act is almost on the same terms as S. 35, Companies Act of 1862, which in England has now been superseded by a number of subsequent Acts. I refer to the Companies Act of 1862 because, as I have already stated and repeat, the words are substantially the same with one rather important exception and it is on the Act of 1862 that the leading cases have been decided. There are provisions in S. 35 of the Act of 1862 such as references to Courts of Equity and Courts of Common Law. But apart from matters of that kind S. 35 of the Act of 1862 is substantially the same as S. 38 of the present Act. The one important exception is that the Court may either admit or refuse such application with or without costs to be paid by the applicant. Now the Courts in England have construed that as meaning that whatever else may happen, the Courts cannot award costs against the transferor: I refer to the case in (1893) 17 Eq 273.¹ S. 38, Companies Act, in India, gives a wide discretion and the provision in that regard is to this effect: "and may make such order as to costs as it in its discretion thinks fit." As far as the costs are concerned therefore, I am not limited in the same way as the Court was in the case to which I have just referred.

The applicant in her affidavit, sworn by her husband Jamnadas Khemka, says that it was on 22nd April 1927, that the transfer was executed for the sum of Rs. 5334. There was a parcel of 889 shares and the numbers are referred in para. 5 of the affidavit. There is no dispute about the numbers. It is to be noticed in the first place that there was no statement as to the circumstances under which the transfer was executed but merely, as I have stated, for the consideration of the sum to which I have referred. The owner of the shares (transferred) was Sugar Mull Subhkaran, a firm of merchants amongst the original share-holders and subscribers to the Memorandum of Association. It was Subhkaran Chaudhry who filed an affidavit in reply to the application, stating that he had received a telegram from Srimati Mohadevi, who was a close relation of theirs, "to proceed to Jaipur." That is important and highly important; I refer to para. 4 of his affidavit

in reply. According to the story the father was ill and his case was that the lady had asked him to go provided with adequate funds to meet the possible or probable expenses of his father's medical treatment and Subhkaran's case is that he declined to accept the proposal. The statement in itself is remarkable. I can understand a relation in the circumstances asking this boy (as he claimed to be) whether he was in need of funds, but I do not accept the suggestion, even if there was any truth in the story at all, that she was pressing funds upon him. According to his affidavit he was pressed by the lady and pressed to execute a certificate of transfer of shares in the company which she could use by way of security for any money to be provided. There is also a statement in para. 8 of the counter-affidavit setting out a story which it is difficult to follow. It is to the effect that the lady suggested to Subhkaran Choudhury that some sort of arrangement should be made against the contingency of my falling short of funds in the matter of my father's treatment, and I was asked to keep a number of ornaments belonging to our family and the certificate of shares in the aforesaid company with her in Calcutta to be utilized and held by way of security.

I understand by that, that according to this young man's story he was carrying about the ornaments of the family and the lady requested him to let the ornaments and the share certificate remain with her as security, or at least he had control of them. The story sounds highly improbable. Paragraph 10 of the counter-affidavit is very important and there Subhkaran says:

The said lady being one of my respectable elders I had every confidence in her and did not suspect that she could have any ulterior motive by making me do the act stated in the preceding paragraph.

And he says in para. 12 that no money was ever taken from the said lady either by sale, transfer or mortgage of the said shares.

It is to be noted that there is no proof whatever or suggestion how the certificate got to Jaipur. If I am to take the affidavit at its face value, this youth (as he then was) according to the case was a person travelling with family ornaments and much of their moveable property and had apparently with him the transfer deed of shares in Motiram Roshan Lal Coal Company, Ltd. There is no suggestion in his affidavit that the lady asked him to go back to his home to fetch these things; in fact there are no circumstances whatever excepting the bare statement that the lady asked for the ornaments and the transfer deed. The story as told leads me to the conclusion

1. In re Tahiti Cotton Co., Ex parte Sargent, (1893) 17 Eq 273=48 LJ Ch 425=22 WR 815.

that the transfer was executed in circumstances other than those stated by the respondents.

But the important fact which is established by this affidavit of 19th August 1938, is that Subhakaran Chowdhury executed the transfer deed, and there is no suggestion by him that he executed it contrary to the authority of the firm of which he was a member. There is no suggestion either of coercion or anything of the kind. It was a voluntary act on his part, on the suggestion of the lady it is true, for the purposes of providing security for any money which he might require from the lady in the circumstances. In a supplementary affidavit of October of the same year, he tells a story contradicting his first story. That story is that he was made to put down the name on the printed form in which there was nothing written in hand. He asserts that he was "sure that the printed form had been later on filled up without his knowledge to set up as a transfer deed." In para. 5, he says :

That on 22nd April 1927, the date of the alleged sale of shares at Calcutta, I was at Sardar Shahar in Bikaner State in connexion with the marriage of Kishori Lall.

That is a clear suggestion that it was a forgery. Then in para. 8, the following statement appears :

With reference to para. 19 of the affidavit of Jamnadas Khemka I say that the fact that the ornaments belonging to my family and share scripts were deposited with Srimati Mohadevi is known to Surajmal Chowdhuri, Badridas Chowdhuri, Ratanlal Chowdhuri and Harmukhrai Chowdhuri who may bear witness to the fact. I further say that there have been good relations between my family and Srimati Mohadevi until the date of the knowledge of the present proceeding, and as such, I believed that the said ornaments and share scripts were lying fully safe on our behalf in the custody of Srimati Mohadevi who is one of our closest relations.

It will be seen that there is a complete contradiction of the story : on the one hand, he was not sure when the certificate was executed and when was it suggested that the ornaments and the transfer deed should be handed over to the lady, while on the other hand there is the clear case that he executed the transfer in the circumstances which I have narrated, and thirdly that he thought that everything was safe in the hands of the lady. If I were to accept the story at its face value, it would be impossible to come to any conclusion as to what the facts were, and I frankly say that I do not believe for one moment any one statement made in the counter-affidavit and

the supplementary affidavit by Subhakaran Chowdhury.

I pass on to another matter. The suggestion made by Sagar Mall, the father of Subhakaran Chowdhury, in his affidavit is that Subhakaran was a minor at the time, i. e. in 1927. Jamnadas Khema, the husband of Srimati Mohadevi, states in his affidavit that Subhakaran was about 19 years, 6 months and 17 days old on 22nd April 1927, when he transferred the shares. That by a simple process of arithmetic would fix Subhakaran's birthday. The father Sagar Mall says in para. 5 of his affidavit this :

It is absolutely true that my son Subhakaran Chowdhury was minor at the date when Srimati Mohadevi made him write out the name of Sagar Mall Subhakaran Chowdhury on the printed form which was later on set up as a deed of transfer.

Although, as I have stated, the husband of the applicant swore to the actual years, months and days of the age of Subhakaran Chowdhury, the father Sagar Mall says in his affidavit in his para. 6 : "It is altogether false because my son Subhakaran was not born on the Dewali day of Sambat 1964." But he does not volunteer the information on what date he was born. One person who could have spoken of the date of birth of Subhakaran was the father. His statement in his affidavit may be perfectly true, but it does not necessarily follow that the son was a minor in 1927; he may have been born on the day following the Dewali or later or even earlier but still be major. I do not accept the father's statement for one moment. I have not been placed in possession of facts which would entitle me to come to a conclusion in the matter.

But the important point in this case is this, that when the application was made to the company to rectify the register their answer was that the transfer was not authorised by Art. 16 of the Articles of Association which provides :

Any share may be transferred at any time by a member to his or her father or mother or grandfather or grandmother or to any lineal descendant (male or female),

and the respondent's case is that the lady was not a lineal descendant. Although the company represented by Mr. Mahabir Prasad resists this application, it is not contended that the applicant is not within the relationship set out in Art. 16. Sagar Mall is the brother of the applicant and Subhakaran, the son, is the nephew. The point put forward is that, as the father and the son and other members of the family constituted a joint Hindu family concern

or business under the style of Sagar Mall Subhakaran Chowdhury, the applicant could have no concern therein. I characterize that as a disingenuous argument and not worthy of consideration. It is perfectly clear from the list of subscribers and the circumstances of the case that this is a family concern; that the company itself is nothing more than a family or connexions of the family; and that it is perfectly obvious that they must have been, if I may use the expression, working hand in glove. Although there is no evidence on the point, I have not the slightest doubt, having regard to the correspondence appended to the affidavit in support of the application, that the company must have known of the circumstances under which the transfer was executed. I wish to make myself clear. I am assuming for the purpose of the argument that the case of the respondent is true. If that be the fact, I am perfectly certain that the company knew and yet they contended that the registration could not be put through because the application was not within the relationship contemplated by Art. 16. I am not concerned in this case with the question whether this transfer was executed for joint family necessity; it does not arise and was never put forward. Indeed if the case the respondent put forward were true, that is to say the money was advanced for the purposes of the family or one part of the family, then if the applicant had advanced the money, there is not the slightest doubt that that would be a legal necessity. But I decide that point merely on the footing that it was not put forward in this case.

The defence put forward, if I may call it such, was that the transfer was for a contingency which did not arise and therefore there are certain equities in favour of the transferor. If that alone had been a question to be determined, I should have said long since that the case put forward by the applicant lady (in reply to the story set up by the respondent) that she had paid off some of the debts of the family firm and that the lady was owing Rs. 31,020 at the time this transfer was executed as part payment of that debt to the extent to which I have referred in my opening observation was true.

But in my judgment there is no truth in the story of the respondents whatever. It is a story which I cannot accept for reasons which perhaps I have not given to very great detail. I fail to understand why

there has been so much delay on the part of the applicant. On the other hand, as I have already observed, there is no reason why the Court should not exercise its discretion under the Section. Equally difficult questions of fact were decided under similar circumstances in (1893) 17 Eq 273,¹ to which I have already referred, and in (1876) 2 Q B 463² where the decision of Lord Cairns in (1867) 2 Ch 431³ at p. 441 was discussed. I have no doubt that I should, in this case, although the facts appear at first sight to be somewhat complicated, exercise my discretion in favour of the applicant and order the company to rectify their register by placing Srimati Mohadevi on the register as owner of shares Nos. 40001 to 40500, 56401 to 56700 and 59911 to 59999 inclusive.

Before I leave the case I would like to repeat what the son stated in his affidavit, namely that the applicant was closely related to the members of their firm. I have already pointed out that under the present Act, differing from the Act of 1862 upon the construction of which the decisions to which I referred were made, I have the widest discretion as to costs, and I order the costs to be paid both by the company and the respondents to the applicant. The claim for damages has not been established and I disallow it. The hearing fee is assessed at fifteen gold mohurs.

D.S./R.K.

Order accordingly.

2. *Ex parte A. R. Shaw*, (1876) 2 Q B 463=46 L J Q B 394=36 L T 573=25 W R 569.

3. *In re Ward and Henry's case*, (1867) 2 Ch 431=36 L J Ch 462=16 L T 254=15 W R 569.

* A. I. R. 1939 Patna 607

JAMES AND ROWLAND JJ.

Mt. Dulhin and others — Appellants.

v.

Harihar Gir and others, Judgment-debtors and others — Respondents.

Appeal No. 302 of 1937, Decided on 13th February 1939, from original order of Sub. Judge, Gaya, D/- 16th August 1937.

* Civil P. C. (1908), S. 48—Art. 182, Limitation Act, cannot be invoked in finding starting point for 12 years under S. 48 — Period of 12 years under S. 48 cannot be extended by amendment of decree.

In construing S. 48, Civil P. C., one ought to limit oneself to examination of the provisions of the Code itself and not import the provisions of other enactments more particularly Article 182, Limitation Act, which by its own terms applies only to the period for execution of a decree or

order not provided for by S. 48, Civil P. C. Hence the amendment of a decree does not give a new date for starting a period of limitation if the application for execution is beyond the period of 12 years allowed by S. 48, that is, the period of 12 years under S. 48 is final and cannot be extended by any amendment of the decree: 60 I C 318, *Dissent.*; A I R 1918 Bom 217; A I R 1932 All 351; A I R 1935 Lah 292; A I R 1934 Oudh 465 and A I R 1917 P C 85, *Foll.*; A I R 1938 Pat 401, *Disting.* [P 609 C 1, 2; P 610 C 2]

Dr. Sir Sultan Ahmed and Syed Hasan
— *for Appellants.*

Sir M. N. Mukherji, P. C. Manuk, Sarjoo Prasad, Rai G. S. Prasad, Rai Paras Nath, R. J. Bahadur, G. C. Das and N. K. Prasad II — *for Respondents.*

Rowland J. — The only point for decision is whether as held by the Subordinate Judge the application presented to him for execution of a mortgage decree by sale of the mortgaged properties was barred by time. The Subordinate Judge was of opinion that S. 48, Civil P. C., was a bar. The plaintiff (now decree-holder) had sued on three mortgage bonds and obtained a preliminary decree dated 23rd June 1922 for approximately Rs. 42,000. The decree mentioned as usual a period of grace which having expired the decree-holder applied for and obtained a decree-absolute for sale dated 19th December 1923. He applied to execute this decree on 16th August 1926 and was met by an objection on behalf of some of the judgment-debtors that the decree in the form in which it had been drawn was not executable because the debts due on the three mortgage bonds were separate debts secured on different items of property and the amounts for which the several properties were liable must be specified in the decree before it could be executed. The Subordinate Judge disallowed this objection, but, on appeal, this Court on 3rd August 1928 reversed that decision and said referring to the judgment in the original suit that the decree as it stood could not be executed and the Subordinate Judge must proceed to execute the decree substantially as three decrees. That being so, the order of the lower Court directing execution to proceed was set aside and the case remanded for disposal according to law. Thereafter on 15th September 1928 the decree-holder suffered the execution to be dismissed for default. He next applied in 1930 for amendment of the decree which was duly ordered to be done on 16th July 1930. Subsequently he found that some further amendment was necessary and obtained orders to that effect on 27th August

1932 and 24th September 1932. On 8th July 1933 he made his second application to execute the decree and this application was dismissed on 20th June 1934 for default in prosecution. The third application to execute the decree was presented on 2nd January 1937 and is the application against which the objection under S. 48, Civil P. C., has been allowed by the Subordinate Judge. The Subordinate Judge was of opinion that the period of 12 years began to run from 19th December 1923 the date of the decree absolute and expired in December 1935.

For the appellants, reference is made to the words in S. 48 "12 years from the date of the decree sought to be executed" and it is said that when there was no executable decree in existence before 16th July 1930, the decree sought to be executed must be considered to be of that date and 12 years will run from that date and it has further been suggested that 24th September 1932 again gives a starting point available to the decree-holder for computing the period of 12 years laid down in S. 48. In support of this contention reference is made to 60 I C 318¹ where a single Judge of this Court took the view that the words "decree sought to be executed" must include the amended decree. The learned Judge did not quote authority for his view, but he referred to what was generally understood to be the law under the old Limitation Act when Art. 179 had to be construed. It may be that the learned Judge was referring to such decisions as that in 17 All 39² in which although Art. 179, as it then stood, contained no reference to the date of the amended decree as distinct from the date of the decree itself, the date of decree had been held for the purposes of that Article to mean or at least to include the date of the amended decree where there had been an amendment. It may be noticed here that subsequent to that decision both the Limitation Act of that time and the Code of Civil Procedure have been repealed and their place taken by new enactments. Art. 182 which takes the place of Art. 179 in the Limitation Act has been amplified and now makes specific provisions for a period of three years' limitation to run from the date of an amended decree where there has been an amendment.

1. Baldeo Shukul v. Syed Yusuf, (1921) 60 I C 318.

2. Muhammad Suleman Khan v. Muhammad Yar Khan, (1894) 17 All 89=1894 AWN 191.

In Sec. 48 on the other hand the words are "date of decree sought to be executed," without any qualifying reference to possible amendments subsequent to the date of the original decree. It has therefore been argued for the respondents that in construing S. 48 we ought to limit ourselves to examination of the provisions of the Code itself and not import the provisions of other enactments, more particularly Art. 182, Lim. Act, which by its own terms applies only to the period for execution of a decree or order not provided for by S. 48, Civil P. C.

In support of this view we have been referred to decisions of the High Courts in Bombay, Allahabad, Calcutta, Lahore and the Chief Court of Lucknow. In Bombay the matter came under consideration in 42 Bom 309.³ In this case the decree had been passed under the old Code and the Court considered the words in S. 205 "the decree shall bear the date the day on which the judgment was pronounced." It was said that this language was imperative and was designed to meet precisely a case of this sort where owing to certain oversights or irregularities a delay has intervened between the delivery of the judgment and the formal drawing of a correct decree. This was laid notwithstanding that the decree which was at first drawn was incapable of execution until it was amended. I may in passing mention that this case was not apparently brought to the notice of the learned Judge of this Court who decided 60 I C 316.¹ Both those decisions were examined in 54 All 622⁴ where the learned Judges drew special attention to the wording of col. 1 of Art. 182 and held that the amendment of a decree does not give a new date for starting a period of limitation if the application for execution is beyond the period of twelve years allowed by Sec. 48. That is, the period of twelve years under S. 48 is final and cannot be extended by any amendment of the decree. The view of the Lahore High Court is expressed in A I R 1935 Lah 292⁵ in which the above Bombay and Allahabad decisions were also followed by the Chief Court of Oudh in

10 Luck 208.⁶ In Calcutta a similar view was taken in a decision apparently unreported but which was taken on appeal to His Majesty in Council and the judgment of the Judicial Committee is reported in 22 C W N 145.⁷ The report shows that the Subordinate Judge had proceeded on the view that the period of twelve years provided in the case of a decree does not certainly begin to run until the decree becomes operative and capable of execution but the High Court took the opposite view observing:

The terms of Sec. 48 seem to us to be perfectly clear, and according to that Section time runs from the date of the decree. The date of the decree is fixed by O. 20, R. 6, and we cannot understand how there can be any other date of the decree, from which limitation should run.

Their Lordships of the Judicial Committee simply stated that they saw no reason to differ from the judgment of the High Court. I think that we are bound to follow these authorities and cannot hold that time for the purposes of S. 48 is to be calculated from a date prescribed elsewhere than in that Section. I should however, state that we have been referred to a recent decision of this Court in 19 P L T 424⁸ which is said to favour a different view. The facts in that case are not quite on all fours with those before us, for the question there was whether the starting point for the period of 12 years under Section 48 was the date of the decree of the original Court or the date of the final order of the Appellate Court. The point decided was that time would run from the final order of the Appellate Court, and in the course of the judgment reference is made to Art. 182 in support of that proposition. The learned Judges did not say that the decree sought to be executed in S. 48 was the decree of the Appellate Court as has been sometimes held; if that had been their reading of the scope of Sec. 48, then it would not have been necessary to invoke Art. 182 in the determination of the starting point for limitation under S. 48 in cases where there has been an appeal. But whether the observations in 19 P L T 424⁸ are in their entirety correct or not with

3. Narsingrao v. Bando Krishna, (1918) 5 A I R Bom 217=46 I C 107=42 Bom 309=20 Bom L R 481.

4. Faqir Chand v. Kundan Singh, (1932) 19 A I R All 851=138 I C 98=54 All 622=1932 A L J 471.

5. Ganesh Das v. Vishan Das, (1935) 22 A I R Lah 292.

1939 P/77 & 78

6. Narendra Bahadur Singh v. Oudh Commercial Bank Ltd., (1934) 21 A I R Oudh 465=151 I O 541=11 O W N 1103=10 Luck 208 (FB).

7. Khulna Loan Co. v. Jnanendra Nath Bose, (1917) 4 A I R P O 85=45 I O 436=22 O W N 145 (P O).

8. Ram Ranbajaya Prasad Singh v. Kesho Prasad Singh, (1938) 25 A I R Pat 401=176 I O 553=19 P L T 424.

reference to Art. 182 (2), I do not think we are to treat those observations as applicable to cases falling within all the sub-clauses of Art. 182. Such a view would have a surprising result if applied to Art. 182 (5), and one which I do not think can have been intended by the learned Judge. So I think we should not regard these observations as applying to sub-cl. (4) or any other sub-clause than No. 2. And in dealing with the matter before us, I feel no doubt that we ought to follow the current of authority in Bombay, Allahabad, Lahore, Calcutta and Lucknow and to hold that the application presented on 2nd January 1937, to execute the decree dated 19th December 1923 was barred by S. 48, Civil P. C. I would dismiss this appeal with costs to each act of contesting respondents.

James J.—I agree to the order proposed by my learned brother and I agree with his view that we must regard ourselves as bound by the current of authority on this question to accept as correct the view of the learned Subordinate Judge, although if the matter were *res integra* I should feel more difficulty. In 17 All 39² the Allahabad High Court was dealing with Arts. 178 and 179, Limitation Act of 1877. Sir Sultan Ahmad for the appellants suggests that S. 230 of the former Civil Procedure Code, would also have applied to that case; but the application in execution with which the learned Judges were dealing had been made within 12 years of the original decree, so that whether the provisions of S. 230 applied or whether they did not, the Court in that particular case was not required to consider them. Sir Sultan Ahmad suggests that the remark with which the judgment ends, that with regard to any future application in execution, para. 4 of col. 3 of Art. 179 contains the limitation which will be applicable, implies that the learned Judges had considered the question of whether after 12 years from the date of the original decree execution would or would not be barred by the provisions of S. 230. If it had been clear that S. 230 did apply to that particular case, the decision would have been of considerable authority in support of Sir Sultan Ahmad's view, because any obiter dictum of Sir John Edge is to be treated with respect; but it is not clear that Sec. 230 did apply in this case at all.

In 1908, when both of these Acts were repealed and re-enacted, a new S. 48, Civil P. C., took the place of the old S. 230; and

Arts. 181 and 182 took the place of Arts. 178 and 179 of the Schedule in the Limitation Act. Art. 182 was amended in such a manner as to give statutory authority to the decision of Sir John Edge and Banerji J., but applications governed by S. 48, Civil P. C., were excluded from its operation; and S. 48 merely said that limitation was to run from the date of the decree of which execution was sought. In favour of the appellants' view we have the decision of a single Judge of this Court in 60 I C 318;¹ but the Allahabad High Court expressly dissented from that decision in 54 All 622⁴ and the weight of authority in general appears to be against it. I find some difficulty in treating the decision of this Court in 19 P L T 424⁸ in the manner in which Sir Sultan Ahmad suggests, as authority for the view that in looking for the starting point for limitation under S. 48, Civil P. C., we must apply the conditions laid down in Art. 182 of the Schedule to the Limitation Act. In that case the learned Judges were dealing with para. 2 of col. 3, of the Schedule and not with para. 4; but I find it difficult to act upon the general proposition that the provisions of Art. 182 should be held in any way to affect S. 48, Civil P. C.

The provisions of Art. 182 cannot be read into Art. 183, as is clear from the decision of the Judicial Committee of the Privy Council in 36 All 350⁹ wherein it was held that the decision of the Appellate Court could only afford a new starting base for limitation under Art. 183 when there was a decree of the Appellate Court in which the original decree merged; and if Art. 182 cannot be invoked to find the starting point for the twelve years' rule of limitation prescribed by Art. 183, it appears to me difficult to hold that it can be invoked to find the starting point for the twelve years' rule under S. 48, Civil P. C., since Art. 182 prescribing the three years' rule for petitions of decree-holders in execution, is expressly excluded from application where the twelve years' rule may apply, under Art. 183 of the Schedule or S. 48, Civil P. C. In 22 C W N 145⁷ their Lordships of the Judicial Committee approved of the decision that the period of twelve years under S. 48 ran, not from the date when the decree became operative and capable of execution, but from the date of the decree; and I consider that the decisions of the

9. Abdul Majid v. Jawahir Lal, (1914) 1 AIR P C 66=28 I C 649=36 All 850 (P C).

Allahabad High Court in 54 All 622,⁴ of the Bombay High Court in 42 Bom 309⁹ and of the High Court at Lahore in A I R 1935 Lah 292⁵ leave us no option but to hold that the view taken by the learned Subordinate Judge was right and to dismiss the appeal.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 611

MOHAMAD NOOR AND DHAVLE JJ.

Ambika Thakur and others

Appellants

v.

Emperor.

Criminal Appeal No. 172 of 1938 and Criminal Revn. No. 110 of 1939, Decided on 25th April 1939, against decision of Addl. Sess. Judge, Shahabad, D/- 26th July 1938.

(a) Criminal P. C. (1898), S. 145—Possession of successful party in proceedings under S. 145 cannot be put an end to by unsuccessful party by mere violence or surreptitious invasion.

Though an order under S. 145 confers no title, the fact of possession remains and the person in possession can only be evicted by a person who can prove a better title to possession himself. The possession of the party which succeeds in proceedings under S. 145 cannot be put an end to by the unsuccessful party by mere violence or surreptitious invasion. Hence, even if the unsuccessful parties under Sec. 145 are able on some occasions either surreptitiously or forcibly to cultivate the lands in possession of successful party, these would be no more than isolated acts of trespass—and offences punishable under S. 188, I. P. C.—but not acts amounting to the dispossession of the other side and constituting the juridical possession of the offenders unless the other side refrain from asserting their possession for a sufficiently long period and give up the protection of the order under S. 145 in their favour. [P 618 C 1]

(b) Criminal P. C. (1898), S. 145—Party forbidden to disturb possession of successful party cannot be allowed to plead that in spite of order under S. 145 he is still in possession or has been able to regain possession by force.

The whole object of S. 145 is to stop a breach of the peace by deciding which party is to remain on the land and which party is to seek his remedy in the Civil Court. Breaches of the peace will continue, and the object of the Legislature will be frustrated if the party who has, on the finding that he is not in possession, been forbidden to disturb the possession of the successful party until eviction in the due course of law, is allowed to interfere with the possession of the successful party and to plead once more that whatever the order might have been, he is still in possession or has been able to regain possession by force, and thus either compel the successful party to go to the Civil Court or to force a Magistrate to proceed again under S. 145 : *View of Cuming J. in A I R 1927 Cal 701, Dissent.* [P 618 C 2]

(c) Criminal P. C. (1898), S. 145 — Fresh proceeding under S. 145 can be started if party to it was not party to former proceeding under S. 145 (*Obiter*).

Where an order under S. 145 has been passed and possession of a party has been declared under it, Magistrate has jurisdiction to start fresh proceeding under S. 145 if the party to it was not a party to the former proceeding: *A I R 1938 Pat 1, Rel. on.* [P 619 C 1]

(d) Criminal Trial—Revision—Application in revision by private parties to convict accused of offences of which they have been acquitted and to enhance sentence on them, when can be entertained stated.

In ordinary circumstances High Court as a rule is loath to entertain an application in revision from private parties asking the High Court to convict the accused of the offences of which they have been acquitted by the Sessions Judge and to enhance the sentences passed upon them. But where there is in a case clear indications that the accused party has been defying law and disobeying the order, both of the Civil and the Criminal Courts, and has been repeatedly creating trouble in the locality for many years past the High Court should entertain the application in revision. [P 620 C 2]

(e) Penal Code (1860), S. 149—Mob armed with deadly weapons going to achieve particular object by force — Knowledge that grievous hurt would be caused is to be inferred on part of members.

If a mob armed with deadly weapons goes to achieve a particular object by force or show of force, it is reasonable to infer that all the members of the assembly knew that grievous hurt, if not murder, is likely to be caused in prosecution of that object. [P 621 C 1]

(f) Criminal P. C. (1898), Ss. 423 and 439—Acquittal under Ss. 302/149, I. P. C., whether can be converted into conviction under Ss. 326/149 under combined appellate and revisional powers of High Court (*Quare*).

Where persons are charged under Ss. 302/149 and also under Sec. 147 and the Sessions Judge acquits the accused under Ss. 302/149 but convicts under S. 147 and then appeal is preferred by the accused against conviction and the revision is filed by complainant to convict the accused of the offences of which they were acquitted or in the alternative to enhance the sentence, whether High Court in such a case under its combined powers of appeal and revision while affirming the conviction under S. 147 can convert the acquittal under Ss. 302/149 into a conviction under Ss. 326/149 and then pass a sentence, none being passed by the Sessions Court for the latter offences: *Cass law reviewed.* [P 621 C 1]

Sir M. N. Mukherji, Naqui Imam, R. J. Bahadur and S. Mehdi Imam —
for Appellants.

C. P. Sinha — *for the Crown.*

Mahabir Prasad and A. B. N. Sinha —
for Petitioner (Complainant).

Judgment. — The appellants have been convicted by the Additional Sessions Judge of Shahabad and sentenced as follows :

1. Ambika Thakur;
2. Ramprasad Thakur;
3. Sheoprasad Thakur;
4. Nawab Thakur;
5. Kuer Thakur;
6. Nagina Pandey;
7. Sheodahin Thakur;
8. Maina Thakur;
9. Beni Madho Thakur;
10. Lalchand Thakur;
11. Jagannath Thakur;
12. Chhabila Thakur;
13. Kawal Thakur alias Ramkawal Thakur;
14. Chaman Thakur;
15. Rajdayal Thakur;
16. Jamuna Prasad Thakur;

One and a half years' rigorous imprisonment under S. 147, I. P. C.

One year's rigorous imprisonment under S. 147, I. P. C.

One and a half years' rigorous imprisonment under S. 148, I. P. C.

Seven more persons tried along with the appellants were acquitted. Lalchand Thakur (No. 10 above) was also charged under Sec. 302, I. P. C., with causing the death of one Ramnarain, and the remaining appellants under S. 302/149, I. P. C., in respect of that murder. They were acquitted of these charges. Rajdayal Thakur who was further charged under S. 324, I. P. C., with causing simple hurt by a dangerous weapon to the same Ramnarain was acquitted of this charge. Beni Madho Thakur, Kawal Thakur alias Ram Kawal Thakur, Jamuna Prasad Thakur, Jagannath Thakur and Chaman Thakur were similarly charged under Sec. 324, I. P. C., the first three with causing simple hurt by dangerous weapons to one Lalmohar Rai and the last two to one Ujagir Rai. All of them were acquitted of this charge.

One of the accused, Guraman Ahir (acquitted), was charged (among other Sections) under S. 436, I. P. C., (arson) with setting fire to a hut, and Ambika Thakur and Rajdayal Thakur were charged with abetting that offence under Sec. 436/114, I. P. C. These charges were withdrawn during the trial. The trial commenced with five gentlemen as jurors in respect of the charges relating to arson and as assessors in respect of the remaining charges. When the charge of arson was withdrawn, the trial proceeded with the same gentlemen as assessors only. All of them were of opinion that the accused were not guilty of any offence. The first informant, Ramkewal Rai, has presented an application in revision praying that the appellants be convicted of the offences of which they were acquitted by the learned Additional Sessions Judge or, in the alternative, that their sentences be enhanced. We postponed

the passing of orders on this application till the appeal had been heard. Sir Manmatha Nath Mukherji who appeared on behalf of the appellants intimated to us that in case we decided to issue notice in the revision application, he would accept it so as to make it unnecessary to send out notices to the appellants personally. After the conclusion of the hearing of the appeal we called upon Mr. Naqui Imam, who was then appearing on behalf of the appellants, to take notice of the revision application and show cause, if any, why it should not be allowed. We heard Mr. Naqui Imam in this connexion and will deal with that matter in this judgment after disposing of the appeal itself. The occurrence in question took place on the morning of 5th February 1938 over the possession of some diara lands which had alluviated from the river Ganges. Such occurrences are not uncommon; when a large area of land alluviates, there is generally a struggle for possession, and all who can by any stretch of imagination do so lay claims to the land and riots attended with murder often take place. The present is one of a series of such riots between the parties.

Before we deal with the facts of the riot, it is necessary to describe the position of the disputed land. In doing so, we must clear up some confusion (which has been noticed before now) in the directions, (north, east, south, west) given by the witnesses and mentioned in a number of documents produced in the case. The general course of the river Ganges in the district of Shahabad is from west to east along the northern border of the district, but at the particular place where the present occurrence took place the Ganges has taken a turn, and runs from north to south on the east of the lands involved in the case. Notwithstanding this, the Ganges is locally regarded as lying to the north; and the consequent shift is reproduced both in the oral and in the documentary evidence, the popular directions being 90 degrees ahead of the true or magnetic directions. The learned Additional Sessions Judge in his judgment has used the popular directions, with the result that his north is the magnetic east, his east the magnetic south, his south the magnetic west and his west the magnetic north. We prefer to use the magnetic directions, which were followed in the cadastral survey map and are thus more convenient for our purposes. There are four mauzas lying one after another from north to south, to the west of

the Ganges in this locality. The northern most is Rajapur, a Government Khas Mahal, south of it is Dubha, next comes Gangauli, and the southernmost is Kharatanr, the last three belonging to the Maharaja of Dumraon. Each of these four mauzas has its mal lands, that is, lands which appertained to it from the beginning and, so far as Dubha, Gangauli and Kharatanr are concerned, were permanently settled with the Maharaja of Dumraon. Each of them also has *taufir* (accreted) lands which have become attached to the main lands of the mauza by alluvion. A portion of these *taufir* lands was surveyed at the time of the cadastral survey in 1908-09, doubtless because it had by then become firm and was under cultivation. The rest of the *taufir* lands were not surveyed then, and are known as "unsurveyed," though the lands of Dubha *taufir* have been surveyed in 1935, and a Record of Rights prepared. It is the *taufir* land of Dubha which is the subject-matter of the riot in the present case, that is, the land which accreted to the main lands of Mauza Dubha and was not surveyed in 1908-09. East of mauzas Dubha, Gangauli and Kharatanr, we have Shivpur (or Sheopur) Diara lying in the District of Ballia in the United Provinces, some of the litigation, to which we shall have to refer, has thus been in that district.

The prosecution case is that under leases granted by the Maharaja of Dumraon 10 tenants of village Rajapur were in possession of all the unsurveyed portion of the Dubha *taufir* lands with the exception of 77 bighas (which have admittedly been in the possession of Lalmohar, deceased, father of the appellant Ambika and uncle of the appellant Nawab). They had grown crops on the land and erected a hut for the accommodation of those who were set to guard the crops. On the morning of 5th February 1938, about half a ghari after sunrise, some of the lessees and their relations and partners, in all 11 men, were in the said hut, when they heard shouts of "Mahabir ki jai." They came out of the hut and saw a mob of about 100 (including the appellants) with lathis and spears, at a distance of about 10 bans on the south (magnetic west) of the hut. The appellant Ambika was riding a mare and had a whip in his hand. He and the appellant Rajdayal ordered assault and burning of the hut. All the occupants of the hut fled away, but Ramnarain, Lalmohan (P. W. 2) and Ujagir (P. W. 6) were surrounded. Ramnarain

was hit in the chest with a spear by the appellant Lal Chand and was killed. Lalmohar fell down unconscious, having been hit with spears by Ramkawal, Beni Madho and Jamuna, and with a lathi by Shiv Prasad. Ujagir also fell down senseless, having been hit by the spears of Jagannath, Chhabila and Chaman and by a lathi of Ramprasad. Thereafter Jurawan (acquitted) set fire to the hut. Then the mob proceeded towards Gangauli, the village where all the appellants lived. Ramnarain was removed from the place where he had fallen. Three cots were procured from the basti of Rajapur *taufir*; and on them the dead body of Ramnarain and the two injured persons were carried towards the Dumraon police station 12 miles away. When the party reached a tank in Dumraon, they met the Sub-Inspector (P. W. 38) who was on his way to the place of occurrence on receipt of some information from the *chaukidar* of Gangauli. At that very spot, a short distance from the police station, the Sub-Inspector drew up the first information report on the statement of Ramkawal, one of the leaseholders (P. W. 1). This was at about mid-day (12.15). The body of Ramnarain was sent for post-mortem examination to Buxar, and the injured persons were also sent there for medical examination and treatment. After doing some preliminary investigation the Sub-Inspector deputed constables Agin Singh (P. W. 2), Muhammad Kifait (P. W. 17) and Pahlu Singh (P. W. 18) to the place of occurrence to keep a watch on it. He himself reached the spot at night. After investigation the accused persons were sent up for their trial.

The defence is that all the Dubha *taufir* lands had all along been in the possession of Lalmohar Thakur (now dead) and are now in the possession of the members of his family. No part of them is directly in possession of the Maharaja of Dumraon or of any of his settlement holders. The appellants denied taking part in any occurrence whatsoever. Their case was that in the early hours of the morning of the day in question, several hours before the time of the occurrence given by the prosecution, an attempt was made by Ramnarayan and other settlement-holders to put up a hut as a proof of their possession of the lands, and Gangauli guards (*rakhwaras*) who lived in another hut on the 77 bigha block, admittedly in the possession of the Gangauli Thakurs 'Lalmohar's family,' saw this and

went up to oppose, and a scuffle ensued in which some persons were injured at the hands of the rakhwaras and Ramnarayan might have received his fatal injury. In other words, the appellants denied the possession of the other side and claimed to be in possession themselves and denied that there was any hut in existence at about the time of the occurrence and said that they had heard of an attempt to put up a new hut which was resisted by the men set to guard their crops and living in a hut in the 77 bigha block.

Both the parties have adduced documentary evidence in connexion with the previous litigation in order to prove their respective possession. Sir Manmatha Nath Mukherji, who appeared on behalf of the appellants, has addressed us at great length and has asked us to hold that whatever might have been the decisions of the Courts from time to time (and we will refer to them later), the deceased Lalmohar and the members of his family had in actual fact been in uninterrupted possession of all the Dubha taufir lands up to the date of the present occurrence. In our opinion, this question of possession is important only for the purpose of appreciating the evidence of the occurrence as deposed to by the prosecution witnesses. If the prosecution case is believed, there is no case of a right of private defence, and the question of possession is not very important in relation to the charges framed against the appellants. Sir Manmatha Mukherji however contended that one of the common objects mentioned in the charges of rioting being "by means of criminal force to Ramnarain Rai and his party to take possession of the lands in Dubha 'taufir, police station Dumraon, held under the pattas granted by the Maharaja of Dumraon," these charges must fail if the prosecution fail to prove their possession. But there is another common object mentioned in the charge, namely "to assault Ramnarain Rai and others of the same party," which has little to do with actual possession. But the defence assertion of actual possession in the face of repeated decisions adverse to these Thakurs of Gangauli implies lawlessness, and we propose to examine the question of possession in some detail, as we have come to the conclusion that it is high time they were bound over to keep the peace.

It is however not necessary for the purposes of even the first part of the charge to decide whether all the unsurveyed lands of

Dubha taufir were in the possession of the prosecution party on the day of occurrence. If they were in possession of some substantial area out of those lands, and the appellants went there in force to dispossess them, this part of the charges would be brought home to them. The learned Sessions Judge has carefully detailed the previous litigation about these lands. It is therefore not necessary for us to give more than a short history in order to determine the question of possession. (After giving the history and certain evidence regarding possession the judgment proceeded.) The facts stated above practically exhaust the documentary evidence of possession. The following appears clear from them :

The Thakurs of Gangauli were originally raiyats of lands in the Dubha as well as the Gangauli and Kharatanr taufirs. Their names were recorded as such in the Diara Survey Record of 1892. This is abundantly clear from the judgment (Ex. B) of the suit instituted by the Maharaja against the Thakurs of Gangauli for ejecting them from the 77 bighas of land. In this judgment reference has been made to the plaint of the Maharaja in Title Suit No. 193 of 1916 against the Shivpur Babus and to his written statements in Title Suit No. 247 of 1911 which Lalmohar had brought against the Shivpur Babus for recovery of 244 bighas of land. In both of them the raiyati interest of Lalmohar and others in the Dubha taufir lands was admitted. The lands must have gone under water for some time thereafter, and most of them were not fit for cultivation during the cadastral survey of 1908.09 as only 22.06 acres of taufir lands of Dubha were then cadastrally surveyed, and the rest only dealt with topographically. But some portion of these unsurveyed lands would appear to have become fit for cultivation as there was a scramble for possession between the old raiyats, the Thakurs of Gangauli, on the one hand and the Babus of Shivpur on the other, the latter claiming the lands as re-formation in situ of their old Shivpur lands in the district of Ballia. In this fight the Thakurs of Gangauli lost all the Dubha taufir lands and the Babus of Shivpur got possession of them on 30th November 1913, after the civil suit of Lalmohar and others against them was dismissed by the Appellate Court. The Shivpur Babus not only succeeded in dispossessing the Gangauli Thakurs from the Dubha taufir lands, but by an order under S. 145, Criminal P. C., passed by the Magistrate

of Buxar, they got possession of the taufir lands of Gangauli and Kharatanr as well. This was the situation when the Maharaja of Dumraon brought his title suit for recovery of possession of all the taufir lands of the three villages. Regarding the 244 bighas which, as we have said, later became known as 258 bighas, the Maharaja claimed khas possession as his raiyats Lalmohar and others had lost not only their possession but also whatever rights they had. Regarding the Gangauli and Kharatanr lands in which his raiyats had not lost their rights, he claimed possession through them. The suit of the Maharaja was reinforced by a suit on behalf of the Gangauli Thakurs in respect of Gangauli and Kharatanr lands only. Both the suits, as we have said, were decreed, and possession was given to the Maharaja according to his prayer on 30th April 1925.

Lalmohar and others who had lost all the taufir lands of the three villages and subsequently recovered possession of Gangauli and Kharatanr lands did not take any settlement from the Maharaja of the Dubha taufir lands which they had completely lost and which were only recovered through his efforts, but attempted to take possession of the lands by sheer force. In the meantime Lalmohar was declared to be in possession of a block of 77 bighas in another part of the Dubha taufir which was at that time believed to be a part of Rajapur; but this was in a domestic dispute between the members of his own family. Lalmohar then attempted to obtain possession of the 244 or 258 bighas of land which he had altogether lost, and this resulted in the first 145 Criminal Procedure Code case decided by the Sub-divisional Officer, Rai Sahib Sukhdeo Narayan, on 1st September 1931. This Magistrate declared the Maharaja to be in possession of 258 bighas and Lalmohar Thakur in possession of the 77 bighas, and in order to decide the question of possession for our purposes we propose to start from this judgment of 1931. We may recall the following dates :

Decision of the first 145 case ...	1st September 1931.
Lands attached in the second 145 Cr. P. O. case ...	1st August 1933.
Lands released from attachment ...	11th June 1936.
Present occurrence ...	5th February 1938.

The 335 bighas of land which formed the subject-matter of dispute in the 145 Crimi-

nal Procedure Code case decided by Rai Sahib Sukhdeo Narayan in 1931 lay in two blocks—one of 177 bighas north of a chhaur which ran east to west (magnetic) and the other of 158 bighas south of it. Lalmohar claimed to be in possession of all this area—of 77 bighas as the land over which his possession was maintained in the 145 Criminal Procedure Code case proceeding between him and Dadul Thakur, of 100 bighas as an accretion to that block and of 158 bighas as having all along been in his possession. We have said before that the learned Magistrate declared the possession of Lalmohar over the 77 bighas and of the Maharaja over the 100 bighas east of it and the 158 bighas south of the chhaur. He held that these 258 bighas were in fact the 244 bighas, of which the Maharaja had got khas possession from the Civil Court in his suit against the Shivpur Babus. The building Sub-Inspector, Abdus Shakur (P. W. 13), located signs of the destroyed hut and the place where Ujagar Rai and Lalmohar Rai were injured in survey plot No. 349 and the place where Ramnarain was killed and where his dead body was found in plot No. 350. According to the survey map prepared during the settlement operations plot No. 350 is within the 100 bighas the possession of which was declared to be with the Maharaja and plot No. 349 is just outside that area but within the lands found by the Settlement authorities to be accretions to the 258 bighas. Neither of the two plots is in the 77 bighas the possession of which had been declared in favour of Lalmohar. The Records of Rights have been finally published and must be presumed to be correct unless the contrary is proved by evidence adduced. There is no such evidence. It is thus clear that the place where the occurrence took place and the lands near about it are unconnected with Lalmohar's block of 77 bighas but are either part of or connected with the area to the possession of which the Maharaja was declared to be entitled as far back as 1931, Lalmohar and his party being on that occasion prohibited from interfering with the Maharaja's possession. That order is in full force till now.

It was however urged before us as in the lower Court that the lands of which possession was declared in favour of the Maharaja were unidentifiable and that the order of 1931 under S. 145 did not apply to any particular plot of land that the Maharaja and his lessees did not know the lands and

therefore were never in possession of them and that Lalmohar and others continued in possession of them in spite of the order. This we cannot accept at all. It does not lie in the mouth of Lalmohar or his descendants and relatives to say that the 258 bighas of the Maharaja was unknown to them. These lands are the same as Lalmohar had lost in the 145 Criminal P. C. case against the Babus of Shivpur in the Court of the Magistrate of Ballia though at that time they were known as 244 bighas. It was for these very lands that Lalmohar had brought his civil suit against the Shivpur Babus and lost. These very lands were also included in the subject-matter of the 145 Criminal P. C. case before the Magistrate of Buxar (Rai Sahib Sukhdeo Narayan). Lalmohar never alleged in that case that these lands were unidentifiable. He filed a written statement and claimed 100 bighas of them as accretions to his 77 bighas and also claimed possession of the remaining 158 bighas which lay just north of the surveyed Dubha taufir lands. He himself supplied the boundaries of the disputed lands. In his revision application also to this Court he asserted his possession and did not allege that the lands were unknown.

Stress is laid on behalf of the appellants on an order of this Court passed by James J. in the second 145 Criminal P. C. case in which it was ordered that the lands should be identified and on the fact that when in pursuance of this order an amin and a kanungo were deputed to identify the land they were unable to do so. But this was due to the fact that full materials were not placed before the Court. Without permanent marks for miles and miles as happens in diaras it is not easy to locate a particular plot unless it can be fixed from a scientifically prepared survey map or unless scientific measurements from fixed points far away from the scene are available; and the work is always difficult and requires skill and much labour. But in the present case as has been pointed out by the Settlement Authorities who decided the dispute at the attestation stage and heard the objections under S. 103-A, Ben. Ten. Act, there was no difficulty in finding out at least the 100 bighas north of the chhaur. The block of 77 bighas in the possession of Lalmohar was all along known to him and his family. He had been declared to be in possession of it in the proceeding under S. 145, Criminal P. C.,

against Dadul Thakur and had also won in Dadul's civil suit. His possession over this land was also declared by Rai Sahib Sukhdeo Narayan. With this block known, there could be no difficulty in finding out the 100 bighas which as is clear from the judgment of Rai Sahib Sukhdeo Narayan lay just east of it; and it was thus that when survey and settlement was ordered by the Government, the officers of that Department had no difficulty in locating the area of 100 bighas. We are not concerned with whether others knew this area or not. Lalmohar knew it all along, and Rai Sahib Sukhdeo Narayan's order prohibited him from going upon it.

Sir Manmatha Nath Mukherji has however argued that the Maharaja and his lessees did not know the lands as they would otherwise have been able to point them out to the various officers. We are not prepared to accept this argument. In the second 145 Criminal P. C. case it was strenuously contended on behalf of the Maharaja that the area, for which the proceeding was started, included the 258 bighas of which possession had already been declared in his favour. It appears that Lalmohar held a much stronger position in the locality so far as force was concerned, and that the terrified lessees of the Maharaja were probably unable to point out the lands with exactitude as there were no ridges and the extent of the plots could not be ascertained without measurements which they were in a position to carry out. Great stress has been laid on the somewhat confused boundaries given by Rai Sahib Sukhdeo Narayan at the end of his judgment though he had very clearly specified the lands of the two blocks of 177 bighas and 158 bighas earlier in that judgment. As has been clearly pointed out by the officers of the Settlement Department, this confusion was due to the fact that at some places he gave the popular directions and at others the magnetic directions. However, as we have indicated above, for the purposes of this case, we are not really concerned with all the lands in dispute between the parties. It is quite clear from the survey map and the location of the place of occurrence by the building Sub-Inspector that the occurrence took place away from Lalmohar's 77 bighas and for the most part within the 100 bighas the possession of which was declared by the Magistrate to have been with the Maharaja so far back as 1931; and this is sufficient for our purposes.

Sir Manmatha Nath Mukherji, relying upon map No. I attached to the decision of the attestation officer, contended that according to the identification of the lands by the Maharaja and his lessees the place of occurrence is outside the 258 bighas. He also contended that the survey map is wrong as the position of the 158 bighas south of the chhaur differs from its position as included in the earlier map of 244 bighas prepared for the Maharaja's suit against the Shivpur Babus. Map No. I is a comparative map and shows the positions of the land according to the later claim of the Maharaja and his lessees and also according to the earlier map. When the suits of the Maharaja and of Lalmohar and others against the Shivpur Babus were pending in the Civil Court, one Misri Lall, Amin, was deputed by the Court to measure the lands. He prepared a map which is depicted on map No. I attached to the judgment of the attestation officer. This map has been found to be inaccurate by the officers of the Settlement Department who carried out a complete survey of the locality. Misri Lall has shown the 158 bighas of land just to the south of the 100 bighas, the two together forming one trapezium, while according to the Settlement Department the 158 bighas is south of the 77 bighas. The two blocks of 100 and 158 bighas are shaped like two trapeziums, the south-western corner of the former meeting the north-eastern corner of the latter. We accept the findings of the Settlement Department, not only because their (map and) records were finally published and carry a statutory presumption of correctness, but also because the reasons given by those officers for their conclusions are sound. They examined the judgment of Rai Sahib Sukhdeo Narayan, and from the boundaries given there, they found that the 158 bighas was to the south of the 77 bighas of Lalmohar because the southern boundary of the 158 bighas was the surveyed Dubha taufir lands, though this was ignored in the map of Misri Lall who made the 258 bighas into one compact block.

Sir Manmatha Nath Mukherji then argued, after placing this comparative map over the finally published map, that according to the claim of the Maharaja, as put forward before the Settlement Department, the place of occurrence is outside the 258 bighas. This is so, but the reason is that the Maharaja claimed on the basis of a wrong trijunction and thus included some Rajapur taufir land in Dubha Taufir, with

the result that according to this claim the north-eastern boundary of Dubha taufir was shifted towards the north-west with a corresponding shift of the 77 bighas of Lalmohar and consequently of the 100 bighas also. But, the officers of the Settlement Department carefully went into the matter and found that the boundary of Dubha Taufir commenced somewhat north of the lands pointed out by the Maharaja. These mistakes are very common in diaras where, as we have said before, no permanent marks are available at hand and the fields have no ridges.

Sir Manmatha Nath's argument however was that as the Maharaja and his lessees made a mistake in pointing out the boundary of Dubha taufir, they did not really know the lands of which the possession had been held in 1931 to be with the Maharaja. This must be conceded, but as we have already pointed out, their ignorance of the exact position correct down to a bigha is by no means inconsistent with their knowledge of a very large part of the locality with the additional areas that were being thrown up by the Ganges. Even if we take it that the place of occurrence is outside the land which the Maharaja and his lessees know to be within the land of which the possession was declared to be with them, this makes no difference on the charge of rioting. The place of occurrence, though it will be outside the 100 bighas, will still be in lands accreted to it and beyond any claim of accretion open to Lalmohar and others, for the latter's block of 77 bighas is surrounded on all sides by the lands of other people. On the north of it lies village Rajapur, wherever the boundary between them may be. On the east is the 100 bigha block of Dubha taufir over which the possession of the Maharaja was maintained, and as the Settlement Department found, the 77-bigha block has on the south the 158 bighas the possession of which had been found by the Magistrate to be with the Maharaja. Any accretions on the east or south would thus go not to Lalmohar's 77 bighas but to the 100 or 158 bighas of the Maharaja and must therefore be presumed to be in his possession and in that of his lessees. But we have definitely come to the conclusion that the place of occurrence and the lands near about it on which crops stood at the time are within the 100 bighas of which the possession was declared to be with the Maharaja, Lalmohar and others being prohibited

by the order of 1931 from interfering with this possession.

In 29 I A 24 : 29 Cal 187¹ their Lordships of the Judicial Committee held that though an order under Sec. 145, Criminal P. C., confers no title, the fact of possession remains and the person in possession can only be evicted by a person who can prove a better title to possession himself. Assuming therefore that after the order of 1931 Lalmohar and others were able on some occasions either surreptitiously or forcibly to cultivate the lands, these would be no more than isolated acts of trespass—and offences punishable under Sec. 188, I. P. C., but not acts amounting to the dispossession of the other side and constituting the juridical possession of the offenders unless the other side refrain from asserting their possession for a sufficiently long period and give up the protection of the order under S. 145 in their favour. In our opinion the possession of the party which succeeds in proceedings under S. 145, Criminal P. C., cannot be put an end to by the unsuccessful party by mere violence or surreptitious invasion.

Sir Manmatha Nath Mukherji however drew our attention to the case in 104 I C 443² in support of the proposition that an order under S. 145, Criminal P. C., is only a piece of evidence to be taken into consideration when the question of possession arises between the parties on a subsequent occasion and that though it would go to show that the party in whose favour it was passed was in possession on the date of the order, it is open to the other party to prove that, in spite of the order, he was actually in possession or regained possession. In that case the party in whose favour an order under Sec. 145, Criminal P. C., had been passed prosecuted the other party for the removal of crops. The trial Court held the complainant to be in possession not only on the basis of the order under S. 145, Criminal P. C., but also on the evidence in the case. On appeal, the Additional Sessions Judge declined to go into the evidence of possession and maintained the conviction on the basis of the order under S. 145, Criminal P. C. Cuming J. was of opinion that the question of actual possession ought to have been gone into, and accordingly ordered

a remand, observing that an order under S. 145 was merely a piece of evidence to be taken into consideration in determining who is in possession. This judgment of Cuming J. appears to have been given in Court without much consultation with his colleague Graham J. who on that date observed as follows :

With great respect for my learned brother's opinion as to the effect of the order under S. 145, Criminal P. C., I feel at present some doubt upon the point. I propose therefore to reserve my judgment. As Monday and Tuesday next will be holidays I propose to deliver my judgment on Wednesday next.

This doubt of the learned Judge continued, but as his colleague wanted to remand the appeal for re-hearing, Graham J. did not stand in the way and said as follows:

I have further considered this case and speaking for myself, I must confess that I feel considerable doubt as to the effect of the order under S. 145, Criminal P. C., and as to whether in all the circumstances the possession claimed by the accused in this case can be said to have been lawful possession, or possession which the Court could in any way recognize as a defence to the charges. As the order which my learned brother proposes to make however is to send the case back for re-hearing the appeal, and as it appears from the judgment of the trial Court that there is evidence as to possession apart from the order under S. 145, Criminal P. C., I do not feel disposed to deliver a dissenting judgment, and I concur in the order which has been made.

With all respect to Cuming J. we are unable to agree in his view of an order under S. 145. The whole object of the Section is to stop a breach of the peace by deciding which party is to remain on the land and which party is to seek his remedy in the Civil Court. Breaches of the peace will continue, and the object of the Legislature will be frustrated if the party who has, on the finding that he is not in possession, been forbidden to disturb the possession of the successful party until eviction in due course of law, is allowed to interfere with the possession of the successful party and to plead once more that whatever the order might have been, he is still in possession or has been able to regain possession by force, and thus either compel the successful party to go to the Civil Court or to coerce a Magistrate to proceed again under S. 145, Criminal P. C. This will be a definite encouragement to disobedience of orders under the Section.

There has been some difference of opinion as to whether once the possession of a party has been declared under S. 145, Criminal P. C., a second proceeding under the Section is permissible. It was held by Jwala Pra-

1. Dinobundoo Chowdhurani v. Brojo Mohoni Chowdhurani, (1902) 29 Cal 187=29 I A 24 = 8 Sar 224=6 C W N 386 (P C).

2. Rakhal Dolui v. Makhan Lal Ghose, (1927) 14 A I R Cal 701=104 I C 448 = 28 Cr L J 827 = 31 C W N 964.

and J. in 10 P L T 685³ that an order under S. 145, Criminal P. C., is binding on everybody, whether he was a party to the proceeding or not, and that a Magistrate has no jurisdiction to start a second proceeding. A similar view was taken by Wort J. in 10 P L T 689.⁴ It was however held by one of us in 18 P L T 886⁵ that a Magistrate has jurisdiction to start a fresh proceeding, but whether he should do so or not will depend upon the circumstances. In the last mentioned case, the previous proceeding under S. 145, Criminal P. C., was between one Indradeo Singh as the first party and the servants of the junior Rani of Deo as the second party, and the former was declared to be entitled to possession. Then there was a second proceeding under S. 145, Criminal P. C., between three parties. The junior Rani and her servants were one party, the senior Rani another and Indradeo the third party. Indradeo was ordered not to go over the land in dispute. The District Magistrate of Gaya referred the case to this Court, and it was held that the proceeding was not without jurisdiction.

Though both of us agree in the view taken in this last case, the general principle which we have enunciated above remains the same. A third party, not bound by the order in a proceeding under the Section is in a different position from a party who has been definitely prohibited from disturbing the possession of the successful party. It may also be that the position of the parties to a S. 145 proceeding has changed since the passing of order under the Section. For instance, if in a proceeding under the Section, A was prohibited from interfering with the possession of B who was held to be in possession, and A afterwards comes forward with the allegation that he has since then obtained possession under, say, a lease or a purchase from B, this may be a good ground for the Magistrate to start a second 145 Criminal Procedure Code proceeding in case there be apprehension of a breach of the peace. But the party prohibited from interfering with the possession of another party cannot, in our opinion, be heard to say against that party that he has

disobeyed the order and has thus been able to retain or obtain possession. To allow such a plea will be to defeat the object of the Legislature in enacting S. 145, Criminal P. C. There will be no end to disputes and apprehensions of breach of the peace which the Section is designed to stop.

In the present case there has been no change in the position of the parties since the order of 1931, and the contention of the defence comes to this, that they ignored the order of the Magistrate passed in 1931 and in spite of it continued in possession, and that we should find their actual possession. This, in our opinion, cannot be allowed. Let us however see how far the allegation of the defence that in spite of the order under S. 145, they continued in possession of all the Dubha taufir lands is true. (Their Lordships then examined certain evidence and concluded.) To sum up, our conclusions are that the order under S. 145, Criminal P. C., passed by Rai Sahib Sukhdeo Narayan in 1931 is still in force and by virtue of that order the Maharaja, and thereafter his lessees, must have been and in any case must be held to have been in possession of at least the 258 bighas of land which formed part of the subject-matter of that proceeding. Out of this area, a block of 100 bighas was always easily identifiable on account of its contiguity to the 77 bigha block in the unquestioned possession of the appellants and the members of their family. The situation of this 77 bigha block was neither doubtful nor in dispute; and therefore there could be no real difficulty in locating the 100 bighas at least which lay just east. Since the order of Rai Sahib Sukhdeo Narain in September 1931, excluding the period when the lands were under attachment, the lessees of the Maharaja must be in possession. It is true that occasionally the Gangauli Thakurs (the appellants' party) were able to disturb their possession. In one year they looted the crops. In the cultivation season of 1937-38 they must, in spite of the denials of the prosecution, have cultivated some portion of the lands. But we are satisfied that a large area in the neighbourhood of the 77 bighas was actually cultivated and sown by the prosecution party; and the present occurrence took place in respect of it. The documentary evidence, the decrees of the Civil Courts and the orders of the Criminal Courts are in favour of the prosecution, and last but not least, there is the statutory presumption of correctness

3. Raghunandan Pandey v. Kishin Mohan Singh, (1922) 9 A I R Pat 210 = 77 I O 1005 = 25 Cr L J 541 = 10 P L T 685.

4. Jainath Pati v. Ramlakhan Prasad, (1929) 16 A I R Pat 505 = 1929 Cr O 265 = 117 I O 648 = 30 Cr L J 840 = 10 P L T 689.

5. Indradeo Singh v. Keso Singh, (1938) 25 A I R Pat 1 = 178 I O 107 = 39 Cr L J 268 = 18 P L T 886.

attaching to the Record of Rights in their favour, which has not been rebutted. This disposes of the question of possession, which was very elaborately argued before us by Sir Manmatha Nath Mukherji.

Comparatively little argument has been addressed to us on the question of the occurrence itself. The principal comments made on this part of the prosecution story were : that the hut alleged by the prosecution to have been burnt was not even constructed ; that its dimensions as given are so small that 11 persons could not have been sleeping in it ; that in the neighbourhood there was no mark of habitation in the hut. Witnesses have made contradictory statements about the time when the hut was constructed and as to the place from where the materials for its construction were brought. No hoof-marks of the mare on which Ambica Singh is said to have been riding were found at the place where they ought to have been found ; and it was urged that what was found was due to the pony of the ekka on which the Sub-Inspector reached the spot. We have looked into the evidence in the light of these comments and do not consider it desirable to prolong this judgment by dealing with them in detail, as has been done by the learned Additional Sessions Judge. It is sufficient to say that we see no reason to differ from his conclusions on these points. There is no dispute that an occurrence took place in which Ramnarain was killed and Lalmohar and Ujagir were wounded. The explanation of the defence that when the prosecution party was stealthily attempting to put up a hut, they were seen by their rakhwaras (guards), who were occupying the hut of Gangauli Thakurs on 77 bighas of land, and that a fight took place between the prosecution party and these rakhwaras cannot be accepted. The hut in the 77 bighas of land was by no means close to the scene of the occurrence, and it is far from probable that in the dead of night the rakhwaras (of whom none has been produced) noticed the alleged erection of the hut and went up to interfere. In our opinion, the view of the learned Additional Sessions Judge is right that the occurrence took place in the manner deposed to by the prosecution witnesses.

The question of participation by individual accused in the raiyat has received very careful consideration at the hands of the learned Additional Sessions Judge. We have also looked into this question and

are of opinion that the learned Additional Sessions Judge has come to the correct conclusions. There is therefore no merit in the appeal. We now take up the application in revision in which the first informant asks us to convict the appellants of the offences of which they have been acquitted by the Additional Sessions Judge and to enhance the sentences passed upon them. This Court is as a rule loath to entertain such applications from private parties in ordinary circumstances. But there are in this case (as we have said before) clear indications that the accused party has been defying law and disobeying the orders, both of the Civil and of the Criminal Courts, and has been repeatedly creating trouble in the locality for many years past. We therefore decided to entertain the application in revision. The circumstances are such that even without the application we should have felt it our duty *suo motu* to consider whether the sentences are adequate, if not also whether the appellants were not wrongly acquitted of some of the more serious charges.

We agree with the learned Judge below that on the evidence on record the conviction of Lalchand Thakur under S. 302 and of the other appellants under Ss. 302/149 was not possible. The learned Judge has referred to the discrepancies in the evidence about the weapons used, and pointed out that the eye-witnesses could not really have seen the actual assault which took place at some distance from them. He is similarly right in acquitting Jagannath Thakur, Kawal Thakur, Chaman Thakur, Rajdayal Thakur and Jamuna Prasad Thakur of the specific charges under S. 324, I. P. C. The evidence in this connexion comes only from the victims Ujagir and Lalmohar and is not free from contradictions and other difficulties. We do not however see any good reason why the learned Judge did not convict all the appellants (excepting Lalchand Thakur) under Ss. 326/149, I. P. C., as included in the actual charge under S. 302/149 framed against them. The reason given by him for not applying S. 149 to the murder is that the murder was not committed in the prosecution of the common object of the unlawful assembly. In our opinion it was. But even if the contrary were to be held, attention must be paid to the second part of S. 149, I. P. C., which we underline (*italicize*) below :

If an offence is committed by any member of an unlawful assembly in prosecution of the common

object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

If a mob armed with deadly weapons goes to achieve a particular object by force or show of force, it is reasonable to infer that all the members of the assembly know that grievous hurt, if not murder, is likely to be caused in prosecution of that object. The murder and the assaults in the present case were not isolated acts committed by individual members of the assembly independently of the common object. It is obvious from the manner in which the riot was committed that the members of the unlawful assembly were out to terrorize the prosecution party by destroying their hut and beating them in order to deter them from remaining on the land. Among the two objects mentioned in the charge, one was to commit assault, and assaults were committed in prosecution of that object. Even if it could be properly held that the murder was not committed in prosecution of the common object of the assembly, the liability under S. 149 would remain in so far as the members of the assembly knew that at least grievous hurt would be caused in the riot. We are therefore clearly of opinion that the appellants were wrongly acquitted of the charges under S. 149 altogether. But we do not propose to convict them under Ss. 326/149 for reasons which will now be stated.

The question arises whether this Court under its combined appellate and revisional powers can convert the acquittal (under Ss. 302/149) into a conviction (under Sections 326/149) and then pass a sentence where none was passed by the lower Court. Two propositions are now settled by decisions of their Lordships of the Judicial Committee. In 62 I A 36⁶ their Lordships held that in the exercise of its revisional powers under S. 439, Criminal P. C., 1898, a High Court upon having the record of a criminal proceeding brought to its notice on an appeal from the conviction therein, can call upon the appellant to show cause why the sentence should not be enhanced, and having heard and dismissed the appeal can forthwith enhance the sentence under that revisional power although precluded by S. 423 from doing so in the appeal. In

6. *Chunbida v. Emperor*, (1935) 22 A I R P O 85=1935 Cr O 199=153 I O 936=36 Cr L J 482=57 All 156=62 I A 86 (P O).

50 All 722⁷ they held that a High Court cannot, while exercising its revisional power under S. 439, Criminal P. C., convert a finding of acquittal into one of conviction and then enhance the sentence. In this case their Lordships referred to the case in 37 Mad 119⁸ and pointed out that the view taken in that case, as regards S. 439 (4) was not accepted in Allahabad in 44 All 332⁹ and in Bombay in 48 Bom 510.¹⁰ The view taken in these last two cases was approved, but their Lordships, after referring to the fact that in the Madras case there was an appeal by the accused, besides a rule issued in revision by the High Court, considered it unnecessary to express any opinion whether the facts would justify the Madras decision. They were however definitely unable to agree that Sec. 439 (4) refers to cases ending in a complete acquittal and not to cases ending in conviction of a minor offence included in the offence charged. These two decisions however do not directly touch the question before us, viz. whether, while dealing with an appeal of a convicted person, his acquittal of some charges can be set aside and he can be convicted of them and sentenced. Since the decision of their Lordships in 50 All 722⁷ there have been two Indian decisions, one in Allahabad and the other in Lahore, which seem to be conflicting.

In 168 I C 17¹¹ the learned Judges of the Allahabad High Court held that a Court of Appeal cannot under S. 423 (1)(b), Criminal P. C., set aside an express order of acquittal, nor can the High Court do so in revision, having regard to Sec. 439 (4). The alteration of a finding within the former Section was in their opinion not the same as reversal. They referred to the decision of their Lordships of the Judicial Committee in 50 All 722⁷ and concluded that neither an Appellate Court nor a revisional Court has power to reverse the finding of acquittal and convert it into one

7. *Kishan Singh v. Emperor*, (1928) 15 A I R P O 254=111 I O 882=29 Cr L J 828=50 All 722=55 I A 390 (P O).

8. *In re Ball Reddi*, (1914) 1 A I R Mad 258=22 I O 756=15 Cr L J 180=37 Mad 119.

9. *Emperor v. Sheodarsan Singh*, (1922) 9 A I R All 487=65 I O 858=23 Cr L J 202=44 All 332=20 A L J 190.

10. *Emperor v. Shivaputraya Durdundaya*, (1924) 11 A I R Bom 456=86 I O 478=26 Cr L J 830=48 Bom 510=26 Bom L R 438.

11. *Sarada Prasad v. Emperor*, (1937) 24 A I R All 240=168 I O 17=38 Cr L J 521=1937 A L J 148.

of conviction, and that where an accused is charged with two separate offences, and the trial Court convicts him of one and acquits him of the other, and the Court of Session on appeal differs from the trial Court on both points, the case must be referred to the High Court which has an unrestricted power in revision to order a retrial.

As we have said however their Lordships of the Judicial Committee in 50 All 722⁷ left open the question of the power of a High Court to alter findings in an appeal from a conviction. In AIR 1933 Lah 661¹² it was held that under the combined provisions of Ss. 423 and 439, Criminal P. C., a High Court has power to alter a conviction under S. 326, Penal Code, to one under S. 302, Penal Code. This is directly opposed to the Allahabad view in 168 I C 17.¹¹ The learned Judges referred to the decision of their Lordships of the Privy Council in 50 All 722⁷ and observed that in that case their Lordships had expressly stated that they did not decide the point as to the combined powers of the High Court under the two Sections as decided in 37 Mad 119.⁸ As in our opinion also, their Lordships of the Privy Council have not decided the matter, it is necessary to examine the position in some detail. In 1 Rang 436,¹³ it was held that in an appeal from a conviction under S. 304, Penal Code, (the accused person having been committed to stand his trial under Sec. 302, Penal Code), where in addition the High Court takes seisin of the case also in its revisional jurisdiction, the conviction for the lesser offence can be converted into one under Sec. 302, Penal Code, and the sentence can be enhanced accordingly, under the combined provisions of Ss. 423 and 439, Criminal P. C. This case was however decided before the decision of their Lordships of the Privy Council in 50 All 722.⁷ We are not aware of any later decision of the Rangoon High Court on the point. And in the present case the appellants have been convicted of rioting—a conviction which we must affirm so that there is here no question of merely altering a finding under Sec. 423 (1) (b) (2) and then enhancing the sentence.

In the Madras High Court the earliest relevant case which has come to our notice

is 34 Mad 545.¹⁴ In this case the High Court held that under Sec. 423 (1) (b) (2), Criminal P. C., the Appellate Court may alter the finding maintaining the sentence and that there is nothing to restrict the finding which may be altered to a finding of conviction. In the later case in 37 Mad 119,⁸ already referred to, the view was taken that the acquittal referred to in S. 439 is a complete acquittal, but this was expressly disapproved by the Privy Council in 50 All 722.⁷ It is also held that in an appeal from a conviction, the finding can be so altered as to convict the accused of an offence of which he has been acquitted by the trial Court. The correctness of this view seems to have been left open in 50 All 722.⁷ But the same High Court in 50 Mad 259¹⁵ seems to have dissented from this view. It is true that this was a case in revision and not an appeal, but the express dissent from 37 Mad 119⁸ is to be noted, being prior to the Privy Council decision in 50 All 722.⁷

A number of Calcutta cases were placed before us, but only two of them are of some help in this case. One is 23 Cal 975,¹⁶ where it was held that the Appellate Court can under Sec. 423, Criminal P. C., in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of an offence of which he was acquitted by that Court; there was however no question of enhancing the sentence or passing an additional sentence in respect of this conviction. In 36 CWN 1152¹⁷ where an accused charged under S. 376 and S. 354, I. P. C., was acquitted of the former offence and convicted of the latter, the High Court altered the conviction to one under Sec. 376/511, I. P. C., Mallik J. held that the acquittal under S. 376, I. P. C., did not constitute acquittal under Ss. 376/511, I. P. C., while Remfry J. was of opinion that in spite of the acquittal the High Court could under S. 423 (b), Criminal P. C., convert and alter the finding of acquittal into one of conviction. All the cases which we have referred to above are cases in which a conviction of a lesser offence was converted into one of a graver offence or a conviction of one offence was substituted for a conviction of another.

14. Appana v. P. Mahalakshmi, (1911) 34 Mad 545=7 I C 861=1910 M W N 474.

15. In re Subba Chukli, (1927) 14 A I R Mad 582=100 I C 1053=28 Cr L J 397=50 Mad 259=52 M L J 707.

16. Queen Empress v. Jabanulla, (1896) 23 Cal 975.

17. Hanuman Sarma v. Emperor, (1932) 19 A I R Cal 723=1932 Cr O 728=141 I C 622=34 Cr L J 177=60 Cal 179=36 C W N 1152.

12. Mehdi v. Emperor, (1933) 20 A I R Lah 661=1933 Cr C 888=146 I C 949=35 Cr L J 250=35 P L R 238.

13. On Shwe v. Emperor, (1924) 11 A I R Rang 93=76 I C 711=25 Cr L J 247=1 Rang 436.

tion of another offence, though the trial Court had recorded an acquittal on the former. None of them is a case in which while a conviction of one offence was maintained, the Appellate Court sided a conviction of another offence of which the appellant had been acquitted by the trial Court.

We now come to Patna cases. Here again there is practically no case which directly touches the question before us. The nearest case which can be found is 7 Pat 579.¹⁸ In this case the accused Warir Kunja was acquitted by a Magistrate of an offence under S. 326, I. P. C. and convicted under S. 148, I. P. C. only. On a reference made by the Sessions Judge, the High Court convicted him under S. 326 and awarded a sentence in addition to the sentence imposed by the trial Court under S. 148, I. P. C. This was done in March 1928, under the revisional powers of the Court, and can no longer be regarded as good law after the later Privy Council decision in 50 All 722.¹⁹ Other cases need not be referred to in detail, as they all relate to replacing one conviction by another, as for instance, 3 Pat L J 565.²⁰ In view of the divergence of judicial opinion before and after the Privy Council decision in 50 All 722,¹⁹ we have considered whether it would not be desirable to refer this case to a larger Bench for an authoritative pronouncement on the point. But in the circumstances of this case the point is relatively unimportant; the appellants have already been subjected to the cost of one long hearing, and we feel that they can be adequately dealt with without pursuing this aspect of the revisional application any further. That application will therefore be allowed only in respect of the sentences on the charges of which the appellants have been found guilty.

The appellants' repeated defiance of the orders of various Courts both Civil and Criminal, of which we must take notice, can be appropriately dealt with under S. 106, Criminal P. C. In affirming their convictions on the charges of rioting we consider that the sentences passed by the lower Court are not altogether adequate and that the following sentences will suffice to meet the ends of justice:

18. Warir Kunja v. Emperor, (1929) 16 A I R Pat 139=116, I C 768=30 Cr L J 673=7 Pat 579.
19. Mahangu Singh v. Emperor, (1915) 5 A I R Pat 257=46 I C 415=19 Cr L J 735=3 Pat L J 565.

1. Ambika Thakur.

Under S. 147, I. P. C. two years' rigorous imprisonment and a fine of Rs. 500 (rupees two hundred) with six months' rigorous imprisonment in default.

2. Ram Prasad Thakur;
3. Shac Prasad Thakur;
4. Ruar Thakur;
5. Nagina Pandey;
6. Shobadhin Thakur;
7. Maina Thakur.

Under S. 147, I. P. C. One and half years' rigorous imprisonment and a fine of Rupees 50 each, with six months' rigorous imprisonment in default.

8. Nawab Thakur.

Under S. 147, I. P. C. two years' rigorous imprisonment and fine of Rs. 100 with three months' rigorous imprisonment in default.

9. Beni Madho Thakur;
10. Lal Chand Thakur;
11. Jagannath Thakur;
12. Chhatila Thakur;
13. Nawal Thakur alias Ramkhal Thakur;
14. Chaman Thakur;
15. Rajdoyal Thakur;
16. Jamuna Prasad Thakur.

Under S. 148, I. P. C. two and a half years' rigorous imprisonment and a fine of Rs. 50 each with three months' further rigorous imprisonment in default.

We enhance the sentences as above, and direct that out of the fines if realized, Rs. 500 be paid to the lessees of the Maharaja through the first informant. We further under Sec. 106, Criminal P. C., order that the appellants do each of them execute a bond with sureties, as specified below, to keep the peace for a period of three years, from the dates of their release from jail. Ambika Thakur and Nawab Thakur to execute bonds of Rs. 500 each with two sureties of Rs. 250 each, and the remaining appellants to execute bonds of Rs. 200 each with two sureties of Rs. 100 each. In case any appellant or appellants fail to execute the bonds with sureties as specified above, the defaulter or defaulters will suffer simple imprisonment for the same period (three years) from the dates from which they would otherwise be due for their release from jail.

D.S. R.K.

Order accordingly.

A. I. R. 1939 Patna 623

BOWLAND AND CHATTERJI JJ.

Ram Ranbijaya Prasad Singh —

Appellant.

v.

Madho Turha and others — Respondents.

Appeal No. 186 of 1938, Decided on 9th August 1939, from original order of Addl. Dist. Judge, Shahabad, D/- 6th April 1938.
(a) Civil P. C. (1908), O. 22, R. 11 and O. 43, R. 1 (k) — Order refusing to set aside abatement of appeal is appealable.

An appeal lies against an order refusing to set aside an abatement of an appeal : *A I R 1938 Pat 125 and A I R 1925 Pat 162, Foll.* [P 624 C 2]

(b) Appeal — Abatement — Setting aside — Sufficient cause held was shown for setting aside abatement.

The critical question in deciding whether an abatement should be set aside is whether sufficient cause has been shown and that is a matter for decision on the facts of each case. No hard and fast rule can be laid down as to what constitutes sufficient cause. [P 624 O 2]

An appellant made an application for setting aside the abatement of appeal on the ground that the conduct of the appeal was in the hands of his law agent, who was neither living in the village nor had any touch with the village where the deceased respondent lived and he only came to know of the death of the respondent after several months from his death :

Held that sufficient cause was made out for setting aside abatement of appeal. [P 625 C 1]

S. M. Mullick and B. P. Sinha —

for Appellant.

A. D. N. Sinha and M. Azizullah —

for Respondents.

Chatterji J.—This is an appeal against an order refusing to set aside an abatement of an appeal. There were 24 defendants in the suit, all residents of the same village, and they were also the respondents in the lower Appellate Court. Respondent 21 died on 7th May 1937 after notices of the appeal were duly served. On 6th September 1937, respondent 16 filed a petition stating that the appeal abated as respondent 21 died more than three months ago. On 13th September 1937, the appellant made an application for substitution of respondent 20 in the place of the deceased respondent. On the following day however respondent 18 intimated to the Court that the deceased respondent had left a son and two nephews who were not on the record. The matter was put up on the next day when the Court recorded an order that the appeal abated. Thereafter, on 1st October 1937, the appellant made an application for setting aside the abatement. The appellant is the Maharaja of Dumraon. The ground for setting aside the abatement was that the conduct of the appeal was in the hands of his law agent who lived at Arrah for the purpose and he came to know of the death of respondent 21 only when the petition was filed on 6th September 1937 by respondent 16. At the hearing the law agent gave evidence in support of the application. No evidence was adduced on behalf of the respondents. The learned District Judge has held that no sufficient case was made out for setting aside the abatement. He

remarks that the deceased respondent being resident of a village where the appellant's patwari and tahsildar live, it was possible for him, if he was diligent, to keep himself informed of the death of respondent 21.

A preliminary objection is taken to the maintainability of the appeal. It is contended that O. 43, R. 1 (k) which provides for an appeal against an order refusing to set aside an abatement by its terms applies only to suits and not to appeals. However looking to the provisions of O. 22, R. 11, it is clear that so far as abatement is concerned 'suit will be deemed to include an appeal.' The matter is concluded by authorities of this Court. In 18 P L T 1014¹ a similar objection was taken but it was overruled. Their Lordships with reference to the provisions of O. 22, Rr. 9 and 11 held that an appeal lies against an order refusing to set aside an abatement of an appeal. On the same point there is also the case in 85 I C 1010.² These are Division Bench decisions of this Court and we have to follow them.

On behalf of the appellant Mr. Mullick, relying on the same decisions in 18 P L T 1014¹ and 85 I C 1010,² contends that in an appeal after notices have been duly served on the respondents, it is not obligatory on the appellant to keep himself informed about the movements of the respondents. On behalf of the respondents on the other hand reliance is placed on the earlier cases in 4 P L T 567³ and 5 P L T 349⁴ which lay down that it is obligatory on an appellant to keep himself informed of any devolution of interest that may take place by reason of the death of any of the respondents; and it is not sufficient for setting aside an abatement merely to say that the appellant had no knowledge of the death of the respondent till many months after such death. To my mind this proposition was too broadly stated. The critical question in deciding whether an abatement should be set aside is whether sufficient cause has been shown and that is a matter for decision on the facts of each case. No hard and fast rule can be laid down as to

1. *Wajid Ali v. Fagoo Mandal*, (1938) 25 A I R Pat 125 = 174 I O 40 = 17 Pat 84 = 18 P L T 1014.

2. *Hari Saran Singh v. Saiyid Mohommad Eradat Hussain*, (1925) 12 AIR Pat 162 = 85 I O 1010.

3. *Mahanth Ramperkash Das v. Kunj Lal*, (1924) 11 AIR Pat 126 = 79 I O 414 = 4 P L T 567.

4. *Phulwati Kumari v. Maheshwari Prasad Singh*, (1924) 11 AIR Pat 607 = 75 I O 909 = 5 P L T 349.

what constitutes sufficient cause. In this particular case the appeal was in charge of the appellant's law agent; it is not suggested that he was living in the village or had any touch with the village where the deceased respondent lived. The reason given by the learned District Judge is that the appellant has his patwari and tehsildar in the village and if he had been diligent he might have known of the death of the deceased respondent. This is hardly fair. There is nothing to suggest that in the ordinary course of business the appellant could have known of the death. Nor is there anything to show that the patwari or tehsildar had any connexion with the appeal. The respondents do not suggest that the appellant's law agent who was in charge of the appeal had been to their village near about the time when respondent 21 died.

In the circumstances I do not consider that the learned District Judge was justified in rejecting the evidence of the law agent. Accepting his evidence, I would hold that sufficient cause was made out for setting aside the abatement. I would therefore allow the appeal and set aside the abatement and direct that the appeal be disposed of according to law. The abatement will be set aside on condition of the appellant paying the costs of the lower Court as well of this Court to the contesting respondents: Hearing fee Rs. 4 in the lower Court and two gold mohurs in this Court.

Rowland J.—I agree.

D.S./R.K. *Appeal allowed.*

* A. I. R. 1939 Patna 625

VARMA AND ROWLAND JJ.

Nehal Mahto Accused — Appellant.

v.

Emperor.

Death Reference No. 3 and Criminal Appeal No. 20 of 1939, Decided on 24th March 1939, made by Sess. Judge, Manbhum-Singhbhum, D/- 23rd January 1939.

* Penal Code (1860), Ss. 33 and 302—Accused assaulting deceased with intention to cause death and after rendering him unconscious placing him on railway line where death is caused by train—Offence amounts to murder.

Where an accused has assaulted deceased with the intention of causing death and after rendering the deceased unconscious has placed him on railway line where death is actually caused by decapitation by a running train and there is no evidence that the accused when he carried the deceased to

the railway line was under the belief that he was dead, the offence committed by the accused amounts to murder, because the acts so closely following each other cannot be separated and assigned the one to one intention and the other to other intention but must both be ascribed to the original intention which prompted the commission of these acts: *Majority view in 15 Bom 194, Dissent.; A I R 1915 Cal 221 and A I R 1920 Mad 862, Disting.; A I R 1923 All 545; A I R 1931 Lah 27 and A I R 1933 Mad 798, Rel. on.*

[P 629 C 1; P 630 C 1]

Advocate-General — *for Reference.*

S. M. Gupta — *against Reference.*

Rowland J.—This is a reference by the Sessions Judge of Manbhum-Singhbhum under S. 374, Criminal P. C., for confirmation of the sentence of death passed under S 302, I. P. C., on Nehal Mahto charged with the murder of Nisi Mahtain. The crime is said to have been committed on 16th August 1938, after sunset while the deceased was returning from Balarampur hat to her own village Maldih in company with Duli Mahatain, P. W. 3. The deceased and the accused were in a way related, the deceased Nisi being the widow of Aklu whose mother Panu was the sister of the grandmother (Pelu) of Nehal and Gahan and of Gangi, mother of Rathu. Nehal, Gahan and Rathu were the accused persons in the case of whom Gahan and Rathu have been acquitted and Nehal convicted. The witness Duli is a sister of Rathu and another witness Giri is her son. I have mentioned Aklu, the husband of Nisi, and may state that P. W. 1, Badi, is father's brother of Aklu. Between the deceased Nisi and the accused persons there was indisputably ill-feeling from some time past. Nisi had a claim to certain landed property by virtue of a deed of gift executed by Aklu's grandmother Sounri. The validity of this deed was disputed by the other side. There was a criminal proceeding which terminated in some sort of compromise. Subsequently, Nisi pleaded that the compromise was not voluntarily agreed to by her with knowledge of its terms but was fraudulently induced, and brought a pauper suit in 1937 claiming to recover the lands from which, she stated, she has been dispossessed. The suit was contested by Rathu, Uday and Ridu (Ridu being the father of Nehal, the appellant) and was fixed for hearing on 15th September 1938. The motive assigned for the crime is enmity against Nisi and for the purpose of stifling her litigation. She has left a daughter Fulmani, aged about 10 years, and it has been suggested for the accused that the motive

is weak because the litigation could be continued on behalf of Fulmani even after the death of Nisi. But we have had in evidence that the suit in fact has collapsed and this result probably could be expected as a reasonable consequence of Nisi's death. In my opinion an adequate motive existed.

The prosecution story regarding the event of 16th August 1938, is that Duli and Nisi had gone from Maldih to Balarampur hat to make purchases. After attending the hat they started to return home. On the way they were seen near a tank not far from Balarampur by P. W. 2, Mohammad Ali and P. W. 11, Jadu. Thereafter they continued their way and had reached the field of Lalu Mahto, Nisi walking in front and Duli following, when Nehal attacked Nisi with blows of a lathi on the neck and head. Nisi fell down. Duli who was approaching was threatened by Nehal who told her to run away and tell no one or else he would kill her and her son. Duli began to run away. Looking back she heard Nehal shouting to the other accused to join him. She saw the other accused and they began to drag Nisi away. Looking round she dropped and fell and broke her lantern which she had bought that day in Balarampur hat. She went home and she says became unconscious. Her son Giri returning that night found her unconscious. In the morning she told him what she had seen. That is the direct evidence as to the murder. The other part of the prosecution case relates to the recovery of what is said to be the dead body of Nisi. About 6.30 A. M. the engine driver of 57 Down Adra-Chakradharpur Passenger Train saw between the up line rails near the Urama Railway Station an object lying and being attacked by dogs. He reported this at Urama. The station master sent a man to guard the body which was the headless body of a female, the arms as well as the head having been severed from the trunk and the head being found lying at a short distance away at the foot of the embankment. Information was sent to the Government Railway Police, Purulia, from which place a Sub-Inspector came at about 4 P. M. Meanwhile news of the gruesome discovery had reached the village Maldih where the absence of Nisi had already been noticed. In fact on the previous evening at about 7 or 8 P. M. the little daughter Fulmani was crying and was taken by the witness Dhonu, the father of Ludhai, the chaukidar, to the house of P. W. 1 Badi, where

the child spent the night. In the morning Badi went early to Bamhanjora and returned at about 9.30 not having found Nisi there. Bamhanjora is a village one kos from Maldih and is the home of Mt. Nisi's father. When he returned at what is called besham time, i. e. about 9.30 A. M. news reached the village that a woman was lying dead. On this he and Ludhai chaukidar went to the railway line and saw a body which they both claim to have been able to recognise as the body of Nisi. Post mortem examination was held on the remains which appeared to be the head and body of one person, the Civil Surgeon being of opinion that the injury might have been caused by being run over by a train and that it could be inferred from extravasation of blood in the tissues over the shoulder blades that the train might have run over the woman during her life. On this the case of the prosecution is that Nisi was seriously assaulted in the presence of Duli, that she was dragged or carried from that place to the railway line and placed on the line in an unconscious and helpless condition to be run over by the next train.

Mr. Gupta who has argued the case with ability and thoroughness on behalf of the accused, has contended that there is not sufficient evidence to prove that Nisi has been murdered, that the body and head discovered are not proved to have been hers, their condition being such as to render certain identification impossible; secondly, that the direct evidence of Duli as to the assault on Nisi ought not to be accepted because of some discrepancies and improbabilities in her statements and because of the delay that elapsed before she disclosed to the world what she at the trial claims to have seen; and finally, that if the prosecution has succeeded in establishing the facts that an assault was made by the accused as deposed to by Duli, that Nisi was carried away thereafter and left on the line where a train ran over her, the persons who left her on the line might have done this in the belief that she was already dead and that an act done to a dead body or to what is believed to be a dead body is not an offence against the person within Chap. 16, I. P. C. Therefore, in his contention, the accused could not have committed murder of Nisi by placing her on the railway line and, on the other hand, they did not commit murder of her by the assault on the field because

that assault itself did not cause death. These contentions I shall examine in order.

As regards the condition of the body the medical evidence shows that portions had been eaten by wild animals, the face bones were crushed into several fragments and greater parts of the soft parts were missing. The right side of the skull and the base was broken into several fragments, membranes were lacerated, brain was liquified and was coming out. The left side of the scalp however seems to have been present and on dissection clotted blood was found within it and between it and the skull about four inches in diameter around the parietal eminence. I shall have to refer to this injury later. It has been argued that on this description recognition could not be possible but the Civil Surgeon himself does not express a definite opinion as to this. The clerk in charge at Urma Railway Station, Babu Nritya Gopal Banerji, P. W. 10, who saw the body before it was removed from the railway line has however stated that there was nothing in the head by seeing which the person could be recognised by appearance. Of the two witnesses who claimed to identify it Ludhai is hardly cross-examined as to the possibility of identification and he speaks in chief of having seen the body and recognized it. He adds that he recognized the body by seeing the tatoo marks on the legs and the only question asked in cross-examination on this point elicited that there are tatoo marks on the legs and arms of some other women of the village. The other witness Badi says he recognised the dead body to be that of Nisi and in cross-examination he says that he recognized it by the tatoo marks on the leg and by the face. He says further that although one of the cheeks had been eaten by wild animals the other portions of the head had not been damaged. The hair and scalp presumably was there and one gathers from the medical report that one cheek was present. It is perhaps not necessary to say whether if this evidence of identification stood absolutely alone it would be considered sufficient. Actually it is to be considered along with and in the light of other evidence in the case the decision of which turns on the question whether the evidence taken as a whole carries the conviction to a reasonable certainty as to the events which have happened.

Now I turn to the story told by Duli and the criticism on it that the disclosure of the facts of which she deposed has been

unduly delayed. According to her son Giri she told him what she had seen at cock crow on the morning of 17th August. It is stated by Duli and by the child Fulmani that Duli told Fulmani on the morning after the hat day that Nehal had killed her mother. But when Dhonu Harhi questioned Mt. Duli at about besham time that morning she apparently told him that she had returned alone from the hat and had not seen Mt. Nisi. Duli has explained her silence at first by saying that she was terrified of the consequences of giving out to the public what she had seen and there is some confirmation in the evidence of Giri, her son. He was out at work till the evening of the 16th about 8 P. M. When he came to the door of the house he found it shut and his mother did not respond on being called. The door was opened by his nephew, a small boy, and he found his mother unconscious. She did not respond when spoken to. Seeing her unconscious he rubbed oil on her body and did not disturb her further. It seems to me to be the truth that Duli was suffering from the effect of some violent shock and fright. Giri further deposed that he found a broken lantern chimney which his mother had brought home from the hat and this fits in with her explanation that she had bought the lantern but that its chimney was broken when she fell in running away at the time of the occurrence. We find that it had become known in the village that Duli and Nisi had been in company on the previous day. Badi informed Ludhai on Wednesday. Badi who went to the police station and lodged the first information at 4 P. M. mentioned that Nisi and Duli had gone to the hat together and mentioned his suspicion against the accused because of the motive. On the arrival of the Sub-Inspector in the village he examined Duli and Giri that same evening and Duli disclosed the substance of the facts known to her as already stated by me. The Sub-Inspector forthwith went to the alleged place of occurrence as indicated by Duli and there found paddy plants disturbed and marks of violence.

It was dark and closer search could not be made at that time; but he went again to the place on the following morning and found at two points marks of blood. Scrapings were taken and one was found to be blood of which the origin could not be proved and the other was found to be human blood. The delay on the part of Duli in disclosing her knowledge of the

occurrence can I think be explained by her fear of consequence to herself should she say anything against the accused before the arrival of some public authority who would be in a position to protect her. On the question of whether she was present when the assault on Nisi was made the fact that immediately on her statement the Sub-Inspector found marks of a struggle at the alleged place of occurrence is strong corroboration of her having been present and being a genuine witness. There is also the evidence of P. W. 2, Mohammad Ali, a witness who appears entirely disinterested and who saw Nisi and Duli together near a tank on the way home from the hat. The alleged discrepancies in her evidence mostly consist of matters of detail which appeared in her later statement and are not present in the first disclosure. These are not in themselves proofs of fabrication and do not in my view discredit her testimony on the main point. If she was there, as she says, there is no reason why she should not have been able to correctly identify the principal assailant Nehal. The witness would appear to have favourably impressed the Sessions Judge and the assessors whose opinion was unanimous and agree with the view at which I have arrived independently. I would accept Duli's testimony on this point.

Now we have to consider whether it is safe to put together the two parts of the prosecution case namely the disappearance of Nisi and the recovery of the body and to say that the facts point to the one conclusion that the missing woman is the body found. To some extent the two parts of the case are mutually corroborative. If the body belonged to some other person it is probable that evidence would be forthcoming of the disappearance of some such person. The coincidence in time between disappearance and the finding very strongly suggests that there is identity between the two. Along with this, we have to see the motive, which as already pointed out, is fully adequate. In all the circumstances I feel no doubt that the identification which was made by the two witnesses and that not without reference to a definite mark of identification of tatooing should be accepted and I hold it established that Nisi was attacked, rendered unconscious and taken to the railway line. One more coincidence may be referred to before leaving this part of the case. Duli has stated in her evidence that the attack began with a lathi blow from behind on the back of the head and neck. The extra-

vasation of blood in the parietal region of the scalp may well be the result of just such a blow.

Now, it remains to consider the point of law urged, namely that the offence committed by the accused cannot be said to amount to murder. For this contention reliance is placed on the decisions in 15 Bom 194,¹ 18 C W N 1279² and 42 Mad 547.³ In the first of these cases which was decided by a majority out of three Judges the facts were that the accused had struck the deceased on the head with a stick and rendered him unconscious and then believing that he was dead set fire to the hut in which he was lying with a view to remove all evidence of the crime. The blows struck were said to be insufficient to cause death and not the cause of death. Death was caused by injuries from burning; but the intention with which the accused set fire to the shed was not to cause death or to make the deceased's death certain but to do away with evidence. In the result it was held in the facts of that case that the offence committed by the accused was only an attempt to murder. In 18 C W N 1279² it was held that the accused was not guilty of murder on a finding that he had first assaulted the deceased without any intention of causing death and subsequently, believing her dead, had suspended her body by the neck by a piece of string tied to the roof of the house. It was found that in fact death was not caused by the previous assault but by the hanging. A conviction was had under S. 325. These cases were considered by a Full Bench of the Madras High Court in 42 Mad 547.³ In this case, as in the last case referred to, the finding was that the accused had assaulted his wife not intending to cause death and subsequently believing her dead he suspended the body by a rope intending it to be believed that she had committed suicide. It may be noticed that in the Calcutta and Madras cases there was at the outset, as found, no intention to cause death. Herein these cases differ in the facts from the Bombay case. The correctness of the decisions in 18 C W N 1279² and 42 Mad 547³ it is not necessary to question. I feel no

1. *Queen-Empress v. Khandu*, (1891) 15 Bom 194.

2. *Emperor v. Dalu Sardar*, (1915) 2 A I R Cal 221=26 I O 157=15 Cr L J 709=18 C W N 1279.

3. *Palani Goundan v. Emperor*, (1920) 7 A I R Mad 862=51 I O 164=20 Cr L J 404=42 Mad 547=37 M L J 17 (F B).

doubt that unless the intention to cause death or a bodily injury sufficient to cause death has been present, the offence of murder is not committed. The majority in the Bombay case however have gone further than this and have held that even if the original assault was made with the intention of causing death then if that assault did not cause death, the assailant is guilty in respect thereof of attempt to murder and the subsequent disposal of what is believed to be a dead body was not considered to add anything to the crime. Parsons J. dissented from this view and was of opinion that the acts so closely following upon and so intimately connected with each other could not be separated and assigned the one to one intention and the other to another, but must both be ascribed to the original intention which prompted the commission of those acts and without which neither would have been done. With great respect to the majority of the Judges who decided that case I am of opinion that the view taken by Parsons J. is the correct view. It is curious that none of the Judges in dealing with either of the cases which I have cited has referred to S. 33, I. P. C., which runs thus :

The word 'act' denotes as well a series of acts as a single act; the word 'omission' denotes as well a series of omissions as a single omission.

In an earlier case of the Calcutta High Court, 6 W R 55 Cr,⁴ where a Magistrate had recorded a conviction of causing hurt, commitment proceedings were ordered on the homicide charge in a case in which the deceased had first been assaulted and then hung up to a tree to make it appear that he had committed suicide. Norman J. said:

It would be a very serious matter if an offender were to be allowed to escape because a too critical Court could not determine at what precise point in the course of a series of acts of violence, each capable of producing death, an unfortunate man expired under the hands of those who were ill-using him.

while Seton-Karr J. seems to have thought that it might be a question of fact whether the accused believed the victim to be dead before they hung him up. In the Allahabad High Court in 25 Cr L J 703 = 81 Ind Cas 191⁵ the opinion was expressed that the view taken by Parsons J. in the Bombay case was the correct one, and in 32 Cr L J 483 = 130 I C 321⁶ it was held that

4. In re Gour Gobindo Thakoor, (1866) 6 W R 55 Cr.

5. Emperor v. Khubi, (1928) 10 A I R All 545 = 81 I C 191 = 25 Cr L J 703.

6. Emperor v. Gajjan Singh, (1931) 18 AIR Lah 27 = 1931 CrO 91 = 130 I C 321 = 32 CrLJ 483.

where the action was continuous and it was impossible to resolve the two incidents into two wholly separate actions, inspired by different motives and committed for different reasons, the accused must be treated as having done one act with the intention of causing death and as having succeeded in carrying out his object, and he was therefore guilty of murder. In this case the accused had struck his victim several times on the head so that he lost consciousness. Then, with the assistance of a boy Jagganath, he carried the victim a short distance and threw him, face downwards, into a pool. Gajjan then robbed the body and covered it with branches. Subsequently, Gajjan and the boy carried the body to the canal into which they threw it. In my opinion S. 33, I. P. C., though not referred to by the Judges, would fully have supported the treatment of the whole incident as one series of acts, and therefore within the meaning of the Code as an act. These cases were considered in 57 Mad 158⁷ in which the facts were strikingly analogous to those before us now. The two accused persons it seems had assaulted a woman, the wife of one of them, with the intention of causing death, and thereafter, intending to cause evidence of the offence to disappear placed her body on the railway line with the intention of screening themselves from legal punishment. The Sessions Judge, following 15 Bom 194,¹ had recorded a conviction under S. 307, I. P. C., and imposed a sentence of transportation for life. Medical evidence, as in the case before us, favoured the view that the actual cause of death had been decapitation. The cases in 42 Mad 547³ and 18 C W N 1279³ were distinguished on the ground that in those cases there had not been at the outset, or at any time, the definite intention of causing death. But where, as in the Bombay case, that intention is present it was held that Parsons J. was right in regarding the incident as composed of two acts committed by the accused which together have caused death and must both be ascribed to the original intention. The result was that the accused were convicted of murder and dissent was definitely expressed from the view of the majority in the Bombay case. I am of opinion that the law is correctly stated in this decision. I wish to make it clear that we have not to deal with such a case as was

7. In re Kallappa Goundan, (1932) 20 AIR Mad 798 = 1933 Cr C 1400 = 145 I C 959 = 67 Mad 158 = 84 Cr L J 1109 = 65 M L J 597.

before the Judge in 42 Mad 547³ or 18 Cal W N 1279² where the original intention was not to cause death. So far as the evidence indicates, the intention of the accused was from the outset to cause death of the victim in pursuance of a preconceived plan. It is also to be noted that there is no evidence whatever that the accused, when they carried Nisi to the railway line, were under the belief that she was dead and that they were handling a dead body. Mr. Gupta asked us to infer that they were under that impression from the fact that Duli, the eye-witness, said in her deposition that she saw Nisi lying dead and Nehal still assaulting her. But the inference which Duli looking from a distance and under circumstances of great agitation may have drawn does not give us reason to suppose that a similar belief was induced in the accused persons who were actually handling the person of the victim. They had full and complete means of observation. They could notice whether she was breathing, whether she had a pulse, and it is no part of the defence set up by the accused themselves that they removed her body under any misapprehension as to whether she was alive or not.

In my opinion the Sessions Judge and the four assessors have correctly held that the accused is guilty of murder, and for a crime of this nature it can hardly be suggested that the extreme penalty of the law is excessive. I would accept the reference, dismiss the appeal, and confirm the sentence of death.

Varma J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Patna 630

ROWLAND AND CHATTERJI JJ.

*Rama Prasad and another —
Defendants — Appellants.*

v.

*Ram Ran Bijay Prasad Singh —
Plaintiff — Respondent.*

Appeal No. 32 of 1937, Decided on 8th August 1939, from appellate decree of Sub-Judge, Arrah, D/- 24th September 1936.

(a) Bihar Tenancy Act (8 of 1934), S. 60 — Registered proprietor can obtain full decree for rents due to estate to extent of his recorded interest even if his title is to smaller interest.

The registered proprietor of an estate is not barred from obtaining a full decree for the rents due to the estate to the extent of the interest for which he is recorded notwithstanding that he may in reality have title to a smaller interest or

even to no interest at all : *A I R 1918 Cal 492, Rel. on.* [P 631 C 2]

(b) Bihar Tenancy Act (8 of 1934), S. 60 — Claim for back rents is suit for rent.

The claim for back rents is a suit for rent falling within the Act. [P 632 C 1]

(c) Bihar Tenancy Act (8 of 1934), S. 60 — Distinction cannot be drawn between rent due to proprietor and rent due to proprietor as successor—Fact that something happens to proprietor will not change nature of rent.

No distinction can be drawn between rent due to a proprietor as such and rent to the person who is the proprietor, but due to him as the successor in interest of his predecessor. A plain reading of the Section indicates that it is intended to apply to cases where rent has accrued due to the proprietor of an estate and is still unpaid. The fact that something happens to the proprietor will not affect the character of the rent or the nature of this liability, nor will the rent cease to be rent due to the proprietor. The contrary case to which S. 60 is meant not to apply is the case where rent is due to a tenure-holder by an under-tenure-holder or raiyat, or due to a raiyat by an under-raiyat. [P 632 C 2]

(d) Bihar Tenancy Act (8 of 1934), S. 60 — It cannot be said that S. 60 only bars plea that rent is due to some third person as proprietor.

It cannot be said that S. 60 only bars a plea that the rent is due to some third person as proprietor. Such words of limitation are not to be found in the Section itself; it bars a plea that the rent is due to any third person. [P 633 C 1]

(e) Bihar Tenancy Act (8 of 1934), S. 60 — Suit for rent by registered proprietor — Plea that he alone is not entitled to maintain suit is barred.

To make the Section applicable it is only necessary to see whether the tenancy is held under a proprietor, manager, or mortgagee of an estate. If this condition is satisfied, the registered proprietor suing for rent shall be deemed to be the person to whom the rent is due and no plea to the contrary by the tenant will be permissible. Where the plaintiff in a suit is the registered proprietor S. 60 bars the plea that he alone is not entitled to maintain the suit. [P 633 C 2]

D. N. Varma—*for Appellants.*

Sushil Madhab Mullick and B. P. Sinha
— *for Respondent.*

Rowland J. — This appeal, which at first came before a Single Judge of this Court and was referred by him to a Division Bench, arises out of a suit for the rent of the years 1338, 1339, 1340 and twelve annas kist of 1341. The plaintiff is the proprietor of the Dumraon estate and the defendants are tenants having an occupancy holding directly under the estate without the intervention of any intermediate tenure. The proprietor, at the time when the rents of the first three years in suit accrued due, was Maharaja Bahadur Kesho Prashad Singh, who died in September 1933, and the estate, which is an impartible Raj,

devolved on his elder son, the present plaintiff respondent. There was also a younger son, Kumar Biswanath Prashad Singh, who did not succeed to the estate, but became along with his elder brother, the heir to the personally acquired properties of the late Maharaja. The contention of the defendants was that rents due to the estate were such personal properties, and on the death of the Maharaja the persons entitled to those rents are the two brothers and not the elder brother only. Therefore it is said, the elder brother alone cannot sustain this suit for the sixteen annas rents. The younger brother has not been impleaded, nor has he intervened. The Munsif gave effect to the contention of the defendants and gave the plaintiff a decree for the rent of twelve annas kist of 1341 only; but on appeal the Subordinate Judge has decreed the entire suit, taking the view that S. 60, Ben. Ten. Act, precluded the defendants from resisting the suit of the plaintiff who is registered as sixteen annas proprietor by the plea that the rent is due to any third person.

The position taken up by the Subordinate Judge is supported by a very long series of authorities of which at this stage I may refer to 6 Pat L J 658¹ as the leading case of this Court. In this case it was held that the person registered as proprietor under the Bengal Land Registration Act, 1876, is entitled to recover rent from the tenants without any further proof of his title to it, and the tenants are not entitled to plead that the registered proprietor is not in fact the proprietor and that the rent is due to a third person. The contention of the defendants was based on 50 I A 1=2 Pat 319² and 5 P L T 111=3 Pat 367.³ In the former of these cases, which was decided by their Lordships of the Privy Council, the dispute was between a widow, who was the personal heir of the late holder of an impartible estate, and a somewhat distant agnate who succeeded to the estate itself by primogeniture, and the decision was that certain moveable and other properties which had been self-acquired by the late Raja were to be regarded as not incorporated in the estate, and therefore should pass

to his widow and not to the new holder of the estate.

In the Patna decision a Bench of this Court applied the principle to rents which had accrued due during the lifetime of the last holder of an estate, and it was held that the person entitled to moneys due on account of rent of this kind was the widow, that is to say, the personal heir and not the agnate on whom the estate devolved. In neither of those cases was there any question of S. 60, Ben. Ten. Act. The latter case, it is true, dealt with certain rents, but they were not agricultural rents; they were rents and royalties in respect of coal mines, &c., and were governed by the Transfer of Property Act. It may be conceded that any realisations made by the new proprietor on account of rents accrued due in the lifetime of his father are not and will not be his exclusive property and that his brother is entitled to share in the enjoyment of any such receipts. But the decisions under S. 60, Ben. Ten. Act, make it quite clear that the registered proprietor of an estate is not barred from obtaining a full decree for the rents due to the estate to the extent of the interest for which he is recorded notwithstanding that he may in reality have title to a smaller interest or even to no interest at all. For instance, in 41 I C 769,⁴ in spite of a finding of fact by the Courts below that the plaintiff was not entitled to get his name registered as heir of Naba Chandra nor in respect of the third share of Ram Kant the High Court applied S. 60, held that the above plea could not be entertained in a rent suit and gave the plaintiff a full decree. It is not necessary to multiply the citation of decisions which are very numerous.

Mr. D. N. Varma for the appellants contended that the plea excluded by S. 60 was a plea that the rent was due to any third person as proprietor. In support of this he referred us to cases in which rents which had accrued due to the proprietor of an estate became in certain circumstances payable to a person who was not the proprietor. It has been held in some cases that such a person was not required to be registered and was not barred by S. 78, Bengal Land Registration Act, from recovering what was due to him. The decision in 3 C W N 294=26 Cal 536⁵ was a case in

1. *Mt. Nand Kuer v. Jodhan Mahton*, (1921) 8 A I R Pat 363=61 I O 886=6 Pat L J 658=2 P L T 387.

2. *Jagadamba Kumari v. Wazir Narain Singh*, (1928) 10 A I R P O 59=77 I O 1041=50 I A 1=2 Pat 319 (P O).

3. *Aparna Debi v. Shiba Prashad Singh*, (1924) 11 A I R Pat 451=83 I O 628=3 Pat 367=5 P L T 111.

4. *Shyama Charan v. Mustafizar Rahaman*, (1918) 5 A I R Cal 492=41 I O 769.

5. *Nagendra Nath Bose v. Satadulbashini Basu*, (1899) 26 Cal 536=3 C W N 294.

which the arrear of rent fell due in the lifetime of a registered proprietor, and on his death, the debt of course became the property of his heirs. The latter alienated the property within two months, but without assigning the arrears of rent. They were permitted to sue for those arrears, the Court observing that they were not suing as proprietors but as the legal representatives of the late registered proprietors, and S. 78 does not apply to such a case. This is a stronger case than the decision of this Court in 14 Pat 352⁶ in which the suit had been instituted by registered proprietors one of whom died during the pendency of the suit. It was held that the fact of his heirs not yet having got registration of their names did not bar them under S. 78, Bengal Land Registration Act, from obtaining a decree which they claimed in the capacity of his heirs and representatives. But these cases were not cases under S. 60, Ben. Ten. Act, at all. They fell to be decided under S. 78, Bengal Land Registration Act.

What we have to see here is not whether Kumar Biswanath Prasad Singh might have realized the money from the defendants if he had claimed it from them before they had made any payment to the Maharaja or had been sued by the latter, but what the position is in a suit instituted by the Maharaja in which the defendants are attempting to plead that the rent which they have not paid is due to the Kumar Sahib. Mr. D. N. Varma suggested that the claim for back rents was not really a suit for rent falling within the Bengal Tenancy Act, but was a money claim, that what was due to the Kumar Sahib not being due to him as a proprietor was not to be regarded as rent. The argument on the face of it does not appear convincing and it seems quite impossible to accept it in face of the Full Bench decision of the Calcutta High Court in 4 CWN 357.⁷ That, it is true, was not the case of a legal representative of a deceased proprietor, but it was an assignee of arrears of rent from a proprietor. The contention was raised that the claim was not a claim for rent and was not excepted from the cognizance of a Court of Small Causes. The Full Bench negatived the contention. It was pointed out that the debt in its inception was

clearly in respect of that which is known as rent, and the character which it had while it belonged to the assignor was not changed when the right to it passed to the assignee. But the main argument on which Mr. Varma laid most stress was that the opening words of S. 60 did not apply to the rent claimed in this suit. The words of the Section are "Where rent is due to the proprietor, manager or mortgagee of an estate." First he contended that what is due is not rent. This argument fails in view of what I have already said.

The next argument was that it is not "due to the proprietor" of the estate because it belongs to the legal representatives of the late proprietor. Mr. Varma had to choose between taking the position that the plaintiff could recover as much of the rent as is due to himself but not what is due to his brother, and taking the position that the whole claim in respect of the years 1338, 1339 and 1340 should be dismissed. He adopted the latter contention; but it has implications which make us unable to accept it. If it were well-founded, it would apply even in cases where a proprietor is succeeded by a sole heir and would lead to the conclusion that even such a person insuing for back rents cannot rely on Sec. 60 in support of his claim. It would require us to draw a highly artificial distinction between rent due to a proprietor as such and rent due to the person who is the proprietor, but due to him as the successor-in-interest of his predecessor.

Had Mr. Varma's argument taken the other form, that the claim must fail to the extent of the share of Kumar Biswanath Prasad Singh, it would be equally untenable. For, we should have the case that some rent was due to the proprietor and some of it was alleged to be due to a third person. That position is clearly within the terms of S. 60. A plain reading of the Section indicates that it is intended to apply to cases where rent has accrued due to the proprietor of an estate and is still unpaid. The fact that something happens to the proprietor will not, I think, affect the character of the rent or the nature of this liability, nor will the rent cease to be rent due to the proprietor. The contrary case to which S. 60 is meant not to apply is the case where rent is due to a tenure-holder by an under tenure holder or raiyat, or due to a raiyat by an under-raiyat. Now, it is not disputed that the plaintiff has got himself registered as the 16-annas proprietor

6. *Brindaban Prasad v. Banku Bihari*, (1935) 22 A I R Pat 144=153 I C 1031=14 Pat 352.

7. *Sirish Chandra Bose v. Nasim Quazi*, (1900) 27 Cal 827=4 C W N 357 (F B).

of the estate, and under S. 60 he is competent to give a sufficient discharge for all rents due to the estate or to its proprietor as such. The Section goes on to say that the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person.

Mr. Varma's concluding argument was that this only bars a plea that the rent is due to some third person as proprietor; the answer is that those words of limitation are not to be found in the Section itself; it bars a plea that the rent is due to any third person. To the argument that if the rent in fact belongs to some third person, the Section does not apply at all, the answer is that on this construction the whole Section would be emptied of meaning. The plea which S. 60 bars would only be barred if it fails on the merits. This is contrary to a very long series of decisions. In my view the plea of the appellants is barred by S. 60 and the decision of the Subordinate Judge should be affirmed and the appeal dismissed with costs.

Chatterji J. — I agree. The whole controversy in this appeal relates to the true construction of S. 60, Bihar Tenancy Act, particularly with reference to the opening words "where rent is due to the proprietor, manager or mortgagee of an estate." Mr. D. N. Varma for the appellants contends that these words imply that the Section requires that the person to whom the rent is due must be the proprietor, manager or mortgagee of an estate. In the present case, it is said, the rents for the years 1338.40 which became payable to the late Maharaja devolved on his death not as part of his ancestral impartible estate on his eldest son, the present plaintiff, but as his separate property on his two sons and are therefore due to them not as proprietors but as legal representatives of the late proprietor. At any rate, the younger son admittedly not being a proprietor, his share of the rent cannot be said to be due to a proprietor. Consequently, S. 60 cannot apply. The construction thus sought to be put on the Section is in my opinion erroneous. As I read the Section, it seems to me that what it really requires is that the tenant should hold his land directly under the proprietor of an estate as distinguished from a tenure-holder or any other intermediate landlord. To accept Mr. Varma's contention, it would be necessary to decide who is really entitled to the rent sued for, but that is exactly the question which the Court is forbidden by the Section to entertain.

To make the Section applicable it is only necessary to see whether the tenancy is held under a proprietor, manager or mortgagee of an estate. If this condition is satisfied, the registered proprietor suing for rent shall be deemed to be the person to whom the rent is due and no plea to the contrary by the tenant will be permissible. Admittedly the plaintiff in this suit is the registered proprietor and therefore S. 60 bars the plea that he alone is not entitled to maintain this suit. The fact that the rents for the years 1338.40 accrued due during the life-time of the late proprietor makes no difference.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 633

WORT J.

Bikan Mahuri and others —

Defendants — Appellants
v.

Mt. Bibi Walian and others, Plaintiffs
and others, Defendants—Respondents.

Appeal No. 546 of 1938, Decided on 12th April 1939.

(a) Bengal Regulation (27 of 1793), Art. 2 — Dues payable by occupant of gola on sales of articles stored therein is tax or duty — Consolidation of amount on various articles makes no difference.

Dues payable by an occupant of a gola on the sales of various articles there stored by him is tax or duty. And the mere fact that the sums payable on the various articles have been consolidated makes no difference to the nature of the amount and the consolidated amount of dues is a tax or duty within the meaning of Art. 2 of the Bengal Regulation of 1793. [P 636 O 1]

(b) *Res judicata* — *Res judicata* is a form of estoppel — There can be no estoppel against statute — Recovery of amount prohibited by statute — Defendant can plead statute though plaintiff is entitled to recover under previous judgment.

The principle of *res judicata* is only a form of estoppel. There can be no estoppel against the statute. Therefore if a statute prohibits the recovery of a certain amount the previous judgment entitling the party to recover the same cannot stand in the way of defence of defendants in a subsequent suit for the recovery of the amount: 2 *Ex 680, Rel. on.* [P 636 O 2]

(c) *Res judicata* — Judgment deciding merely party's liability to pay is not *res judicata* in subsequent suit regarding nature of sum.

The judgment in a previous suit which decides merely the party's liability to pay and not the nature of the sum is not *res judicata* in a subsequent suit in which the question to be decided is the nature of the sum. [P 636 O 2]

P. R. Das, B. P. Sinha and K. K. Singh
— *for Appellants.*

Khurshed Husnain and A. H. Fakhruddin
— *for Respondents.*

Judgment. — This is an appeal arising out of a number of suits which in the Court below gave rise to four appeals, but in this case we are only concerned with one which arises out of suit No. 169 of 1936 in which according to the statement of the learned Judge in the Court below there was

a claim for tangiana at the rate of Rs. 150 and also ground-rent for the land on which the defendant's gola house stands at the rate of Rs. 8-12-0 per year for the years 1341 to 1343 Fasli.

I have purposely substantially quoted the words of the Judge in the Court below, because upon the question of what this Rs. 150 was depends my decision in the case. I must confess that my mind has changed very considerably during the course of the argument, but in the result the question to be decided falls within a very small compass; and, once that question is decided, it seems to me that the other difficulties in the case disappear. The substantial question on the merits which arose, apart from the technical objection to the claim which has been raised by Mr. P. R. Das in this Court, was whether the defendant was liable to pay the sum of Rs. 150. I do not think there is any substantial dispute between the parties as to his liability to pay Rs. 8-12-0 which was the ground-rent. The question whether he should pay the Rs. 150 was made to depend in the Court below first upon custom and then upon contract. It would appear that the defendant and the plaintiff were the successors-in-title of persons who (if the contract existed) originally entered into that contract. The learned Judge in the Court below has come to the conclusion that there was no contract to pay tangiana. I propose to quote his words to prevent any difficulty arising. The learned Judge says :

In view of the evidence and circumstances of the case which I have discussed at length and which has been considered by the learned Munsif, I agree with him in holding that no contract to pay tangiana has been proved nor has any realization of the same from the defendants at the lump rates claimed or at any rate has been established.

The point was accordingly decided against the appellants before the lower Appellate Court. The learned Judge then goes on to point out that there was practically no evidence of custom and comes to a conclusion against the plaintiff so far as his case depended on custom. It seems to me quite clear that the finding of the learned Judge in the Court below that there was no contract to pay would entitle the defendant to have the suit, so far as it concerned the sum of Rs. 150, dismissed as against the

plaintiff. But the learned Judge proceeds to determine the case on the footing of a previous judgment and after having discussed the various considerations placed before the Judges at various stages of that case makes this observation :

The defendants must be presumed to hold the gola lands on the same terms and conditions as their father against whom the decree was passed so far back as 1872 and there is no reason to think that they have not paid the rent ever since.

He also points out that even if rent had not been paid, the fact would not relieve the defendants of the liability. It is difficult to understand the judgment having regard to the previous statement of the learned Judge that no contract was proved. It is only on the footing of contract that the liability of the defendant would arise, and the conclusion stated by the Judge to which I have referred as regards the previous judgment of 1872 is tantamount to a finding that contract was to be implied from the circumstances of the case. It seems therefore that the learned Judge has decided the liability of the defendant on the footing that he held over as laid down in the judgments in the previous case (Exs. 11 and 11-a) and decided that that liability was a continuing liability. It is contended by Mr. Khurshed Husnain on behalf of the plaintiff-respondent that the judgment is *res judicata*. It seems to me that that is an argument which cannot be accepted. What was decided in that case was a question of title—the question of the title of the plaintiff in the case of 1872 was decided, as it was contended (so it appears) that the plaintiff was not entitled to claim the sum. It is upon that fact that the question of title was decided in the case, which decision Mr. Khurshed Husnain contends operates as *res judicata*. A passage in Sir Dinshaw Mulla's book on Civil Procedure Code is relied upon by both parties. That passage is as follows :

If the question of title is gone into in the previous suit as if the right of rent were sought to be established not for one particular year, but once for all, it will be said to have been directly and substantially in issue. But if the question of title is gone into in the previous suit as if the right of rent were sought to be established not once for all but for one particular year, it will be said to have been in issue collaterally or incidentally.

It seems to me that the question of title in this case was collateral and incidental to the suit and not directly in issue: in other words, it depended entirely upon the circumstances of the case. If it was *res judicata* for all time, as was contended, then the logical

result of that proposition would be that the defendant would be liable for rent whatever may happen: in other words, whether he went out and delivered up possession to the landlord or not. In my opinion, it is very difficult, if not impossible, to contend that the previous judgment was *res judicata*. It might be said in this case and that seems to be the strongest point in favour of Mr. Khurshed Husnain on this particular part of the case that, as the parties established no new circumstances, the judgment to that extent was conclusive.

It seems to me that the case depends upon the consideration of another and much more serious point. One of the contentions of Mr. P. R. Das who appeared on behalf of the defendant was that this rent or tax (by whichever name it may be called) of Rs. 150 was not made the subject-matter of the return under the Cess Act in the year 1928, the year when the last return was made, and therefore was not recoverable by reason of the provisions of S. 25 of the Cess Act of 1880. I (*sic*) think it is quite clear in the first place that no such return was made, and secondly, there is in evidence a petition filed certainly about a year after original return, by which the plaintiffs sought to amend their return. Mr. Das however contends that as it was not made within six months as provided by S. 20, it was of no avail. Whether the Collector has power or not to extend the time I am not prepared to say. No provision of the Act has been pointed out which would entitle me to hold that he was so entitled. But the fact remains that the Collector accepted the petition and there are orders in evidence which would indicate that the return was amended. In those circumstances it would be difficult to sustain the plea in bar now raised by Mr. P. R. Das, more particularly by reason of the fact that facts and circumstances were not brought to the notice of the lower Court and thus entitling the Court to arrive at a final judgment with regard to the matter. Now, the other and the substantial point was that this amount of Rs. 150 was contrary to Regulation 27 of 1793 the Preamble of which commences in this way:

The imposition and collection of internal duties have from time immemorial been admitted to be the exclusive privilege of Government.

Then later:

It was however judged advisable to leave the exercise of this privilege to the landholders, Government contenting themselves with imposing general

regulations for the prevention of undue exactions; then further stating the history of the case and stating the intention to deal with this matter, it says:

In the adoption of the above arrangements, the Governor-General in Council had no intention to divest the landholders of any collections they had made, under the denomination of *sayer*, not in reality a duty, but a consideration for the use of grounds, shops, or other buildings belonging to them.

Then comes the description of various sums which have from time to time been collected. Then comes the Regulation itself, para. 2 of Art. 1 of which provides:

No landholder, or other person, of whatever description shall be allowed to collect, in future, any tax or duty of any denomination; but all taxes and duties shall be hereafter levied, on the part of Government, by officers duly appointed for that purpose under such Regulations as may be passed for their guidance.

Then Art. 2 provides:

No monthly or annual payments now made, or which may be hereafter made, for the use of land, or houses, shops, or other buildings erected thereon, being clearly of the nature of rents and not duties or taxes are to be understood to be within this prohibition, but all such rents are to be enjoyed by the proprietors entitled thereto as heretofore.

It is contended by Mr. P. R. Das, on the one hand that this Rs. 150 comes within the mischief of the Regulation, while on the other hand Mr. Khurshed Husnain contends for the respondent that it is a sum in the nature of the rent and payable for the use of the gola. Mr. Husnain relies upon the judgment or statement in the judgment in the previous case (*Ex. 11-a*). In that case two separate suits had been brought, one for the ground-rent proper and the other for *tangiana*. The learned Judge in that case observed:

But it appears to me that the liability for rent of the land on which the gola stands is *prima facie* so inseparable from the liability to pay the *arhut* dues that nothing but the strongest evidence to the contrary would justify me in holding that appellant is not liable for such rent if he is liable to pay the *arhut* dues.

I am afraid, that gives very little assistance to the respondents, because it is clear, not only from the words which I have read but from the context in which they are found, that the learned Judge there was dealing with the question of liability and not the question of the nature of these dues. The Judge of the trial Court in that suit makes this observation:

Sukhlal, the father of Mangru, took land for constructing a gola from Babu Dayal Narain by fixing the ground-rent at 10 annas per month and took lease of the *arhut* at Rs. 150 a year and constructed a gola. The rent all along continued to be paid at the above rate. These two suits are being brought in accordance therewith.

Now, it is not denied, indeed it is quite clear, that this Rs. 150 was a consolidated amount of dues which were payable by the occupant of the gola on the sales of various articles there stored by him. This is clear from para. 5 of the plaint which runs as follows :

In the aforesaid village often some lands are given in settlement for erecting gola houses. The custom relating to the rate of settlement is that the goladar who takes settlement of the land to set up gola thereon pays to the malik 15 dams per tangi on grains, 5 dams per rupee on sale of tobacco, 2½ dams per rupee on sale of mustard oil and so on. The land of the said village is settled for setting up gola in accordance with custom.

Now, the difficult question which I have to decide is whether this was a consideration for the use of the land or whether it was (to put it in the terms of the Regulation) tax or duty of any denomination. The fact that the amounts have been consolidated seems to me to make no difference whatever. It may be that the amount of Rs. 150 was found to be the amount which was recoverable on an average and that the landlord contented himself with that payment rather than going into some complicated accounts and recovering the actual amount which according to the custom set out in para. 5 of the plaint became due. To repeat myself, the mere fact that the sums have been consolidated seem to me to make no difference in the nature of the tax or rent by whichever names it may be properly described. Now bearing that in mind it seems to me to lead one irresistibly to the conclusion that it was tax or duty on those articles within the meaning of para. 2 of the Regulation. I repeat myself by saying that had it not been for the fact that the amount was a consolidated amount, the liability of the occupant of this gola to pay an indefinite sum according to the amount of business which he did and at certain rates according to the articles sold would lead irresistibly to the conclusion that it was something in the nature of a tax or duty. It might have been otherwise, had the landlord agreed to charge a rent for the gola on a percentage of the turn-over of the tenant. Coming to the conclusion at which I have arrived, namely that the consolidation of the amount makes no difference to the nature of the amount, I, not without hesitation, come to the conclusion that it was tax or duty within the meaning of Art. 2 of the Regulation of 1793. Now, if that be so, there seems to me to be no difficulty in coming to the conclusion in regard to the previous judgment. That the previous

judgment is not *res judicata*, it seems to me to be plain on elementary principles; as pointed out by Baron Parke in (1848) 2 Ex 665¹ at p. 680, the principle of *res judicata* is only a form of estoppel and it is a principle of law for which no authority is required and that there could be no estoppel against the statute. If the Regulation prohibits the recovery of this sum, the previous judgment entitling the plaintiff to recover the sum cannot stand in the way of defence of the defendants in this case with one exception which has been pointed out by Mr. Husnain in the course of his argument. If the previous case of 1872 had decided not only the liability of the defendants, but that the nature of the imposition was not such as to bring it within the mischief of the Regulation, the matter would have been concluded. But there was no such decision and, in order to rely upon the plea of *res judicata*, Mr. Husnain falls back on what is ordinarily known as constructive *res judicata*, that is to say, it was a defence which the defendants could have set up in the previous action. But as they did not, it must be presumed that the point was decided against them. But the judgment of the case of 1872 was merely a judgment which decided the defendants' liability to pay rather than the question of the nature of the sum. The point was not decided and therefore the plea of *res judicata* cannot be taken.

In my judgment, therefore, the decision of the learned Judge in the Court below was wrong and the plaintiff's case should have been dismissed to the extent of Rs. 150, and to that extent, the decree of the learned Judge in the Court below will be modified. The appeal is allowed with costs. There will be leave to appeal.

N.K./R.K.

Appeal allowed.

1. *Bollean v. Rutlim*, (1848) 2 Ex 665 = 12 Jur 899 = 76 R R 720.

A. I. R. 1939 Patna 636

WORT AND AGARWALA JJ.

Kumar Raghava Surendra Sahi and others — Appellants.

v.

Babui Lachmi Koer and others —

Respondents.

Appeals Nos. 62, 63, 64, 69, 139 and 197 of 1935, Decided on 9th May 1939, from original decrees of Sub-Judge, Gaya, D/- 5th June 1934.

(a) Hindu Law — Succession — Mitakshara does not exclude from consideration test of propinquity or nearness of blood — Religious

efficacy is to be considered only in competition between persons of same class.

The Mitakshara whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude from consideration the test of propinquity or nearness of blood. The test of the right of capacity to offer religious oblations is a test of the Dayabhaga School whereas in the Benares School the test is propinquity. Only in competitions between persons of the same class is the matter determined on the footing of religious efficacy. [P 643 O 2]

(b) Hindu Law — Succession — Mitakshara School — Stridhana of maiden — Order of succession stated.

According to the Mitakshara School the stridhana of a maiden first goes to her uterine brothers, then to her mother and failing that her father would be entitled to inherit. After father's death succession will go to father's heirs determined according to Mitakshara rules regarding succession to a male. As co-widow of the father is heir of father according to Mitakshara School she would be entitled to succeed after father's death. After her death the succession will go to an agnate even if remote and not to cognate even if nearer : Case law discussed. [P 642 C 2; P 645 C 2; P 646 O 1; P 647 O 2]

(c) Adverse Possession—Plea of—Plea cannot be entertained in appeal.

Where the question of adverse possession was not pleaded nor decided in the Court below, depending as it does on questions of fact, it cannot be entertained in appeal. [P 648 C 2]

(d) Hindu Law — Stridhan — Stridhan of maiden and of woman married in unorthodox form.

The rules relating to the succession to stridhan are the same in the case of a maiden who has no brothers and a woman married in an unorthodox form and dying without issue. [P 652 O 1]

(e) Will—Bequest to dharm.

A bequest for dharm is too vague and uncertain to be given effect to : 23 Bom 725 (P O), Rel. on. [P 658 O 1]

(f) Hindu Law—Widow—Dedication of portion of husband's estate for her own spiritual benefit and not that of her husband is invalid.

It is true that under the Hindu law a widow has power to dedicate a portion of her husband's estate to religious and charitable objects but the widow's act must be reasonable having regard to the value of the estate, and its object must be such as according to the notions prevalent in Hindu society conduce to the spiritual benefit of her husband. Where a widow has alienated a part of her deceased husband's estate for the maintenance of a deity which had not been installed by him and the dedication is found to be prima facie for the widow's own spiritual benefit and not that of her husband, the dedication is invalid : 22 Cal 506, Rel. on. [P 658 O 1, 2]

Dr. Dwarka Nath Mitter and Harnarayan Prasad (in Nos. 62, 63, 64 and 69) and Sir Manmatha Nath Mukherjee, P. R. Das, L. K. Jha, S. N. Bose and J. N. Sahai (in Nos. 139 and 197) —

for Appellants.

Sir Sultan Ahmad, P. R. Das, S. M. Mullick, S. N. Bose, B. N. Rai, Syed Ali

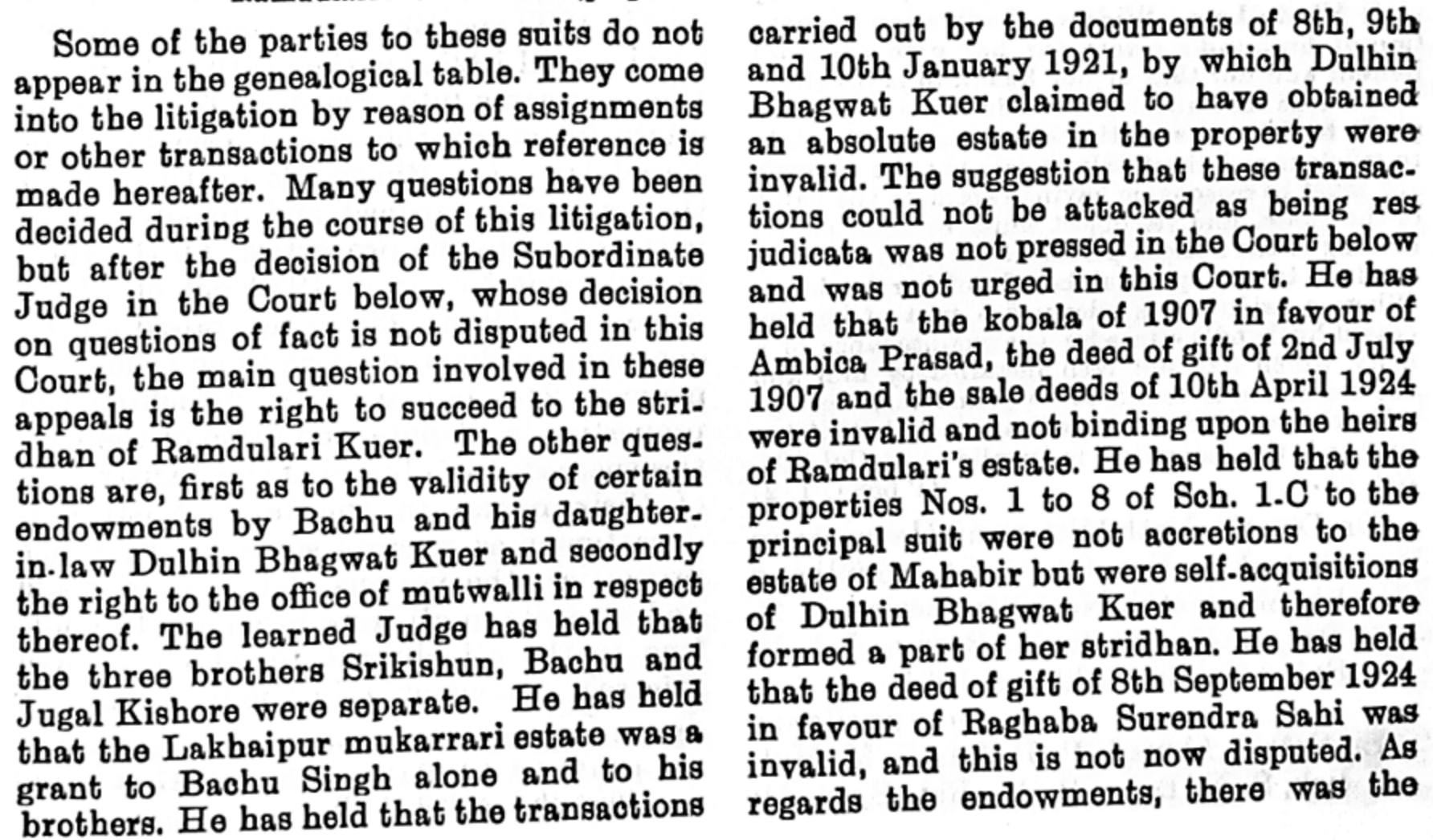
Khan, A. H. Fakhruddin, S. I. Hasan, S. N. Rai, K. Dayal, Gulam Mohammad and S. S. Rakshit (in Nos. 62, 63 and 64), Sir Sultan Ahmad, P. R. Das, S. M. Mullick, S. N. Bose, Syed Ali Khan, L. K. Jha, A. S. S. Sinha S. I. Hasan, Jadubans Sahay, S. S. Rakshit, Gulam Mohammad, B. N. Roy, D. L. Nandkeolyar, K. Dayal and Ganesh Sharma (in No. 69), Dr. Dwarka Nath Mitter, Ganesh Sharma, Harnarain Prasad, B. N. Rai and Golam Mohammad (in No. 139) and Sir Sultan Ahmed, Dr. Dwarka Nath Mitter, S. M. Mullick, B. N. Mitter, Gulam Mohammad, Syed Ali Khan, B. N. Rai, A. H. Fakhruddin, Ram Chandra Prasad and S. I. Hasan (in No. 197) —

for Respondents.

Wort J. — These six appeals arise out of five suits which were brought claiming various interests in certain property, the last male holder of which was one Mahabir Prasad Singh. The genealogical table appended (*see next page*) states the relationship between some of the parties to the suit as found by the learned Subordinate Judge. It appears that Mahabir was the son of one Bachu Singh. Mahabir died on 21.6.1894 leaving him surviving two widows, namely Bhagwat Kuer and Rupkali Kuer, and what has been held by their Lordships of the Judicial Committee in 46 I A 259¹ a vested remainder in favour of a posthumous daughter Ramdulari who died about six months after birth. Ramdulari Kuer, the posthumous daughter, died in 1894 and Rupkali died in 1899 and Bhagwat Kuer a co-widow survived till 1925. On the death of Rupkali, Bhagwat came into possession of the whole estate including the vested remainder of Ramdulari. On Bhagwat's death in 1925 the succession opened and disputes arose with regard to the properties. Of the suits brought suit No. 38 of 1932 out of which Appeal No. 69 of 1935 arises, raised all the questions in dispute. But as an order was made on 21st January 1927 attaching the properties in dispute and some of the parties succeeded in obtaining the registration of their names in the land registration department as regards some of the other properties, the various claims were made and six suits in all were brought. In addition to the attachment to which I have referred, defendant 1 in the principal suit

1. Bhagwat Koer v. Dhanukdharl Prasad Singh, (1919) 6 A I R P O 75 = 53 I C 347 = 47 Cal 466 = 46 I A 259 (P O).

one of the persons through whom the claim of defendant 1 of the principal action was made, got her name recorded with regard to the properties situate in the Saran District. This was in 1926. The parties therefore deemed it necessary to start the various suits.



endowment by Bachu Singh of six villages out of the Lakhaipur mukarrari to the deities in the temple at Ajodhya under the deed of 2nd September 1873 which endowment was admitted by the parties to be valid. The endowment created by Dulhin Bhagwat Kuer was held to be invalid. He has found that none of the contesting parties to the mutwalliship of the properties endowed by Bachu had any rightful claim. The Judge having held that the endowment of Bhagwat Kuer was invalid the question of mutawalliship did not arise.

The principal question of law is whether Sarabjit Protap Sahi who was a near cognate to Mahabir Prasad Singh, the last male-holder, being the great-grandson (through his mother who married the Raja of Tomkahi) of Mahabir Prasad Singh's paternal grandfather, or a distant agnate Sia Prasad Singh, plaintiff 1, in the suit, being the great-great-great-grandson of one Bakhtour Singh, the common ancestor of Mahabir Prasad Singh and Sarabjit Protap Sahi, is entitled to succeed to the properties in suit which by the terms of the will of Mahabir Prasad Singh were left to his two widows for life and under which the posthumous daughter Ramdulari Kuer had on a true construction of the will a vested remainder. The question shortly stated is, who is, in the events which have happened, entitled to succeed under the Mitakshara law to the stridhan property of Ramdulari Kuer after the decease of Rupkali, her mother, and Bhagwat Kuer, her stepmother.

The remaining question, so far as defendants 1 and 2 are concerned, whether Dhanukdhari Singh who was the great-grandson of Tribeni Singh, who was the grandson of Bakhtour Singh, is entitled as heir of Mahabir Prasad Singh, depends entirely upon the question whether the co-wife of Mahabir was entitled to inherit after the death of his second wife under the Mitakshara School of Hindu law. The other question is as to the rights of these defendants who are plaintiffs in Suits Nos. 30/1930 and 41/1930 to be mutwallis of the endowments of Bachu and Bhagwat Kuer. This question, so far as it relates to the mutawalliship of Bhagwat's endowments depends upon the validity of these endowments. The relationship disclosed in the genealogical table I should have said has been proved by the plaintiff in the Court below and, after contest with regard to the matter, has been accepted by the trial Judge and not disputed in this Court.

The last male-holder of the properties in suit, as I have already said, was Mahabir Prasad Singh. The properties in dispute consist in the first instance of mukarrari interests granted by the Maharani Indrajit Kuer of Tikari in the name of Bachu Singh in 1863. This property is known as Goshwara Mahal Lakhaipur, Lodipur and Saidpur to be described hereafter as the Lakhaipur mukarrari property. There are ancestral properties, also some self-acquired properties of both Mahabir and Bhagwat Kuer. It may be stated at once that the Judge in the Court below has held that the properties acquired by Bhagwat Kuer were not accretions to Mahabir's estate but were the stridhan properties of Bhagwat.

In the year 1864 separation took place between the branch of the family represented by the three sons of Jagatpati and the other branch represented by Ramrachhya. Srikishun, Bachu and Jugalkishore died within a short time of each other: Jugal on 5th July 1872, Srikishun on the 18th of the same month and Bachu on 26th January 1874. Bachu Singh before his death established a temple at Ajodhya in the Fyzabad District and endowed it with six villages out of the Lakhaipur mukarrari. This was by a deed dated 2nd September 1873, by which he constituted a line of succession to the mutwalliship, making himself the first and then his son Mahabir; the succession thereafter was to go to his descendants male and female. In the year 1872, after the death of his two brothers Jugalkishore and Srikishun, Bachu filed an application for succession certificates to the estates of his brothers on the footing that they were joint with him. Ram Kewal Kuer the daughter of Srikishun objected and filed a counter-application, and Anandi Kuer, Jugalkishore's widow, also objected on the ground that the brothers were separate. Kamalbas Kuer, Srikishun's widow, made no objection. The objections were overruled and Bachu was granted succession certificates. On 9th July 1873 Bachu gave certain villages to Kamalbas Kuer by way of maintenance. Anandi Kuer on 17th May 1874 executed an ekrarnama by which she admitted the jointness of the three brothers. This was some four months after Bachu's death and Bachu's son Mahabir Prasad executed the ekrarnama with Anandi Kuer. Ram Kewal Kuer however filed a suit in 1880 against Bachu's son Mahabir by which she claimed the Lakhaipur property as belonging to her father.

But this suit was ultimately compromised, Sorabjit Protap Sahi, the grandson of Sri-kishun, joining in the compromise. By this compromise Ram Kewal Kuer obtained three villages out of the Rushi ancestral estate. Then on 21st March 1884 Mahabir raised funds by sale of six of the villages endowed by his father to the Ajodhya temple: this was while Mahabir was the mutwalli of the endowment.

On 21st June 1894 Mahabir died having left a will dated 26th September 1893. On 5th January 1895, Bhagwat Kuer and her co-wife Rupkali Kuer obtained probate of the said will. On 11th October 1894, Rupkali gave birth to a posthumous daughter Ramdulari Kuer who lived for a few months only dying on 3rd June 1895. By the will estates for life were given by Mahabir Prasad to his widows and the will was construed ultimately by their Lordships of the Judicial Committee of the Privy Council as giving a vested remainder to the posthumous daughter Ramdulari Kuer. Rupkali, the second wife of Mahabir, died on 8th January 1899. It is to be noted that Bhagwat Kuer, after the death of her husband, acted as the mutwalli of the temple instituted by Mahabir's father Bachu. On 7th September 1899, Kamalbas Kuer died and Anandi Kuer died on 4th August 1904. Bhagwat Kuer was therefore in possession of the whole estate commencing in the year 1900. She made endowments six in number to a pathsala known as "Bhagwat pathsala" at Ajodhya. These endowments date from 7th March 1900 to 14th September 1925. In the meantime Bhagwat purported to adopt Raghava Surendra Sahi, defendant 1 in the principal suit. This was on 13th February 1906. The adoption was eventually held to be invalid by the Judicial Committee of the Privy Council. In 1907 Dhanukdhari (father of defendants 8 and 9) claimed to be the nearest agnate of Mahabir and commenced a suit and in February of that year executed a sale of 10 annas 8 pies of the mukarrari property and 2 annas 8 pies of the chapra property to one Ambica Singh, the father of Maharaj Kumar Gopal Saran Narain Singh of Tikari who was defendant 6 in the very suit. The Rushi and Maher properties were excluded. The shares of the properties which Dhanukdhari purported to sell by this deed were alleged to belong to Jugalkishore and Bachu, the contention being that the mukarrari properties belonged to the three brothers. Three suits were commenced, namely suits Nos. 198, 199 and

200 of 1907. The first related to 5 annas 1 pie of Mahabir's property which he got from Bachu, the second related to 5 annas 4 pies which Mahabir got from Jugalkishore, his uncle, and the object of the third suit was to set aside the adoption by Bhagwat of defendant 1.

Again in 1911 Sarabjit Protap Sahi who was defendant 4 in the principal suit, brought a suit against Bhagwat Kuer claiming one-third share of Mahabir's property as the share of his maternal grandfather Srikishun who, he alleged, separated from his two brothers Bachu and Jugalkishore. The suit was dismissed eventually by the High Court in 1913 but pending the appeal to the Privy Council there was a compromise by which one-third share of the estate of Mahabir being the share of Srikishun was released. The suit was against Bhagwat Kuer and in 1921 as the result of the compromise Bhagwat and others entered into transactions which the Subordinate Judge in the Court below has held to be invalid, which decision Dr. Dwarka Nath Mitter on behalf of defendants 1 and 2 contended was wrong; but ultimately it was conceded that the transactions could not be supported. The question relating to them therefore does not enter into our consideration in this case. But the transactions were these.

Dulhin Bhagwat Koer by an ekrarnama dated 8th January 1921 released one-third share of Mahabir's property as the share of Srikishun Singh. Rajkishore Kueri then executed by way of gift a deed dated 9th January 1921 by which she gave to Sarabjit Protap Sahi (defendant 4) substantially the same property. Sarabjit in his turn made a gift to Bhagwat Kuer of the properties excluding 13 villages which he retained and one which he gave to Rajkishore Kuer the balance being given to Bhagwat Kuer as an absolute estate. Another deed was executed the same time undertaking to abide by the compromise even although the Privy Council did not approve of it. In 1917 Ambica Prasad had made a gift of what he had purchased from Dhanukdhari and two of the suits of 1907 were compromised between Dulhin Bhagwat Kuer on the one side and Maharaj Kumar Gopal Saran Narain Singh on the other side. Ultimately, on 10th April 1924 Ambica conveyed what he had got from Dhanukdhari on 8th February excepting nine villages to Dulhin Bhagwat Kuer for a consideration

of Rs. 1,50,000. Dulhin Bhagwat Kuer in her turn executed a kobala in favour of the Maharaj Kumar (defendant 6) in respect of 10 annas 8 pies of the property which she obtained under the deed of 10th April 1924 and 5 annas 4 pies of the nine villages the subject-matter of the deed of 8th February 1907 she making a gift of 10 annas, 8 pies in 52 villages, which she got from Maharaj Kumar Gopal Saran Narain Singh and his father Ambica Prasad Singh to defendant 2, Surendra Sahi. This was by a deed of 1st July 1924. On 19th September 1924 Dulhin Bhagwat Kuer died. The various transactions to which I referred in the earlier part of my judgment and various orders of the High Court and of the Land Registration Department led to the litigation out of which these appeals arise.

The principal plaintiff is Babu Sia Prasad Singh who, as I have said, claims to be the nearest agnate of Mahabir Prasad through whom succession to the stridhan property of Ramdulari Kuer is traced. The principal contesting defendants are defendants 1 and 2 and defendants 4 and 17. In the result the main contest is between the plaintiff and defendants 4 and 17 which depends entirely upon the question of Hindu law as to who is entitled to succeed to the stridhan property of Ramdulari Kuer. As I have already indicated defendants 1 and 2 also claim the property through various transactions entered into by Bhagwat Kuer to which I have referred but it is unnecessary to trace the title of defendants 1 and 2 as they have abandoned any personal claim to the property excepting a 10 annas 8 pies interest title to which they claim through Dhanukdhari by reason of the transaction referred to above, namely the sale in February of 1907 to Ambica Singh and the conveyance by Ambica Singh to Dulhin Bhagwat Kuer as also the gift by Dulhin Bhagwat Kuer to defendant 2, Surendra Sahi, and on the assumption that Bhagwat Kuer as co-wife was not entitled under the Hindu law to inherit the stridhan of her step-daughter Ramdulari Kuer and the property of Rupkali through Mahabir. But it is to be noticed shortly that the other suits were the suit of 1930 brought by defendants 4 and 6 (4 and 17 of the leading suit) out of which Appeal No. 139 of 1935 was preferred. The result of this appeal depends upon the main contest between the plaintiff and defendants 1 and 2 in the principal suit. Then Suits Nos. 39, 40 and 41 were filed by defendants 1 and 2 of the leading

suit out of which Appeals Nos. 64, 63 and 62 of 1935 arise.

The claim in the principal suit was allowed by the Subordinate Judge subject to the properties acquired by Bhagwat Kuer which had been held not to be accretions to Mahabir's estate; that is in Suit No. 38 of 1932. Sorabjit's Suit (No. 30 of 1930) was dismissed, but in this appeal no claim has been made as regards the properties of Bhagwat Kuer which had been held to be self-acquisitions — items 38 to 44 and 48 of Sch. C and the properties which were the subject-matter of Bachu's endowment. Suit No. 39 of 1932 by defendants 4 and 17 claiming 10 annas 8 pies of the property through Dhanukdhari was dismissed and again suit No. 40 of 1932 claiming 5 annas 4 pies being the claim through Srikishun was dismissed. The same results would obtain in this appeal having regard to the acceptance by the parties of the decision of the learned Judge in the Court below on questions of fact, and the respective claims of the appellants to the estate or portions of it of Ramdulari would be decided against them. As has been seen, certain of the plaintiffs' claims in the suit depend upon the rights of the various parties to whom I shall refer as heirs to Ramdulari Kuer's estate. For the purposes of this appeal, the claims of the latter only will be referred to and not of those claiming under them by reason of assignment or otherwise. Defendants 1 and 2 claim through Dhanukdhari Prasad now represented by Bhagwat Kuer, his widow, in the litigation. Dhanukdhari's claim depends upon whether Bhagwat Kuer, the first wife of Mahabir Prasad Singh, was entitled to the property after the death of Rupkali Kuer, the second wife of Mahabir Prasad Singh. The respective claims of Sia Prasad (plaintiff 1) and Sorabjit Protap Sahi are claims to succeed as the nearest heir to the stridhan of Ramdulari admittedly a succession which is traced through her father Mahabir Prasad Singh. The right of Bhagwat Kuer to take a woman's estate in Ramdulari's property after the death of Rupkali Kuer is admitted by defendant 4 Sorabjit Protap Sahi and Sia Prasad and will be dealt with later, but will be disposed of incidentally in discussing the right to succeed as between Sia Prasad and Sorabjit. The learned Judge in the Court below has held that the right of succession to the vested remainder of Ramdulari Kuer's estate is to be traced first through her mother Rupkali Kuer, then Mahabir Pra-

sad, her father, and then to Bhagwat Kuer, the heir of Mahabir. On the death of Bhagwat in 1925, Rupkali, Ramdulari's mother, and Mahabir, Bhagwat's husband, having predeceased her, the succession opened. That this is the position is admitted by the respondent to the principal suit as also by the appellants (defendants 4 and 17), but denied by the other appellants (defendants 1 and 2) who deny the right of Bhagwat as a co-widow of Mahabir to succeed. The claim of defendants 1 and 2 which is now limited to 10 annas 8 pies of the property, depends as I have already said upon the right of Dhanukdhari to succeed after the death of Ramkali Kuer to the exclusion of Bhagwat Kuer. This claim in my judgment fails based as it is on the exclusion of the co-widow Bhagwat as will hereafter be shown, and on that assumption the way is clear for the disposal of the respective claims based on the one hand upon the right of Sia Prasad, a remoter agnatic relation of Mahabir, and on the other hand on the right of Sorabjit Protap Sahi a nearer cognatic relation.

Mr. P. R. Das's argument on behalf of Sorabjit shortly stated is that the scheme of succession to the stridhan is different from that of succession to males, and that after tracing it through Mahabir (which is admitted on all hands) it goes to the nearest sapinda, sapinda a generic term being in this connexion used in a special sense including agnates up to the 7th degree and cognates to the 5th degree gotraja sapindas somanodakas and bhinna-gotra sapindas: see West and Buhler, Hindu Law, Mitakshara Verse 53 and 41 I A 290² at p. 300. It is contended that the word 'sapinda' has a special meaning and not adopted in the Mitakshara in the case of succession to males where the expression is gotraja sapindas and that the Judge in the Court below was in error in relying upon the text of Kamalkara for the solution of this problem, the relevant text regarding a woman's property being as follows :

Her kinsmen take it if she die without issue (Colebrooke: placitum oxliv-a). "If a woman died without issue that is leaving no progeny, in other words, having no daughter nor daughter's daughter, etc., the woman's property as above described shall be taken by her kinsmen (sapindas), namely her husband and the rest as will be (forthwith) explained (Colebrooke's Mitakshara, Chap. 2, Sec. 11, para. 9);

and in para. 30 as the statement of Bandhyayana given by Vigyaneshwara of the Mitakshara is as follows : "The wealth of a deceased damsel let the uterine brethren themselves take." On failure of them it shall belong to the mother: or if she is dead, to the father (Chap. 2, S. 11, verse 30 p. 388 of Colebrooke's translation; Edn. 1870). The text remains silent as to succession after the father, but Veeromitrodaya, an authority in this School, 12 M I A 448³ and 41 I A 290² at p. 304, supplies the omission to some extent. It says : "On failure of the mother and the father it goes to the nearest relations" (Gopal Chandra Sarkar's translation, 241). It is clear that the succession to the stridhan of a maiden is the same as the succession to the stridhan of a woman married in an unapproved form with this difference that in the case of a maiden the uterine brothers come in. In the first place it was argued that the ordinary rule of the Mitakshara that agnatic relations succeed before cognatic does not obtain in the case of stridhan and the fallacy upon which the Judge in the Court below has decided the case is that after the succession is traced through the father Mahabir, it proceeds on the same lines as succession to males.

It was contended that Veeromitrodaya used the term 'nearest relation' advisedly, and that other and more technical terms such as 'gotraja' were used in the case of succession to males (see Setlur's translation, Edn. 1911, Part. VII.1 at p. 421.) "On failure of brother's sons (the heirs are) the gentiles (gotrajas) who are to be taken to be other than the father," and that this being intentional it must be construed as meaning the nearest in relationship in the ordinary sense. That being so, Sorabjit being admittedly nearer (although cognate) than Sia Prasad (being a somanodaka), his claim must prevail. Further, the nearness is not to be determined, as the Judge in the Court below has held, by the rules given in the Mitakshara with regard to succession to males as stated by Kamalkara, but by the test of religious efficacy, in other words, the capacity to offer oblations; again, that sapindaship in this regard is the same as in the case of ceremonials. Further, it is contended that the rule of religious efficacy is the ability to offer (in this case) oblations to the agnatic ancestor of Mahabir,

2. Ram Chandra v. Venayak Venkatesh, (1914) 1 A I R P C 1=25 I O 290=42 Cal 384=41 I A 290=10 N L R 112 (P O).

8. Gridhari Lall Roy v. Bengal Government, (1867-69) 12 M I A 448=10 W R 81=2 Sar 882=2 Suther 160=1 Beng L R 44 (P O).

and that as Sorabjit is the great-grandson (through his mother) of Jugatpati Singh, an agnatic ancestor (grandfather of Mahabir), he could offer two undivided cakes to that ancestor, also undivided cakes to another common ancestor of them both, namely Tribeni Singh, whereas Sia Prasad Singh can only offer divided cakes to an ancestor who was common to himself and Mahabir, being Bakhtour Singh, of whom Sia Prasad Singh is the great-great-great grandson, the rule being that to three ancestors undivided cakes may be offered and after that to three more remote ancestors, divided cakes.

It has been decided in the Court below that the Mitakshara being one whole work cannot be taken to have applied different schemes of succession with regard to different subjects unless expressly so, and that therefore there being no enumeration of the heirs in default of the father, the rule as to males in the case of obstructed succession would apply which in this case is the same as succession to stridhan in default of enumerated heirs in the case of a woman married in one of the blamed or unapproved forms, this rule depending on the principle that a woman married in an unapproved form remains in the gotra of her father as in the case of a maiden. In support of the argument that in using the term sapinda the rule that agnatic relations are to be preferred to cognatic is ignored, a solitary passage in the decision of the Calcutta High Court is relied upon. Chitty J. in dealing with a case in which the contesting parties claiming succession to the properties in suit were sisters of the propositus (father's daughters) and father's brother's sons, asked the question why agnates should be preferred to cognates in the case of succession to a maiden stridhan, and stated that there was no authority for that proposition. The judgments in that case both of Chetty and Mukherji JJ., are in conformity with the view expressed by all the text-book writers of authority. But it is argued that although the decision in that case must be considered right yet the reasoning was to a great extent obiter as the test which the appellants seek to apply in this case was adopted in that case and was sufficient to dispose of the matter. But it is to be remembered that the remark relied upon is limited to the facts of that case in which the rule of propinquity was applied, the successful parties (father's daughters) being in any event the nearest

relations: I refer to 39 Cal 319.⁴ Reliance was placed upon the decision of their Lordships of the Judicial Committee of the Privy Council in 42 I A 208⁵ at p. 217 for the proposition that the test of religious efficacy applies equally to the Benares as to the Dayabhaga Schools. Their Lordships observe:

It is well settled by decisions of this Board that under the Mitakshara the sapinda relationship arises "between two people through their being connected by particles of one body," namely that of a common ancestor, in other words, from community of blood in contradistinction to the Dayabhaga notion of "community in the offering of religious oblations".

But as it will be shown later on, the Mitakshara whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude from consideration the test of propinquity or nearness of blood. But it is to be observed that their Lordships were applying the rule of religious efficacy to persons of the same class and towards the end of the judgment made this statement in referring to Mitra Misra, the author of *Veeramitrodaya* (Gopal Chandra Sarkar's translation p. 91, Ch. 2, Part 1, S. 23.a) an authoritative commentary on the Mitakshara which lays down in express terms the rule:

He says when there are many claimants to the heritage among gotrajas and the like, then the fact of conferring benefits on the proprietor of the wealth by means of offering oblations and the like excludes those that do not confer such benefits, and later:

In 13 M I A 373⁶ the Board affirmed this rule in the following words: 'When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty'.

I think it is clear that the test of the right of capacity to offer religious oblations is a test of the Dayabhaga School whereas in the Benares School the test is propinquity. Only in competitions between persons of the same class is the matter determined on the footing of religious efficacy. As I have said the Judge in the Court below has relied for decision of the question on the Kamalkara as an authority in the Benares School. In Ghosh's *Vivada Tandava* of Kamalkara, p. 1142, in dealing with succession to stridhan it is stated as follows:

4. Dwarka Nath v. Sarat Chandra, (1912) 39 Cal 319=11 I O 872=15 O L J 23=15 C W N 1086.

5. Buddha Singh v. Laltu Singh, (1915) 2 A I R P O 70=30 I O 529=37 All 604=42 I A 208 (P O).

6. Ram Singh v. Ugursingh, (1869-70) 13 M I A 373=14 W R 1=2 Sar 566=2 Suther 390=5 Beng L R 293 (P O).

In default of the husband, the estate is obtained by his near relation beginning with the lawfully married wife and daughter etc., as prescribed in the text of Yagnavalkya in the rule about succession to sonless men. According to Vijyaneshwara it is taken by the husband's wife, her co-wife's daughter and the maiden daughter of the co-wife.

It is contended by Mr. P. R. Das that Kamalakara has not been correctly understood and that although it would appear that Yagnavalkya's text (which is a text dealing with succession to males) is relied upon it is for a limited purpose and is not adopted in the case of stridhan generally. We are invited to look at p. 1145 of the same work where the final conclusion is arrived at by applying the test of religious efficacy. Again, it is argued that if the rule as stated in p. 1142 is applied it is contrary to the Mitakshara and that being so the Mitakshara must prevail. Again reverting to Veeromitrodaya it is contended that the rule of religious efficacy is the true test as will be seen by reference to Sec. 14 where cognates are mentioned as heirs (G. Sarkar's Veeromitrodaya, p. 243). But when there is a failure of the above-mentioned heirs of a childless woman's property, Brihaspati ordains :

The mother's sister, maternal uncle's wife and the paternal uncle's wife, etc., are pronounced similar to mother : If they leave issue of the body, nor son (of a rival wife) nor daughter's son, etc. shall take the property.

Herein, the term aurasa or "issue of the body" both sons and daughters are included : for they debar all (other heirs) and the order in which they debar others has previously been mentioned; and then explaining what Manu declares, the meaning of the term son as not being in apposition with the term aurasa, proceeds :

Hence on the failure of heirs down to the daughter's son first the aurasa inherits, after him his sons and grandsons. For it is proper that succession should devolve on them inasmuch as they are competent to present pinda and are liable to discharge debts, etc.

Apart from the argument on the text, it is contended that the rule of propinquity upon which the plaintiff relies is a rule applicable to the case of succession to males (and there is no reason to apply it to females) which is admittedly based on sapindaship. Mitakshara, Ch. 2, Ss. 3 and 4, provides, "Propinquity is the great regulating principle in determining the order of succession among heirs." The rule is based on the following text of Manu : "To the nearest sapinda the inheritance belongs." In further development of this argument the contention is that the Mitak-

shara used 'sapinda' in one sense only. Sapinda relationship arises "between two people through being connected by particles of one body" : see 42 I A 208⁵ at page 217. But when dealing with the males, the term 'gotraja' is used. "The wife, daughter, both parents, brothers likewise their sons gotrajas (gentiles), bandhu (cognates) a pupil and a fellow student" (Mitakshara Ch. 2, Sec. 1, Verse 2, Mandlik's Translation of Institutes of Yagnavalkya p. 220). The Hindu jurists in their text books deal with this question, and in a manner contrary to the argument put forward by the appellant and the learned advocate does no more than to argue that the views which are thus unanimously expressed are mistaken. Mulla's Hindu law, Edn. 8, Sec. 147 deals with the matter in these words :

If there be none of these, in other words, if the woman dies without leaving issue, her stridhana, if she was married in an approved form, goes to her husband, after him to the husband's heirs in order of succession to him. But if she was married in an unapproved form, it goes to her mother and then to her father and then to the father's heirs.

If this statement of the law be correct the matter is concluded against appellant-defendants 4 and 17. It also defeats the case of the other appellants-defendants 1 and 2, who claim through Dhanukdhari, as it is clear that amongst the heirs of the father would be the co-widow under the text of Mitakshara, Ch. 2, S. 11, placita 8, 9 and 11.

8. A woman's property has been thus described. The author next propounds the distribution of it. 9. If a woman die 'without issue' that is, leaving no progeny, in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely her husband and the rest, as will be (forthwith) explained. 11. Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma &c . . . the property of a childless woman goes to her parents, that is to her father and mother.

These passages are taken from Stokes' Hindu law books, pp. 460, 461 and were adopted by their Lordships of the Judicial Committee of the Privy Council in 33 I A 176⁷ at p. 187. This case is a direct authority against appellants 1 and 2, the decision in the case being that a co-widow is entitled to succeed to the stridhan of a widow dying without issue in preference to her husband's brother or brother's son. Their Lordships agreed with the learned editor of the Vyavastha Chandrika and Lord Davey at p. 197 of the Report stated

7. Bal Kesserbai v. Hunsraj Morarji, (1906) 30 Bom 481 = 33 I A 176 (P C).

that "the words 'and the rest' therefore must mean, or include, the other relations of the husband or father." The case is also important for our purpose for their Lordships of the Judicial Committee of the Privy Council refer to Kamalakara. As is already pointed out there is no dispute, the problem in this case as to what the nearest relation of the father being the same as the nearest relation of the husband. The author makes this observation at p. 142 of his work:

When the marriage is in an unapproved form, the stridhan goes in default of issue not to the husband and his heirs but to the mother, father, and father's heirs—the succession after the father would be the deceased woman's brother, brother's son, stepmother, sister, sister's son, grandmother, paternal uncle and her father's other sapindas samanodakas and bandhus.

This statement, it is argued, is incorrect as the Mitakshara uses the word 'sapindas' only, and not 'heirs' and Veeramikrodaya as we have seen the words 'nearest relations.' The Mitakshara in dealing with succession to males provides:

The wife and the daughters also, both parents brothers likewise and their sons, gentiles, cognates, a pupil and a fellow student. (verse cxxxv). "On failure of the first among these, the next in order is indeed the heir of the estate of one, who departed for heaven leaving no male issue".

This rule extends to all (persons and) classes (verse cxxxvi, Colebrooke, Ch. 2, Sec. 1). Reliance was placed on Sarkar's Hindu law, Edn. 7, p. 830 where dealing with succession to stridhan this statement is made:

It should be noticed that the nearness or propinquity is the principle on which the order of succession is worked out in the Mitakshara. Hence the relations are to a woman's property. In the same order in which they would become heirs to her husband or father or mother: 32 Bom 409.⁸

Again Mulla, Edn. 8, p. 27 in this connection states:

Under the Mitakshara the right to inheritance is from propinquity that is proximity of relationship

and relies upon the authority of 5 Bom 110⁹ at p. 121. There being no difference in principle between marriage in an approved form or an unapproved form excepting that in the former succession is traced through the husband, in the latter through the father and therefore raises the same problem as I have just stated. The statement by the same author "that it descends in the same way as if it had belonged to the husband

himself" is relied upon: see Sarkar's Hindu Law, p. 832. Again, Shyama Charan Sarkar on Vyavasta Chandrika, Vol. II, page 839, dealing with succession to stridhan states:

So according to his own exposition in the case of the 'women being married in the Brahma, Daival, Asura, etc. form,' if there be no husband there then such of the abovementioned heirs as are nearest to her in his family succeed in due order, and

in the case of her being married in the asura, etc. (unapproved forms of marriage) if her father do not exist then such of the aforesaid heirs as are nearest to her in her father's family succeed in due order.

Likewise, Banerji in his Hindu Law of Marriage and Stridhana (Tagore Lectures, Edn. 5, page 424) makes this statement:

In the absence of any provision in the Mitakshara for determining the order of proximity among the husband's (father in the present case) sapindas, we turn to the Veeramikrodaya, a work of high authority in the Benares School. But the work does not help much. The order of succession there is different from that in the Mitakshara as far as there are express provisions in both and where the express enumeration of heirs in the latter treatise stops, Veeramikrodaya does not carry it much further.

Then dealing with succession as to enumerated heirs observes:

The order of succession is no doubt in accordance with the text of Brihaspati. And there is this additional argument in his favour that it is the same as given in the Vyavahara Mayukha, (Ch. XIV, Sec. X "30") and the Smriti Chandrika (Ch. IX, Sec. 111 "36"). But being in conflict with that indicated by Vigyaneshwara it cannot be accepted as law in the Benares School which recognizes the Veeramikrodaya only when it is not contradicted by the superior authority of the Mitakshara.

Then observing that it would be useless to refer to the Bengal authority for elucidation of the point, as the founder of the Bengal School controverts almost every doctrine of the Mitakshara on the subject states that according to Kamalkara the "nearness" of sapindas in the above rule of Vigyaneshwara is to be determined by the rule given in the Mitakshara for the devolution of the property of a male owner dying without male issue. The same learned author relying upon West and Buhler, Vol. I, at p. 213 quotes this passage:

This opinion seems to be based on the consideration that as sapindas inherit only through the husband they virtually succeed to property coming from him and that consequently they must inherit in the order prescribed for the succession to a male's estate.

The same learned author is of the opinion that Kamalkara being entitled to be followed as an author in the Benares School when it is not in conflict with that of any higher authority has its further recom-

8. Janglulal v. Jetha Appaji, (1908) 32 Bom 409 = 10 Bom L R 522.

9. Lulloobhoy v. Cassabai, (1880) 5 Bom 110 = 7 I A 212 = 4 Sar 164 = 7 C L R 445 (P O).

mentation being simple as it makes the order of succession to stridhan correspond after a certain point to that applicable to man's property and if that were not Vignaneshwara's meaning, and if he had not referred to this known order of succession after the husband, he would, in all probability, have been explicit. The text of Kamalkara has already been referred to in Ghosh's Vol. II, page 1142 :

In default of the husband the estate is obtained by his near relation—as prescribed in the text of Yagnavalkya in the rule about succession to sonless men.

The argument that Yagnavalkya was used by Kamalakara merely for the purpose of bringing into the succession the wife and daughter is one which, in my judgment, is not justified and certainly is not supported by authority, although in support of this argument it is contended that Kamalakara does not incorporate the whole of Yagnavalkya but relies upon this for support on the particular point only and in that sense has not stated what he is supposed to have stated by certain learned authors including Banerji on Hindu Law of Marriage and Stridhan. Reliance was also placed upon Mayne's Hindu Law, Edn. 9 at page 979 where the author dealing with this subject observed that in either case (a maiden and woman married in an unapproved form) in default of the specifically enumerated heirs, the estate goes to the sapindas of the parents or husband as the case may be. The term 'nearest relations of the parents' in this context means 'sapindas of the father,' and proceeds to state "so it was held that a sister (father's daughter) sister's son (father's daughter's son, etc.)" (see table at p. 836.a). It is argued by Sir Sultan Ahmed that if the meaning which is sought to be attached to the word 'sapindas' by the appellants is adopted reference to the table at page 836.a of Mayne's work would be erroneous. Again, Macnaghten deals with the question in the following way at p. 38 of his Hindu Law, Edn. 2 :

To such property left by an unmarried woman, the heirs are her brother, her father, and her mother successively, and failing those her paternal kinsmen in due order.

As regards the authorities Mr. Das, in the first place in support of his contention that the point is to be tested by the capacity to offer funeral oblations, relies upon the case in 5 Beng L R 15¹⁰ where the claim was by a father's brother's daughter's

son, and the Full Bench of the Calcutta High Court dealing with the point made this observation at page 39 of the report :

We wish to draw particular attention to it as an instance of the extreme solicitude evinced by the author of the Dayabhaga to provide for the spiritual welfare of a deceased proprietor. Again when we come to look at the internal arrangement of each of these classes, so far as the details of such arrangement are actually given in the Dayabhaga, we find that the same principle is always kept in view. Thus among the sapindas, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only; and the reason assigned for the distinction is that the first kind of cakes are of superior religious efficacy in comparison to the second. Similarly those who offer larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones. The same remarks are equally applicable to sakulayas and samanodakas.

It is said that this is a true rule, but there was an attempted departure from the rule in 24 W R 229,¹¹ but the matter, it is argued, was put right in the later Full Bench decision of the Calcutta High Court in 9 Cal 563¹² where it was held that the brother's daughter's son is a sapinda, and is therefore a preferable heir to the great-great-great grandfather's great-great-great grandson. But these cases were cases of Dayabhaga or the Bengal School of the Hindu law in which admittedly the final test is capacity to offer funeral oblations. Defendants 4 and 17 gain no support from these cases. In 36 Mad 116¹³ there was a contest between the daughter of a co-wife of a deceased woman married in one of the approved forms and the sapindas of her husband such as his father's brother's son. It was held, relying upon Kamalakara, that nearness was to be determined by the rule given in Mitakshara in regard to succession to the property of a male who died without descendants and consequently first the wife, i. e. the rival wife of the deceased, succeeds, next the daughter, i. e. the deceased step-daughter and so on. In 37 Mad 293¹⁴ it was held that the brother's widow, although a gotraja sapinda, was not entitled

11. Kashee Mohun Roy v. Rai Gobind Chuckerbutty, (1875) 24 W R 229.

12. Digumber Roy Chowdury v. Moti Lal Bundo-padhya, (1883) 9 Cal 563=12 C L R 204 (F B).

13. Nanja Pillai v. Sivabhagyathachi, (1913) 36 Mad 116=12 I C 128=21 M L J 850.

14. Kanakammal v. Ananthamathi Ammal, (1915) 2 A I R Mad 18=25 I C 901=37 Mad 293.

10. Guru Gobinda Shaha Mandal v. Anand La Ghose, (1870) 5 Beng L R 15=13 WR 49 (FB).

to succeed as an heir under the Madras system of inheritance. In a later decision, in 38 Mad 45,¹⁵ it was held that the rule that in the case of succession to stridhan property a daughter inherits as sapinda where the succession is to be traced through the father or the husband, applies also to the case of a wife or widow. Sundara Ayyar J. delivering the judgment of the Court stated :

We see no reason for not accepting the view of the Bombay High Court in 36 Bom 339¹⁶ that the sapindas, both of the father and mother, must be understood to mean the same persons as the mother becomes a member of the father's family on her marriage. In this view, the defendant, as the wife of the deceased maiden's father, would be a nearer heir than the plaintiff (the maternal aunt of the deceased maiden).

This is a direct authority against the argument of defendants 1 and 2 who depend, as I have already stated, on the exclusion of the co-widow Bhagwat Kuer for the purpose of establishing their title to the 10 annas 8 pies through the transactions of Dhanukdhari who claimed to be the next in succession to Ramdulari. It is also indirectly an authority against the other appellants represented by Mr. P. R. Das unless he could successfully contend that Kamalkara introduced the rule laid down by Yagnavalkya merely for the purpose of putting in wife and daughter. In 43 Mad 32¹⁷ the conflict was between the father's paternal uncle's son and father's sister. The question discussed was what was the nearest relation? After referring to the text Napier J. in delivering the judgment of the Court dealt with the argument that the decision reported in 38 Mad 45¹⁵ had followed the decision in 36 Bom 339,¹⁶ and was wrong in doing so as the Bombay High Court had acted upon Veeramitrodaya, a work which is not followed in Madras, but pointed out in answer to this argument that the learned Judges of the Madras High Court, although not expressly following the language of Veeramitrodaya, which was definite on the subject, proceeded by way of analogy and arrived at the same result.

The argument on behalf of defendants 4 and 17, as will be seen from the above considerations, has always been rejected.

15. Kamala Bai v. Bhagirathi Bai, (1916) 8 A I R Mad 925=16 I O 989=38 Mad 45=28 M L J 518.

16. Tukaram v. Narayan, (1912) 36 Bom 339=14 I O 438=14 Bom L R 89.

17. Sundaram Pillai v. Ramasamia Pillai, (1920) 7 A I R Mad 728=52 I O 821=43 Mad 32.

The authorities, so far as they dealt with the specific points, are entirely against the appellants. The argument is supported neither by authority nor by the authoritative authors of the text books, who are unanimous that sapindaship in the case such as we have before us and in the case of succession to males depends entirely upon the same rules. The argument, although attractive in some of its aspects, is one which cannot be accepted. In my judgment, therefore the learned Subordinate Judge in the Court below was right in rejecting it, and the appeal, so far as these defendants are concerned, fails. That disposes of appeal No. 69 of 1935 in favour of the plaintiffs.

The next case is by the appellants who are defendants 1 and 2 in the action. They do not now press their claim which was given up at the end of the argument accepting the Subordinate Judge's conclusion that the decisions in the suits commencing in 1907 did not operate as *res judicata*, and that the principal property in dispute, the Lakhaipur mukarrari, was Bachu's separate property. The remaining claim is as to 10 annas 8 pies share which, as I have already pointed out, depends upon the right of Dhanukdhari to succeed as heir after Rupkali, the junior wife of Mahabir Prasad Singh, to the exclusion of Bhagwat Kuer, the co-widow. One of the contentions is that Veeramitrodaya (Sarkar, at para. 15, p. 244) deals with wife and daughter of the propositus and therefore the passage could not be of any assistance to those who contend that the co-wife is entitled. But it is to be observed that Ghosh, in his Principles of Hindu Law, at page 1142, expressly mentions co-wife. It is further argued that the mention of "parents" in the Mitakshara does not include step-mother. In 38 Mad 45,¹⁵ a case to which I have already referred, this point was expressly decided against the contention now put forward; so also the case in 30 Bom 333¹⁸ is a direct authority on the point. Also by reason of the decision at which I have arrived as regards the respective claims of Sia Prasad and Kuar Sorabjit Protap Sahi, the right of Dhanukdhari Prasad to exclude Bhagwat Kuer, the co-wife, is necessarily decided against the contention. This appeal therefore so far as it relates to the claim of 10 annas 8 pies share of the property, through Dhanukdhari, fails.

18. Krishna Bai v. Shripati, (1906) 30 Bom 333 = 8 Bom L R 12.

The next questions to be disposed of are the endowments of Bachu and Bhagwat Kuer. Bachu during his lifetime in 1873 endowed a temple at Ajodhya in Faizabad with six villages and also with Rs. 40,000 in cash: this was on 2nd September of that year. Bachu constituted himself the mutwalli and provided for the devolution of the office after his death. Mahabir Prasad Singh held the office after the death of his father Bachu and on Mahabir's death Dulhin Bhagwat Kuer remained in office till her death. Plaintiff 1 in the principal suit claimed the office of mutwalli as the nearest of kin. There was a further transaction by Mahabir Prasad by which he sold six of the villages of the Lakhaipur mukarrari estate to the Thakurji on 21st March 1884. Bhagwat Kuer, when in possession, purporting to act under the provision of the will of her husband, dedicated by six deeds, properties of which she was in possession through the wakf. These transactions were of 7th March 1900, 19th May 1905, 10th February 1906, 3rd November 1913 and 29th June 1924. This last dedication was, as the Judge in the Court below has pointed out, merely a fictitious endowment for the purpose not of the wakf of defendants 1 to 3. On 2nd July 1924 Dulhin Bhagwat Kuer purported to change the order of succession to the office of mutwalli and provided that after her death defendant 1 must be the mutwalli. The right of Bachu to endow the property is not disputed and the Judge has decided accordingly. As regards the mutwalliship, Mahabir, it has been pointed out, remained a mutwalli during his lifetime. As will be seen from the genealogical table, Mahabir was the last of the male line of Bachu. The deed of endowment dated 2nd September 1873 provided :

As long as I live the tauliat and management of the wakf properties shall remain vested in me personally and thereafter it shall be vested in my son Babu Mahabir Prasad Singh and after him it shall continue from generation to generation, to be vested in the eldest son found fit in the line of each of my children one after another, both in the male and female lines.

There was neither male nor female issue surviving and the line of succession laid down by Bachu came to an end. The right of management therefore reverted to the founder or to his heir. Mahabir Prasad made appropriate provisions by which the mutwalliship should go to his descendants, male and female and Ramdulari therefore on her birth was entitled to the office. It

was the opinion of the Judge in the Court below that that being so, the right again reverted to Bachu, the founder, or his heir, and both of them being dead it devolved upon Dhanukdhari Prasad Singh, who unaware of his right, failed to take action. On the findings at which I have arrived, and in the events which have happened, a right would devolve upon Sia Prasad Singh. But again this right was not exercised by him. No one being nominated nor coming within the line constituted by the founder, the parties in these proceedings can establish no right to the mutwalliship. The learned Judge relies upon the deed of gift by Kuar Sorabjit Protap Sahi to Dulhin Bhagwat Kuer admitting Dulhin Bhagwat Kuer's right as mutwalli of this endowment and making no claim to the office himself and also upon the fact that defendant 1 can only lay claim through Dhanukdhari. Dhanukdhari did not exercise his powers and again, as there was nothing to show that Bhagwat Kuer was nominated, she had no power to nominate defendant 1.

One of the points put forward by the appellant however is that rightly or wrongly Dulhin Bhagwat Kuer was in possession and therefore obtained a right to nominate by adverse possession. She however was in possession as executor of the will of her husband and for a limited estate also. This question of adverse possession was not pleaded nor decided in the Court below, depending as it does on questions of fact such as the claim of the persons to whom I have referred either to nominate a line of holders of the office or to claim the mutwalliship themselves. In my judgment the contention of adverse possession cannot now be entertained. The learned Judge has disposed of the matter on the conclusion that none of the persons enumerated was entitled to hold the office of mutwalli of the properties endowed by Bachu, and, as the claims made in the suits were not claims for appointment to the office by the Court, it was sufficient to hold that none of the claimants were entitled in these suits to succeed.

There remain two other questions to be determined, first as to the validity of the endowment by Dulhin Bhagwat Kuer, and secondly, the claim by defendant 1 to the office of mutwalli. The Judge in the Court below has held that the endowments were beyond the power of Bhagwat Kuer. The question therefore as to the mutwalliship does not arise. It is obvious that if the

Judge is right as regards the validity of the endowment, the second question does not arise. These endowments, as I have already said, are of 7th March 1900, 19th May 1905, 10th February 1906, 3rd November 1913 and 29th June 1924. Reliance was in the first place placed upon the will of Mahabir Prasad Singh which in para. 5, after referring to the dedication by Mahabir's father of considerable property to Sri Thakurji installed in the temple at Ajodhya provides:

5. My father has dedicated considerable property to six Thakurji installed at the temple at Ajodhya for purposes of raj-bhog and charity and he also has executed a wakfnama. It is my wish also to do one or two acts of dharam to perpetuate my name and fame, and this is known to my both wives. If I fail to fulfil my desire during my lifetime I authorize my wives who might survive to fulfil this desire of mine as set forth in para. 2, and the wakfnama, etc. which might be executed by them for this charitable act shall be operative and effectual to the same extent as the one which might have been executed by myself.

The translation before us omits the words "one or two acts of dharam" which are taken from the translation by the Subordinate Judge which all parties admit as correct. Under that clause of the will (which I have just read) and by reason of the general law it is contended that Bhagwat Kuer had power to make these endowments. The law on the subject is expressed by their Lordships of the Judicial Committee of the Privy Council in 49 I A 383¹⁹ at p. 394, thus:

In their Lordships' opinion the Hindu law recognizes the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner.

Against the argument in support of the validity of the endowment, it is contended first that the provisions of the will are too vague: 26 I A 71.²⁰ The first of the documents of 7th March 1900 mentions no less than five acts of charity, and it is contended that if she had power to make the endowments of fractions of the property, she had exhausted that power completely by some of the purposes for which the endowment was made—admittedly about one-tenth of the whole property being the subject of these endowments. Again, in the dedication of 1905 a statement is made "by

way of carrying out my husband's wish." In this case the property endowed was of the value of Rs. 40,000 and it is contended that if this was the true purpose, the purpose had already been carried out by the earlier dedication of 7th March 1900. Further in the document of February 1906 Bhagwat Kuer purports to create more endowments on the ground that the properties already endowed were not sufficient to defray all the expenses of the temple and she denied that the two documents of March 1900 and of May 1905 were acts by which she carried out the object of perpetuating the memory of her husband. It would appear that the authority, if it was the authority of her husband upon which she was relying, had long since been exhausted, and it is impossible to contend that the lady was acting under the general rule of the Hindu law which would entitle her to dedicate a small fraction of the property of her husband for the benefit of his soul. It must be remembered her interest was limited, and no valid reason is put forward to support the transaction to which I have already referred quite apart from the documents of 1913 and 1924. It is frankly conceded that the purpose of the 1913 endowment was for a pathsala at Ajodhya which she herself had inaugurated. No mention is made of her husband and therefore it is impossible to say that she was continuing to carry out the authority of her husband under the will. The other deed suffers from the same infirmity. Again in this transaction a property of the value of Rs. 40,000 was transferred.

The Judge in the Court below has held that the authority in the will was vague and void for uncertainty and that the endowments were not in accordance with the authority such as it was, given under the will. For that reason it was held that the endowments were inoperative against the plaintiff in the principal action. It is not an unreasonable view held by the Subordinate Judge that the purpose of these transactions was to benefit defendant 1 Raghava Surendra Sahi whom she adopted in 1906. In my judgment the learned Judge was correct in this view. The decision on all these points being against the appellants the result is that all the appeals fail and must be dismissed with costs to the respondents being plaintiffs 1-a, 1-b, 2, 3 and 4 in the principal suit No. 38 of 1932. There will be two sets of hearing fees, one payable by the appellants in Appeals Nos. 62, 63, 64 and 69 of 1935.

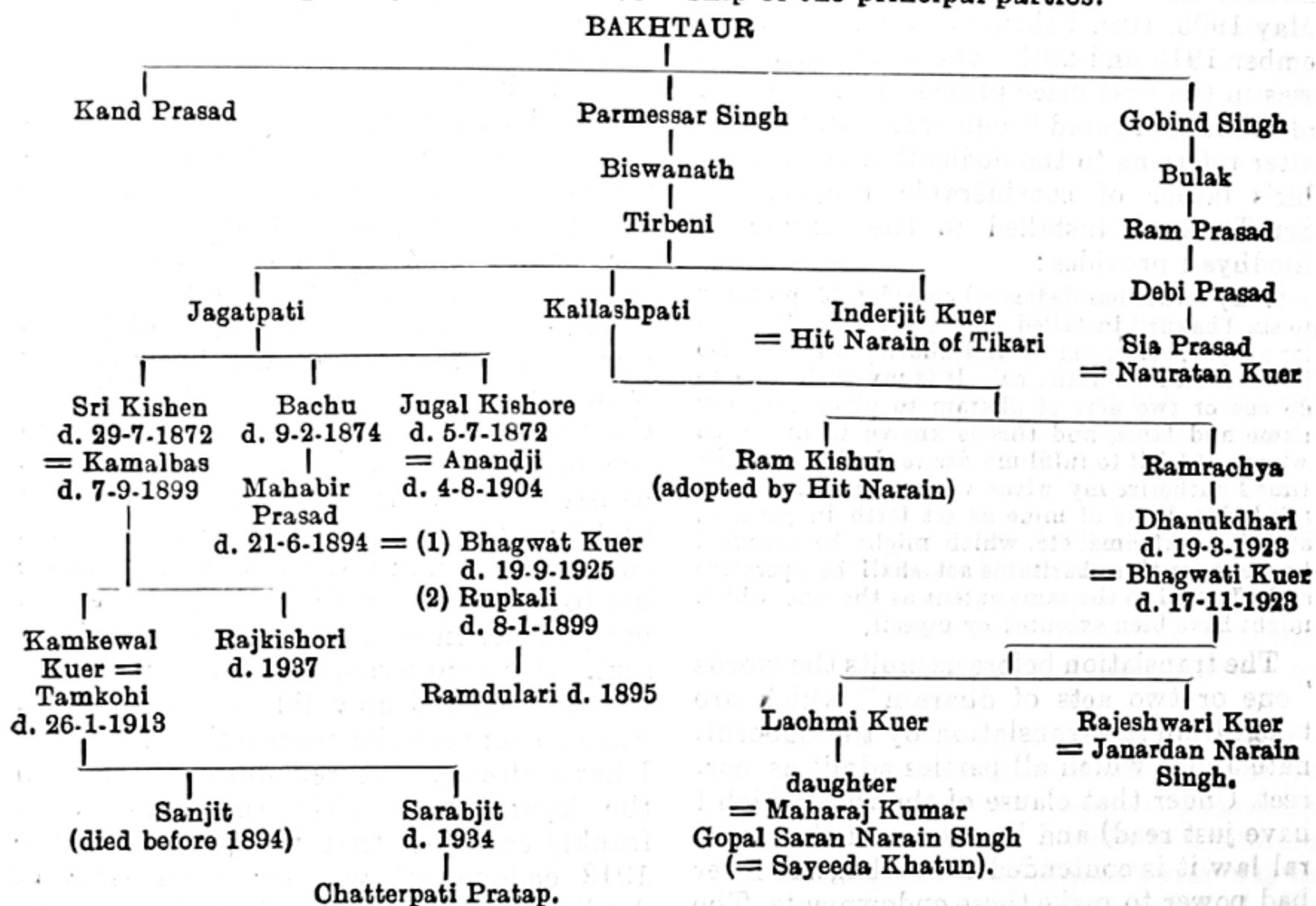
19. *Sardar Singh v. Kunj Bebari Lal*, (1922) 9 A I R P O 261=69 I O 36 = 44 All 508 = 49 I A 383 (P O).

20. *Ranchordas Vandrawandas v. Parvatibai*, (1899) 28 Bom 725=26 I A 71 = 1 Bom L R 607 (P C).

and the other payable by appellants in Appeals Nos. 139 and 197 of 1935.

Agarwala J.—These six appeals which have been heard together, arise out of five

suits which were tried together by the Subordinate Judge of Gaya. The following genealogical table will explain the relationship of the principal parties:



In 1863 Inderjit Kuer, daughter of Tirbeni Singh and wife of Maharaj Hit Narain of Tikari, made a grant known as the Lakhaipore mukarrari to Bachu Singh, one of the three sons of Jagatpati Singh, who was one of her two brothers. At the time the grantee was a member of an undivided Hindu family consisting of himself, his two brothers, Shrikishun and Jugal Kishore and Ramrachya Singh, one of the sons of Kailashpati, brother of the grantee's father. In 1864 Ramrachya separated from Jagatpati's branch of the family taking with him a half share of the ancestral properties but no share in the mukarrari. Jugal Kishore died on 5th July 1872, and Srikishun on the 29th of the same month. Bachu, the grantee of the mukarrari, died on 8th February 1874, after obtaining succession certificates empowering him to collect the debts due to his brothers, Jugal Kishore and Srikishun, respectively. Kamalbas Kuer, widow of Srikishun, and Rajkishori Kuer, one of his daughters, had not opposed Bachu Singh's application for a succession certificate in respect of the debts of Srikishun and received from him, the widow a maintenance grant, and the

daughter an absolute gift of certain properties. The application however so far as the debts of Srikishun were concerned, was opposed by his other daughter, Rani Ramkewal Kuer, and so far as the debts due to Jugal Kishore's estate were concerned, by the latter's widow, Anandi Kuer. They denied that Srikishun and Jugal Kishore were joint with Bachu at the time of their deaths. The matter was decided in favour of Bachu Singh and after the latter's death his son, Mahabir Prasad, made a maintenance grant to Anandi Kuer by a deed dated 17th May 1874. Rani Ramkewal Kuer however challenged the decision by instituting Title Suit No. 163 of 1880 against Mahabir Prasad claiming her father's share in the ancestral properties. No claim was then advanced with regard to the mukarrari properties. The suit was compromised, Rani Ramkewal Kuer admitting Mahabir Prasad's title and receiving three villages from him. Rajkishori was impleaded in this suit. She and Sarabjit Pratap Sahi, son of Rani Ramkewal Kuer, who was then a minor, and his elder brother, were parties to the compromise. In the result these disputes terminated in the widows of Sri-

kishun and Jugal Kishore, and the descendants of the former, admitting that Srikishun and Jugal Kishore died in a state of jointness with Bachu and that the latter's son had succeeded to the joint family properties. But the Lakhaipore mukarrari was not the subject-matter of those disputes.

Mahabir died on 21st June 1894 leaving two widows Bhagwat Kuer and Rupkali Kuer. On 11th October 1894 the latter gave birth to a daughter, Ramdulari Kuer, who died on 3rd June 1895. Rupkali died on 8th January 1899. Kamalbas, widow of Srikishun, died on 9th September 1899, Anandi Kuer, widow of Jugal Kishore, on 4th August 1904 and Bhagwat Kuer on 19th September 1925. Under the will of Mahabir Prasad his estate was given to his widows successively for life, and his daughter, Ramdulari, on her birth became entitled to the reversionary estate. The various claimants to these properties are the parties to this litigation and the principal question on which they are at issue, is as to who ultimately inherited the estate which Ramdulari obtained under the will of her father, Mahabir. The parties are all agreed that the estate of Mahabir vested in Ramdulari on her birth and that on her death it passed to her mother, Rupkali Kuer. The contention of Raghava Surendro Sahi and his son Hari Surendro Sahi, who are plaintiffs in Title Suits Nos. 40 and 41 of 1932 and defendants in Suits Nos. 30 of 1930 and 38 of 1932, is that on the death of Rupkali Kuer the estate of her daughter Ramdulari passed to Dhanukdhari, who was at that time the nearest reversioner to Ramdulari's father, Mahabir, the latter's senior widow, Bhagwat Kuer, being excluded from inheriting the estate of her step-daughter. This contention was challenged by Sia Prasad who instituted Title Suit No. 38 of 1932 and by Sarabjit Pratap who was the plaintiff in Title Suit No. 30 of 1930. Both these persons have since died. Sia Prasad's widow, Nauratan Kuer, was substituted in his place and Sarabjit's son Chatterpati in his place. The contention of the plaintiff in Title Suit No. 30 of 1930 is that at the time of Bhagwat Kuer's death he was the nearest kinsman and heir of Mahabir although he was a cognate and not an agnatic relation. Sia Prasad's claim was based on the Mitakshara text that cognates do not succeed until other classes of heirs are exhausted.

As between the claim of Sia Prasad,

who instituted Title Suit No. 38 of 1932, and the claim of Sarabjit Pratap, who instituted Title Suit No. 30 of 1930 (and whose representative is the appellant in First Appeals Nos. 137 and 197 of 1935) the right to succeed to the stridhan property of Ramdulari on the death of her stepmother, Bhagwat Kuer, depends on the question whether the claim of a remote agnate is to be preferred to that of a less remote cognate. The parties are agreed, and it is clear, that in the case of a maiden the heirs to her stridhan are, first, her uterine brothers, secondly her mother and, thirdly, her father. After this, it is contended by Sir Sultan Ahmed in support of Sia Prasad's claim, that the heir to the deceased maiden's stridhan is the same as the heir to her father's property. In support of the claim of Sarabjit Pratap however Mr. Das contends that the next to the stridhan is not the father's heirs but his nearest relation. Mr. Das founds his contention on the text of Manu, Ch. 9, verse 187: "The property of a near sapinda shall be that of a near sapinda," as explained by the Privy Council in 41 I A 290² at p. 297, and in the commentary of Virmitrodaya. The Mitakshara divides sapindas, or blood relations, into two classes, gotraja sapindas and bhinna-gotra sapindas or bandhus. The Privy Council pointed out that while the Mitakshara uses the word sapinda in its wider sense to include all blood relations (i. e. all persons having particles of the same body as the deceased) it lays down rules for the limitation of the sapinda relationship which confines it to blood relations within seven degrees on the male side and five degrees on the female side. In 41 I A 290³ their Lordships of the Privy Council rejected the contention that the Mitakshara uses the word sapinda in its narrower sense only in relation to marriage, impurity and exequial rites and not in relation to inheritance. They approved of the observations of the Full Bench in 6 Cal 119³¹ at p. 126 with reference to the meaning of sapinda in the Mitakshara:

Having taken great pains in accurately defining the word 'sapinda' in the beginning of his work, and having once said in clear words in the passage in question that 'one ought to know that wherever the word sapinda is used there exists (between the persons to whom it is applied) a connexion with one body either immediately or by descent,' it is hardly reasonable to suppose that the author

21. *Umaid Bahadur v. Udai Chand*, (1881) 6 Cal 119=6 O L R 500 (F B).

used the word in another part of the work in a different sense. It is a well-understood rule of construction amongst the authors of the Institutes of Hindu Law, that the same word must be taken to have been used in one and the same sense throughout a work, unless the contrary is expressly indicated.

With regard to the succession to stridhan property the Mitakshara cites a text of Yagnavalkya that if it be the property of a woman married in one of the orthodox forms it will go to her daughters, and, in default of them, to her husband. In the case of a woman married in an unorthodox form her stridhan goes to her father and mother on failure of her own issue. It is common ground that the rules relating to the succession to stridhan are the same in the case of a maiden who has no brothers and a woman married in an unorthodox form and dying without issue. A text of Baudhayana is cited in the Mitakshara as regulating succession to the stridhan of a maiden :

The wealth of a deceased maiden let the uterine brothers themselves take ; on failure of them it shall belong to the mother; or if she be dead to the father.

Viramitrodaya, who was a commentator on the Mitakshara, after referring to this text, says: "On failure of the mother and father it goes to their nearest relations." The question on which the parties are at issue is whether "relations" (sapinda) is here used in the sense of sapindas generally or whether it is confined to the meaning defined in the Mitakshara. Mr. Das contrasts the word 'sapinda' in the commentary of Viramitrodaya with reference to succession to stridhan with the term 'gotraja sapinda' used in the text of Yagnavalkya cited in the Mitakshara in speaking of succession to the property of a male dying without issue. With regard to the latter Yagnavalkya's text is :

The wife and the daughters also, both parents, brothers likewise and their sons, gentiles (gotrajas), cognates (bandhus), a pupil and a fellow student. On failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no lineal male descendant (putra).

The Mitakshara, Ch. 2, S. 5, after referring to the order of succession among the gotrajas says :

If there be none such, the succession devolves on samanodakas, and they must be understood to reach the seven degrees beyond sapindas, or also as far as the limit of the knowledge and name extend. Accordingly Virhat Manu says, 'The relation of the sapinda ceases with the seventh person, and that of samanodakas extends to the 14th degree, or, as some affirm, it reaches as far as the memory of birth and name extends.' This is signified by gotra.

Mr. Das contends that since the word sapinda in the Mitakshara is to be used in the same sense throughout and since in describing the succession to stridhan the word used is sapinda and not gotraja sapindas as in the case of succession to the property of a male, the author of the Mitakshara must be taken to have intended to indicate that the two lines of succession were not the same, that is to say, whereas in the latter case gotraja sapindas and samanodakas have preference over bhinna-gotra sapindas, in the case of stridhan they have no such preference and the heir must be ascertained from among the sapindas generally by applying the test of religious efficacy. He referred to Viramitrodaya, Ch. V, Part 2 (Setlur), for the purpose of shewing that this writer also held that the lines of succession in the two cases are different. In Sec. 9 the author explains that in the case of a woman married in an unorthodox form, in default of issue, her stridhan goes first to her mother and then to her father, although the text mentions only father. In Sec. 14 the author says:

But when there is a failure of the above mentioned heirs to a childless woman's property, Brihaspati ordains . . . (here follows a list of persons pronounced to be similar to a mother, whom some writers call secondary mothers): if they (the secondary mothers) leave no issue of the body, nor son (of a rival wife) nor daughter's sons, nor their sons, the sister's son and the rest shall take their property.

It is then explained that the term 'aurasa' or 'issue of the body' includes both sons and daughters, and that 'their sons' relates to the term 'issue of the body' and 'son (of a rival wife)' and not to the term daughter's son "because the son of a daughter is not competent to offer oblations." The author proceeds :

Hence on failure of heirs down to the daughter's son, first the 'aurasa' inherits, after him his sons and grandsons. For, it is proper that the succession should devolve on them, inasmuch as they are competent to present the pinda In their default, the son of a rival wife, his son and grandson (become heirs in their order) by reason of their being, under the circumstances, the giver of the pinda Hence on failure of these, the sister's son and the rest alone, in spite of the sapindas, such as the father-in-law are, by virtue of the text (of Brihaspati) which is not reconcilable in any other way, entitled to succeed, according to their comparative propinquity to the property of their mothers, sister and the rest.

Here, contends Mr. Das, Viramitrodaya shews that the heir is to be found by applying the doctrine of religious efficacy to sapindas in general for among the "secon-

dary sons" enumerated in the text of Brihaspati are persons who are cognates. It is to be remembered that, historically, until Yagnavalkya's text recognized the claims of cognates to succeed to the property of a male, in default of agnates, cognates had no right of inheritance at all. Yagnavalkya having, in the case of the property of a male, postponed them to agnates, it is contended that Viramitrodaya, who was commenting on and explaining the text of Yagnavalkya, intended to place them on the same footing as agnates in relation to the property of a woman. In Ch. 3, Part 1, relating to the succession to the property of a separated male, Viramitrodaya states, in Section 3:

But in fact when a person in whom rights vested dies, it is proper that the property should be inherited by his near relations . . . when the owner of any property is dead, then if he leave no male issue, his property is inherited by his relations such as his wife, etc.

There the author is clearly referring to the text of Yagnavalkya: "The wife, and the daughters also, both parents, brothers uterine, and their sons, gentiles (gotrajas), cognates (bandhus) . . ." in support of his proposition that "When a person in whom right vested dies, it is proper that the property should be inherited by his near relations." In S. 9 of Part 2, Ch. 1, relating to women's property the author explains:

It goes to the mother in the first instance, and after her to the father, according to the principle set forth while explaining the term "parents" in the text (of Yagnavalkya), "the wife and the daughters also, the parents, etc.," there being no other text against the application of that principle to the present case.

Sir Sultan Ahmed contends that the citation of Yagnavalkya's text in this context indicates that what Viramitrodaya meant was that on failure of the mother, the father gets the property and on failure of the father it goes to the other persons mentioned in the text of Yagnavalkya in the order there given. Apparently, the rival claims of a near bandhu and a more remote agnate to succeed to the stridhan of a maiden have never been directly in issue before, but the opposing views presented, respectively, by Mr. Das and Sir Sultan Ahmed in these appeals have been advanced in many reported cases and have been the subject of discussion by many text-book writers, and the view now supported by Mr. Das has not been accepted. The text of Brihaspati on which Mr. Das relies has been cited by commentators whose works are authorities in the Bombay, Madras,

Mithila and Benares Schools respectively, but no text-book writer has accepted it in the sense contended for by Mr. Das, and no Court has construed it in that sense: see 30 Bom 431,⁷ 36 Mad 116,¹³ 37 Mad 293,¹⁴ 38 Mad 45,¹⁵ 43 Mad 32,¹⁷ 13 Pat 550²² and 39 Cal 319.⁴ In all these cases the text of Yagnavalkya with regard to succession to the property of a male was applied to the stridhan property of a woman and no instance has been cited in which that text was not applied. In 36 Mad 116¹³ the text of the Mitakshara (Ch. 2, Sec. xi, pl. 11) that on the failure of the husband of a woman married in an orthodox form the property "goes to his nearest kinsmen (sapindas)" was under consideration. The then learned Chief Justice said:

The meaning of the above text is plain; it means that the stridhan property of a woman married according to an orthodox form who has left no issue will devolve on her husband, and on failure of the husband the property will go to his sapindas in the order laid down in the Mitakshara with reference to succession to the property of a male. That is to say, we have to ascertain the person who would succeed to the property as the nearest sapinda of the husband if the property belonged to him. And that is the interpretation which has been placed upon the text whenever it has had to be considered.

This view was reiterated in 37 Mad 293¹⁴ where the learned Judges after citing the passage quoted above, went on to say:

No authority has been quoted for the suggestions of the learned vakil for appellant that the term sapinda in Mitakshara, Ch. 2, S. 11, pl. 11, should be understood in a different sense to that in which it would be used in reference to inheritance from a male.

Again Phillips J. in 43 Mad 32¹⁷ at page 33 said:

I am unable to accept the contention based on the single sentence of the judgment in 38 Mad 45,¹⁵ that the father's sapindas in a case when the property of a female is concerned are different to the sapindas in the case of a male's property. In the absence of any rule to the contrary the sapindas must always be the same.

The true construction of the text of Brihaspati was decided by the Privy Council in 30 Bom 431⁷ in which it was held that the text is merely illustrative, enumerating some of the heirs entitled to succeed to the stridhan of a woman on failure of her husband, in the case of a woman married in an orthodox form, and of her father, in the case of a woman married, in an unorthodox form, and that the order of succession is not indicated in that text. Mr. Das does not accept that decision as

22. Kamla Prasad v. Murli Manohar, (1934) 21 A I R Pat 398=152 I O 446=13 Pat 550=15 P L T 715.

authority for the proposition that the proper order, in the case of succession to the stridhan property of a woman is the same as in the case of the property of a male. He relies on the fact that the claim which the Privy Council upheld in that case was the claim of a co-widow and he contends that even on the view which he has presented the co-widow would exclude all other sapindas because she is the nearest sapinda of her deceased husband. He referred to S. 15 of Part 2 of Ch. 5 of Viramitrodaya (Setlur) as authority supporting the co-widow's rights. In that Section the author is commenting on Manu's text disinheriting women and mentions that the only exception is in favour of those women "whose right of succession has been expressly mentioned in texts such as 'The . . . wife and the daughters, also, etc.'" Mr. Das admits that the author is actually applying the text of Yagnavalkya to stridhan, for he relies on S. 15 to defeat the claim of Dhanukdhari to succeed in preference to Bhagwat Kuer, the stepmother of Ramdulari, but he contends that in para. 15 Viramitrodaya has not applied to stridhan the whole of Yagnavalkya's text relating to the property of a male but only a part of it, namely "the wife and the daughters also." It is true that the text is being cited merely to illustrate the rule that only specially mentioned women have a right to inherit and therefore in S. 15 the commentator cannot be held to have cited it for anything more than in support of the claims of certain women. In S. 9, however, the same commentator cites the same text of Yagnavalkya in discussing succession to the property of a childless woman married in an unorthodox form. In such a case, according to the Mitakshara the property goes "to the father." In S. 9 Viramitrodaya explains that by "father" is here meant parents and goes on :

Amongst them also, it goes to the mother in the first instance, and after her to the father, according to the principle set forth above while explaining the term 'parents' in the text 'the wife and the daughters also, the parents, etc.' there being no other text against the application of that principle for the present case.

Mr. Das' comment on the fact that Yagnavalkya's text is quoted in this context is that it is an instance in which Viramitrodaya has cited in support of his own conclusions a text which is inapt for that purpose and therefore that it should not be read as incorporating into Viramitrodaya's discussion of the succession to

a maiden's property Yagnavalkya's rule regarding succession to the property of a male. That however is not the view taken by Kamalakara in his Vivada Tandava or by other commentators. Discussing succession to the stridhan of a woman married in an orthodox form Kamalakara says :

In default of husband the estate is obtained by his near relation beginning with 'the lawfully wedded wife and the daughter, etc.' as prescribed by the text of Yagnavalkya in the rule about succession to a sonless man.

By this passage it has been generally understood that in Kamalakara's view the succession to stridhan, in default of husband in the case of a woman married in an orthodox form, and in default of father in other cases, was that the heirs of the husband or father succeeded in the order laid down in Yagnavalkya's text relating to succession to the property of a male. West and Buhler (Edn. 4, p. 485) say :

The opinion (of Kamalakara) seems to be based on a consideration that, as the sapindas inherit only through the husband, they virtually succeed to property coming from him, and that consequently they must inherit in the order prescribed for the succession to a male's estate.

They then refer to the view now presented by Mr. Das and continue :

But, the identity of the wife with her husband being accepted as a leading principle of the Mitakshara, the rule seems on the whole consonant with it, whereby precedence in heritable relation to him gives a like precedence and order of succession to his widow. Such appears to be the rule, too, which custom has preferred in this part of India.

See also Vyavastha Chandrika (Shyama Charan Sarkar, Vol. 2 p. 539). Sir Gooroodass Banerjee in his Tagore Law Lectures on the Hindu Law of Marriage and Stridhan (9th Lecture, Edn. 4 pp. 383, 389) refers to the discussion of the subject by West and Buhler and says :

In this conflict of authority it is not easy to say which view is correct. But Kamalakara's opinion is entitled to be followed as authority in the Benares School when it is not in conflict with that of any higher authority; and in the present instance the rule based upon his opinion has the further recommendation of being simple, as it makes the order of succession to stridhan correspond, after a certain point, to that applicable to a man's property.

Another eminent Hindu Jurist, Gopalchandra Sarkar Sastri (Hindu Law, Edn. 6, pp. 730, 731) after citing Viramitrodaya's comment on Baudhayana's text . . . "On the failure of the mother and the father, it goes to their nearest relations" says :

It seems that a maiden's status is similar to that of a woman married in a disapproved form of marriage, both being under the *patria potestas* of their father. The term 'their nearest relations' must be the father's relations, in the first instance

inasmuch as they are also the mother's relations, so the term is not to be used distributively; and in default of such relations the relations of the mother alone become heirs It should be noticed that the nearness or propinquity is the principle on which the order of succession is worked out in the Mitakshara, hence the relations are to take a woman's property in the same order in which they would become heirs to her husband or father or mother.

Mr. Das' comment on these writers is that they all misunderstood the text of Kamalakara because they made the mistake of directing their attention to one passage of his work and failed to notice what he said later on, and that to accept their view is to give samanodakas preference over bandhus which, he contends, is directly contrary to the Mitakshara rule that the heir to a maiden's stridhan is to be looked for among the sapindas in the sense in which that word is defined in the Mitakshara. His contention is that Kamalakara's final conclusion is that in default of husband or father the heir is to be found by applying the doctrine of religious efficacy to the sapindas generally without reference to the particular class of sapindas to which they may belong. It is a startling suggestion that so many eminent Sanskrit scholars and jurists should have missed what is so obvious to Mr. Das. In 39 Cal 319⁴ the question of succession to the stridhan of a woman married in an unorthodox form was considered and although the issue did not arise between a cognate and an agnate the texts relevant to the latter point were fully discussed by Chatterjea J., who said:

So that, according to Kamalakara, the nearness of kinsmen in the rule laid down in the Mitakshara is to be determined according to the well known text of Yagnavalkya relating to the succession to a male owner dying without issue.

The decision in this case was followed in 36 Mad 116¹³ which has already been referred to. In this state of judicial dicta and the comments of learned Sanskrit scholars and jurists I have no hesitation in rejecting the contention of Mr. Das in support of the claim that Sarabjit is to be preferred as an heir to Mahabir in preference to Sia Prasad. Even if the texts and commentaries are capable of being construed in the sense for which he contends I should hesitate to adopt that construction for it would inevitably have the effect of upsetting titles long founded on the contrary view.

Certain other facts must now be stated in order to understand the claims of Raghava Surendro and his son, who are the appellants in the principal appeal (First Appeal No. 69 of 1935, arising out of Title

Suit No. 38 of 1932). By an ekrarnama of 12th February 1906 Bhagwat Kuer proclaimed that she had adopted Raghava Surendro Sahi as son to her deceased husband. Thereupon, on 8th February 1907, Dhanukdhari Singh, son of Ramrachya, executed a sale deed in favour of Ambica Prasad Singh of Tikari purporting to convey a two-thirds share of the Lakhaipore mukarrari and a 2 annas 8 pies share of certain of the ancestral properties. The sale deed recited that the Lakhaipore mukarrari had belonged jointly to Srikishun, Bachu and Jugal Kishore and that they had separated from each other; that on the death of the widows of Srikishun and Jugal Kishore the shares of the two latter had devolved on Dhanukdhari, who on the death of Ramdulari, also inherited the estate left her by Mahabir Prasad, and that in order to raise money to finance litigation for the purpose of recovering the properties from Mahabir's widow, Bhagwat Kuer, who was in illegal possession of them, the vendor was obliged to sell the shares of Jugal Kishore and Bachu in the mukarrari, amounting to two-thirds, and the half share of Jugal Kishore in the other properties. The vendor and the vendee then instituted three suits. Title Suit No. 198 of 1907 was to recover the one-third share of Bachu which devolved on his son Mahabir; Title Suit No. 199 of 1907 was to recover the one-third share of Jugal Kishore, and Title Suit No. 200 of 1907 was to obtain a declaration that the adoption of Raghava Surendro Sahi was invalid. The last suit succeeded. The other two were finally dismissed by the Privy Council in 1919.

In the meantime, Sarabjit Pratap, son of Rani Ramkewal Kuer, instituted Title Suit No. 153 of 1911 to recover the one-third share of his maternal grand-father Srikishun although he and his brother had signed the compromise entered into by his mother which admitted that Srikishun had died in estate of jointness with his brothers. While the suit was pending in appeal to the Privy Council the parties entered into what they called a family arrangement, for the purpose of settling their disputes. The arrangement is evidenced by three deeds. By the first, dated 8th January 1921, Bhagwat Kuer purported to release the one-third share of Srikishun in favour of the latter's daughter Rajkishori. By the second deed, dated 9th January 1921, Rajkishori purported to surrender

this one-third share to Sarabjit Pratap, son of her sister, Rani Ramkewal Kuer. By the third deed, dated 10th January 1921, Sarabjit Pratap purported to transfer to Bhagwat Kuer absolutely, by way of gift, most of the properties included in the one-third share. One of the properties however was given to Rajkishori and the remainder were retained by Sarabjit Pratap himself. Dhanukdhari died on 19th March 1923, and his widow on 12th November in the same year.

While an application by Bhagwat Kuer for mesne profits against the plaintiffs of Suit No. 199 of 1907 was pending, a compromise was arrived at on 10th February 1924 between Bhagwat Kuer on one side and Ambica Prasad Singh and his son, Maharaj Kumar Gopal Saran Narain Singh to whom he had made a gift of the two-third share in the mukarrari properties purchased from Dhanukdhari on 8th February 1907, on the other side. Ambica Prasad and his son executed a kobala in favour of Bhagwat Kuer by which they sold to her their rights in the two-third share, except nine villages, and Bhagwat Kuer executed a kobala in favour of the Maharaj Kumar in respect of the one-third share of the aforesaid nine villages and a deed of surrender in respect of the remaining two-thirds share. On 2nd July 1924 Bhagwat Kuer made a gift of 52 villages out of the two-thirds share to Hari Surendro Sahi, son of Raghava Surendro Sahi. She died on 19th September 1925. Lachmi Kuer, a daughter of Dhanukdhari, was then recorded in Register D as proprietress in respect of some of the ancestral properties. As a result of disputes with respect to the Gaya properties all the latter were attached by the District Magistrate under S. 146, Criminal P. C.

With regard to the two-thirds share which Dhanukdhari purported to sell in 1907 and which the vendee conveyed to Bhagwat Kuer, it is necessary for these appellants to establish that the estate of Ramdulari was inherited by Dhanukdhari and not by her step mother Bhagwat Kuer. It is contended that a step-mother never, in any circumstances, inherits the stridhan property of her step-daughter. In support of this proposition reference was made to three cases none of which however is directly in point. In 9 Cal 725²³ the rival claimants were the gotraja sapindas and

the sister of the last male owner, respectively. The claim of the sister was rejected on the ground that she is not one of the heirs enumerated in the Mitakshara. In 37 Cal 214²⁴ the rival claimants to the estates of two deceased brothers were their father's sister's sons and their step-mother, respectively. The latter's claim was disallowed. The third case is 16 All 221²⁵ in which it was held that a step-mother, not being one of the females expressly named in the Mitakshara and not being included under the term "mother" in Ch. 2, S. 3, cannot inherit from her deceased step-son.

The point which falls for decision in these appeals, namely, the right to inherit stridhan property was considered in 38 Mad 45¹⁵ and decided in favour of the step-mother. There the contest was between the maternal aunt and the step-mother of a deceased maiden. The aunt's claim was disallowed. It is true that this case arose in the Madras Presidency but we have not been referred to any authority holding that in respect of stridhan property the Hindu law of inheritance as administered in this Province differs from that of Madras. It was however contended that the Madras case did not refer to the text of Viramitrodaya relating to succession to the stridhan of an unmarried girl. It is argued that when the succession to stridhan has been traced as far as the father of a deceased maiden the property then passes to the heirs of the father as if it were the property of a male. Accordingly, it is contended, it cannot be inherited by a female agnatic relation unless she be one of those expressly mentioned as heirs of a male, and a step-mother is not so mentioned. But in discussing succession to stridhan Viramitrodaya (Setlur, Ch. V, Part 2, S. 15) expressly introduces the text of Yagnavalkya: "The wife, and the daughters also, both parents brothers likewise, and their sons . . ." as an instance of certain women being specifically mentioned as heirs and there seems to be no reason why this particular text should have been cited in that context if at least the relevant portions of it were not to apply to stridhan; that is to say, if it were not cited as an instance of certain women being heirs to stridhan. Bhagwat Kuer was the wife of Mahabir, the father

24. Tahaldai Kumri v. Gaya Prasad Sahu, (1910) 37 Cal 214 = 5 I C 135 = 11 C L J 588 = 14 O W N 443.

25. Ramanand v. Surgiani, (1894) 16 All 221 = 1894 A W N 47.

23. Jullessur Koor v. Uggur Roy, (1883) 9 Cal 725 = 12 O L R 460.

of Ramdulari, and hence is mentioned in Viramitrodaya as one of the heirs. The claim of Raghava Surendro Sahi and his son, so far as it is based on Dhanukdhari's right of inheritance, therefore fails. This disposes of their claim to the two-third share which was the subject-matter of Dhanukdhari's sale to Ambica Prasad Singh, which was subsequently purchased from the latter's son by Bhagwat Kuer from whom the appellants claim.

With regard to the one-third share which belonged to Sri Kishun, these same claimants make an alternative case. They contend that in the litigation initiated by Dhanukdhari in 1907 which was determined in the Privy Council in 1919 it was decided that each of the three brothers, Srikishun, Bachu and Jugal Kishore separated, and that each had a one-third share in the property; that Bhagwat Kuer put Srikishun's daughter Rajkishori in possession by the deed of release of 8th January 1921; that Raj Kishori surrendered it to Srikishun's grandson Sarabjit Pratap on 9th January 1921, and that the latter conveyed it absolutely to Bhagwat Kuer from whom the appellants obtained it by a deed of gift on 10th January 1921. It is argued that the decision of the litigation of 1907 operates as *res judicata* as to Srikishun's right to one-third of the mukarrari. The transactions of 1921 were relied upon as a family arrangement by which were settled the disputes between Bhagwat Kuer on the one hand and those interested in the estate of Sri Kishun on the other.

The Subordinate Judge overruled the plea of *res judicata* and held that the mukarrari grant was to Bachu alone, that there was no real dispute to be settled in 1921 and that if such a dispute existed the settlement was not *bona fide* for the protection of the estate of which Bhagwat Kuer was in possession as a life tenant, but a device to convert her life interest in the one-third share into an absolute estate for the purpose of enabling her to convey it to Raghava Surendro Sahi. It was not contended that the Subordinate Judge's finding that the mukarrari was granted to Bachu alone is wrong in so far as it is based on the evidence in this case. The finding was at first challenged on the ground that the matter was concluded by the decision in the litigation of 1907 and a considerable amount of time was taken in discussing this question, both by the appellants and the respondents. In his reply however

Dr. Dwarka Nath Mitter, the learned Advocate for the appellants in F. A. 69 of 1935, stated that he accepted the conclusion of the Subordinate Judge on the question of *res judicata* and also his finding that the transactions of 1921 did not amount to a family arrangement by way of settlement of a dispute.

The next question is as to the validity of endowments made by Bhagwat Kuer. They were all challenged both by Sia Prasad and Sarabjit Pratap and by Lachmi Kuer, a daughter of Dhanukdhari Prasad. Raghava Surendra claimed them to be valid. With regard to two deeds of endowment executed in 1905 and 1906, respectively, he sought for a declaration of their validity in Title Suit No. 41 of 1932. In 1873 Bachu Singh conveyed six villages out of the Lakhaipore mukarrari to the deities installed by him in a temple at Ajodhya to whom he also assigned Rs. 40,000 owing to him by debtors. After his death this money was re-paid by the debtors to Bachu Singh's son, Mahabir, who however instead of handing it to the shebait of the temple, conveyed another six of the mukarrari villages to the deities in lieu of it. The validity of these endowments is not in question. In 1900, after the death of Mahabir, his widow, Bhagwat Kuer, purporting to act under his will, conveyed certain properties valued at Rs. 60,000 for the maintenance of a Sanskrit School at Ajodhya and a temple at Chapra. In 1905 she dedicated other properties valued at Rupees 40,000 to a temple which she herself founded at Ajodhya. Further properties valued at Rs. 32,000 were dedicated to this temple in 1906 and to the school in 1913. On 19th June 1924 Bhagwat Kuer dedicated to the temple at Chapra her deceased husband's residential house at Chapra with the out-houses and land appurtenant to it valued at Rs. 40,000 as a residence for the mutwalli of the endowed properties. She herself was the mutwalli at the time. The deed stated that on her death Raghava Surendro, and after him Haris Surendra, would be the mutwalli. The relevant portions of Mahabir's will are as follows :

1. I have two wives. If by the grace of God one or both of them get issues, they shall, on my death, enter into possession and occupation of all my moveable and immovable properties, ancestral as well as acquired, so that the name of my ancestors may be perpetuated and the expenses on charity and temple, etc., which have been met from the time of my ancestors down to the present time, as well as the expenses thereon to be provided for by me hereafter may continue to be defrayed

exactly in the same manner as has (hitherto) been done, so that charitable acts may continue to be done in the family.

2. If my children are minors at the time of my death, the senior wife and on her death the junior wife who are both very intelligent, possessed of administrative ability and pious, shall act as their guardian till they attain majority, and manage the estate, giving training to the boys, and carry out the orders of the hakims for the time being.

5. My father has dedicated considerable property to Sri Thakurji installed at the temple at Ajodhya for purposes of rajbhog and charity and he has also executed a wakfnama. It is my wish also to do one or two acts of dharm to perpetuate my name and fame, and this is known to my wives. If I fail to fulfil my desire during my lifetime I authorize my wives who might survive to fulfil this desire of mine as set forth in para. 2, and the wakfnama which might be executed by them, for this charitable act shall be operative and effectual to the same extent as the one which might have been executed by myself. . . .

The reference in para. 5 to 'para. 2' is apparently a mistake. It seems that para. 1 was meant. The phrase "one or two acts of dharm" is taken from the translation of the will by the learned Subordinate Judge which is admittedly accurate. In 26 I A 71²⁰ at p. 80 the Privy Council held that a bequest for dharm was too vague and uncertain to be given effect to. In 51 I A 282,²⁶ on the other hand, the charity to be benefited was a chattiram, a known and certain charity. It was contended in the present case that the phrase 'known to my wife' explains and amplifies the phrase "one or two acts of dharm." The acts of dharm are indicated with sufficient certainty to be enforced. The learned Subordinate Judge has found that there is no reliable evidence as to what, if any, were the acts of dharm which the testator had communicated to his wives and nothing has been said in these appeals which leads me to reject his conclusion on this point.

Apart from the will however, it is contended that Bhagwat Kuer had power under the Hindu law to dedicate a portion of her husband's estate to religious and charitable objects. That a widow has such a power is not contested but the widow's act must be reasonable, having regard to the value of the estate, and its object must be such as according to the notions prevalent in Hindu society conduce to the spiritual benefit of her husband: see 45 All 596.²⁷ The value of

26. Vaidyanatha Ayyar v. Swaminatha Ayyar, (1924) 11 A I R P C 221=82 I C 804=47 Mad 884=51 I A 282 (P C).

27. Lal Ram Singh v. Deputy Commissioner of Partabgarh, (1923) 10 A I R P C 160=76 I O 922=45 All 596=50 I A 265=26 O C 257 (P C).

the dedicated properties according to the deeds is Rs. 1,72,000. In the course of the argument Dr. Mitter in supporting the dedications admitted that they amounted to a tenth of the estate. The object of the endowments has been found by the learned Subordinate Judge to be for the material benefit of Raghava Surendra and, if any spiritual benefit was in view it was the spiritual benefit of Bhagwat Kuer herself. The circumstances of the case support the conclusion arrived at by the Subordinate Judge. She first attempted to adopt Raghava Surendra as the son of her deceased husband. When this failed she conveyed part of the estate to him and the balance, except the dedicated properties, to his son. She appointed him as mutwalli of all the dedicated properties and even put him in possession of the family residential house. None of the dedications was for the benefit of the deity installed by her husband's father at Ajodhya. In this respect the facts are similar to those in 22 Cal 506²⁸ where a widow alienated a part of her deceased husband's estate for the maintenance of a deity which had not been installed by him and the dedication was found to be prima facie for the widow's own spiritual benefit and not that of her husband. Mr. Das who challenged the dedications on behalf of Sarabjit Pratap, contended that under the Hindu law a woman in possession of a life estate is entitled to dedicate part of the estate for the spiritual benefit of the last full owner only and therefore in the present case all alienations not for the spiritual benefit of Ram Dulari are void. He relied on an observation of their Lordships of the Privy Council in 49 I A 383¹⁹ at p. 394:

In their Lordships' opinion the Hindu law recognizes the validity of the dedication or alienation of a small portion of the property of a Hindu female for the continuous benefit of the deceased owner.

In that case the deceased owner was a male. It is not necessary to discuss this aspect of the matter because in my view of the facts the alienations of Bhagwat Kuer were intended neither for the spiritual benefit of Ram Dulari Kuer nor Mahabir. For the same reason it is not necessary to discuss further the validity of the provisions of the will under which Bhagwat Kuer purported to act although it was contended that Mahabir having bequeathed a vested zamindari to Ram Dulari the subsequent provisions empowering the widows

28. Ram Kawal Singh v. Ram Kishore Das, (1895) 22 Cal 506.

to use a part of the estate for acts of dharm were void. In the result therefore the only dedications of Bhagwat Kuer which can be held to be valid are those of her own stridhan properties. Of these latter she appointed Raghava Surendra the mutwalli and her right to do so is not challenged. With regard however to the endowments made by Bachu Singh and the six villages transferred to the temple at Ajodhya by Mahabir, the right to the mutwalliship was claimed in the suits by Nauratan Kuer, widow of Sia Prasad, Sarabjit Pratap, Lachmi Kuer, daughter of Dhanukdhari and Raghava Surendra. The Subordinate Judge rejected the claims of all of them and only the last-mentioned appeals. His claim is based on a deed of management of all the dedicated properties executed by Bhagwat Kuer in his favour on 8th September 1924, on the strength of which he succeeded in having himself recorded in Register D as mutwalli. In the deed of endowment executed by Bachu Singh in 1873 he appointed himself as the first mutwalli and his son Mahabir as his successor and confined the succession thereafter to the eldest and worthy son of his own descendants, male or female. The male line of Bachu Singh terminated with the death of Mahabir and the latter's only daughter, Ram Dulari, died when only a few months old. The line of succession laid down by the founder of the endowment having thus come to an end and the founder having died the right of management reverted to the latter's heir, Mahabir. The latter, by his will, provided that the mutwalliship should go to his descendant, male or female, and therefore it passed to Ram Dulari. On her death it again reverted to the founder's heir, who at that time was Dhanukdhari. Dhanukdhari never assumed the duties of the office or nominated a successor. On Dhanukdhari's death the founder's next heir was Sia Prasad, who also failed to nominate a successor. None of the claimants is a descendant of the founder or his son and none of them has been nominated by any heir of the founder. The same applies to Bhagwat Kuer. She was not the legally constituted mutwalli and had no power to nominate a successor. Her appointment of Raghava Surendra is therefore inoperative. It was contended that Bhagwat Kuer acquired a title to the office of mutwalli by adverse possession. The argument is that on the death of Ramdulari the mutwalliship devolved on Dhanukdhari but Bhagwat

Kuer remained in possession for more than twelve years before appointing Raghava Surendra. No such case was made in the pleadings or at the trial. She took over the management of the dedicated properties as executrix of her husband's will and there is no indication in the evidence that on the death of Ramdulari she asserted a title to the mutwalliship hostile to the legal claimant. I agree that all the appeals be dismissed with costs as proposed.

D.S./R.K.

Appeals dismissed.

A. I. R. 1939 Patna 659

AGARWALA J.

Narsingh Singh and others
Petitioners

v.

Emperor.

Criminal Revn. No. 48 of 1939, Decided on 13th February 1939, against order of Sess. Judge, Bhagalpur, D/- 22-12-1938.

(a) Criminal Trial — Riot as result of party faction in village — Cause of trouble should be ascertained.

In a case of riot which is the result of a party faction in a village where the evidence on either side is liable to be prejudiced, it is necessarily of importance to ascertain the cause of the trouble.

[P 660 C 2]

(b) Criminal Trial — Evidence — Riot alleged to be result of threats by accused to prevent employee of complainant from working for his employer — Hearsay evidence of complainant as to what employee told him regarding threats — Admissibility.

In case where riot is alleged to be the result of the threats and attempts of the accused to prevent an employee of the complainant from working for his employer, the only way the prosecution can prove these threats is by the evidence of some one who heard them uttered. The hearsay evidence of the complainant with regard to what his employee told him that the accused persons had said is inadmissible unless, possibly, it is impossible to secure the attendance of the employee. [P 660 C 2]

(c) Criminal Trial — Story of unjustified attack not supported by unambiguous and unimpeachable evidence — It is unsafe to accept it unless supported by circumstances indicating its truth.

It is possible to believe a story of an apparently unjustified attack when it is supported by unambiguous and unimpeachable evidence. But when the evidence tendered is not of that description it is unsafe to accept it unless it is supported by circumstances indicating its truth. Evidence of previous threat is evidence of such a nature.

[P 662 C 1]

N. N. Sinha and S. S. Bose —

for Petitioners.

Government Pleader —

for Opposite Party.

Order.—The petitioners have been convicted of rioting and assaults committed

in prosecution of the common object of the rioters and sentenced to various terms of imprisonment. Their appeal against their convictions and sentences to the learned Sessions Judge was dismissed.

The case for the prosecution was that in village Bishunpur the Rajput inhabitants are divided into two hostile parties, one of them headed by the petitioner Dharam Narain Singh. The complainant Mahabir Singh formerly belonged to this party but has now gone over to the other side. According to the evidence of the complainant the result of this was that attempts were made by the petitioners to prevent Babulal (his ploughman) from working for him and that the attempt to deter Babulal from doing so ultimately resulted in the riot which is the subject-matter of this prosecution. The story told by the complainant was that when he went to call his ploughman, Babulal, on the Sri Panchmi day the latter refused to work alleging that the petitioners Dharam Narain Singh and Narsingh Singh had told him not to do so. He was ultimately persuaded to work on that day however but on the next day he again failed to turn up and when the complainant went to fetch him Babulal is alleged to have said that he had been threatened by Dharam Narain Singh and Narsingh Singh if he worked for the complainant. Babulal is again said to have been persuaded by the complainant to resume work but on the way they were met by the petitioners and an altercation ensued during which Babulal was abused and the petitioners stated that they would not allow him to go with the complainant. The complainant took hold of Babulal's hand and insisted upon taking him when the petitioner, Jagat Narain Singh, gave an order in consequence of which the other petitioners assaulted Mahabir Singh and two other persons on the prosecution side. Babulal was not examined at the trial although his name appeared in the list of prosecution witnesses to be examined and summons was actually served on him. But for the trial Court believing that Babulal was to be examined it is difficult to understand how the complainant was allowed to make statements as to what Babulal was alleged to have told him about the threats which had been made by Dharam Narain Singh and Narsingh Singh if he continued his work for the complainant. When it was found that the prosecution were not producing Babulal as a witness the defence moved the Court to examine

him as a court witness. It appears from a note on the petition that was filed for that purpose that the prosecution objected on the ground that he had been won over by the defence. The Court nevertheless directed Babulal to be summoned as a court witness, but the summons was not served. The report of the process server was that he had gone to the house of Babulal and not finding him there had affixed the summons to the house. No further attempt was made to secure the attendance of Babulal. The Courts below have justified the conviction on the ground that apart from the evidence of Babulal there was sufficient evidence to sustain the conviction in spite of the fact that the trial Court found it necessary to reject the greater part of the evidence adduced by the prosecution on the ground that it was partisan evidence.

In a case of this description which is the result of a party faction in a village where the evidence on either side is liable to be prejudiced, it is necessarily of importance to ascertain the cause of the trouble. Now, the prosecution alleged that the cause of the riot under investigation was that in spite of the threats and attempts of the petitioners to prevent Babulal from working for his employer the latter was actually about to do so when he was obstructed by the petitioners and Mahabir Singh and his companions were assaulted. The genesis of the riot therefore was the threat by the petitioners to Babulal and the success of the latter's employer in persuading him to ignore the threats. The only way the prosecution could prove these threats was by the evidence of some one who heard them uttered and there is no indication that anybody heard these threats except Babulal himself. He therefore was the only person competent to prove them. The hearsay evidence of the complainant with regard to what Babulal told him that the accused persons had said was inadmissible unless, possibly, it was impossible to secure the attendance of Babulal. The process server's report does not indicate that it was impossible to secure Babulal's attendance. The mere fact that the latter was not at his home when the process server visited it is insufficient material from which to draw an inference that Babulal had permanently disappeared or that he was avoiding the service of summons. In my view therefore, the complainant's evidence with regard to the threats said to have been held out by the petitioners prior to the occurrence was inadmissible.

The learned Government Pleader however referred to the evidence of the complainant with regard to what took place at the time of the occurrence. After stating what Babulal was alleged to have said to him with regard to the threats he (the complainant) went on to say that he persuaded Babulal to accompany him and they stated :

When we had gone to the south of Laldhari's house, the accused surrounded me. Narsingh Singh and Dharam Narain Singh abused Babulal. I protested. There was altercation between us as they said that they would not allow Babulal to go and I insisted on taking him with me. I caught hold of Babulal and wanted to take him away forcibly. Jagat Singh ordered and Narsingh hurled his *pharsa* at me.

In this passage we have direct evidence that Narsingh and Dharam objected to Babulal going to the complainant on the day of the occurrence. But this evidence does not indicate whether Babulal was willing to go with the complainant or whether it was his desire to refrain from doing so. The fact that the complainant caught hold of Babulal to take him away forcibly, as he says, may indicate that Babulal was undecided what to do or it may, on the other hand, indicate that the complainant caught hold of him merely to prevent his being detained by the accused. In any case, the best evidence on that point would have been the evidence of Babulal himself and in a case like this where the evidence was mainly of a partisan nature it is regrettable that a more serious attempt was not made to procure that evidence. S. 540, Criminal P. C., provides :

Any Court may, at any stage of any enquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine any person already examined; and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case.

It is manifestly therefore the duty of the Court to summon and examine any person whose evidence the Court considers essential to the just decision of the case. It cannot be denied that in the present proceedings the evidence of Babulal was essential and the Court itself recognized that by directing summons to be issued to him, the Court should have been vigilant to satisfy itself that a real attempt was made to serve the summons on Babulal or to take further steps to secure his attendance. Its omission to do so has resulted in the admission of inadmissible evidence and the absence from

the record of the best possible evidence of Babulal's attitude when the petitioners endeavoured to detain him from accompanying his employer. The explanation which the Magistrate has given to this Court is extremely unsatisfactory. It is as follows :

On 23rd March 1938 the accused filed a petition that Babulal should be examined as a court witness which was allowed and summonses were issued against him but he could not be found. Thereafter the defence did not apply for enforcing his attendance.

It was not on 23rd March but on 23rd May that the accused filed a petition for the examination of Babulal. There is no order in the order-sheet either on 23rd March or on 23rd May or on any other date to indicate that this petition was filed or what the Court's order was with regard to it or why the Court did not take further steps to secure his attendance. All that can be found in the record is the order on the petition itself that Babulal should be summoned as a court witness and the process server's report on the back of the summons which I have already referred to above. That report so far from showing that Babulal could not be found merely showed that no attempt was made to find him. The Magistrate's remark that the defence did not apply for enforcing his attendance is entirely beside the point. It was the duty of the Court to secure the attendance of this important witness. The Magistrate goes on to say that

Babulal's evidence could at best have been partisan evidence. Reliance has been placed for proof of the common object on very much superior evidence.

What is meant by this ambiguous statement I am unable to understand. If the Magistrate meant that Babulal would have deposed for the prosecution regardless of the true facts that idea is negated by the prosecution's attitude towards him. As I have already stated, when the accused applied for Babulal to be examined the prosecution stated that he had been gained over by the defence. If however the Magistrate meant that Babulal would have deposed in favour of the defence regardless of the truth, it seems difficult to believe that the petitioners had behaved towards Babulal in the manner alleged by the prosecution, namely that they at first threatened him if he continued working for his employer and then forcibly attempted to prevent him from doing so. In the circumstances I am far from satisfied with the manner in which the trial was conducted

and in the absence of the evidence of Babulal do not feel justified in accepting the view taken by the Courts below that there is sufficient reliable evidence to sustain the convictions. Without evidence as to the preceding threat the bald prosecution case is that for no apparent reason the petitioners suddenly appeared and forcibly attempted to prevent Babulal from accompanying his employer. It is possible to believe a story of an apparently unjustified attack when it is supported by unambiguous and unimpeachable evidence. But when the evidence tendered is not of that description it is unsafe to accept it unless it is supported by circumstances indicating its truth. Evidence of previous threat is evidence of such a nature. It is missing in the present case. The result is that the rule is made absolute and the petitioners are acquitted and their convictions and sentences are set aside.

D.S./R.K.

*Rule made absolute.***A. I. R. 1939 Patna 662****SPECIAL BENCH**

HARRIES C. J., FAZL ALI AND
MANOHAR LALL JJ.

*Commissioner of Income-tax,
Bihar and Orissa*

v.

Rani Prayag Kumari Debi — Assessee.

Misc. Judicial Case No. 20 of 1939, Decided on 26th September 1939.

Income-tax Act (1922), Ss. 3 and 4 (3-vii)—Suit by widow against A for possession of moveable and immovable properties left by her husband on ground that A was not rightful owner—A claiming to be rightful owner—Suit decreed in favour of widow awarding her certain moveable properties and also damages for wrongful detention of moveables—Sum received by assessee during year of assessment towards damages held not income.

An assessee who was a widow instituted a suit against A for possession of moveable and immovable properties left by her husband on the ground that A was not the rightful owner and that the widow as heir of her husband was entitled to succeed to the property of her husband. A claimed to be in rightful possession of all the properties as rightful owner. The suit was decreed in favour of the widow which awarded certain moveable properties to her and also awarded sums as damages for wrongful detention. In the year of assessment the widow received certain amount towards damages awarded by the decree :

Held that the sum received by the assessee by way of damages was not an income assessable to income-tax : (1929) 14 Tax Cas 580, Rel. on.

[P 666 C 2 ; P 667 C 1, 2]

S. M. Gupta — *for the Commissioner.*
Dr. D. N. Mitter, S. C. Mazumdar, Prem
Lall and Vishundeo Narain —
for Assessee.

Manohar Lall J. — This is a reference by the Commissioner of Income-tax under S. 66 (2), Income-tax Act, asking for the opinion of this Court upon the question formulated at page 8, Whether such part of the instalment-payment made under the terms of the exhibit compromise as corresponds to the award of 'interest upto decree' described in col. 2 of the analysis in para. 5 of this statement, is income within the charge of S. 3 of the Act read with its S. 4 (3-vii), which arose out of the following facts. The assessee is one of the widows of the Raja of Jharia who died in 1916 leaving an impartible Raj consisting of a large number of moveable and immovable properties some of which were the self-acquisitions of the then Raja. Upon his death Raja Shiva Prasad Singh, a collateral, took possession of all these properties as the owner of the Jharia Raj. In 1919 the assessee along with two other co-widows of the late Raja instituted a suit for recovery of possession of the whole of the impartible Raj including the moveable and immovable properties thereof chiefly on the ground that Raja Shiva Prasad Singh was not the rightful owner and that the three Ranis as heirs of their deceased husband were entitled to succeed to the Raj and all other properties left by the previous Raja. The defendant, Raja Shiva Prasad Singh, claimed to be in rightful possession of all the properties in suit as the rightful Raja and also relied upon certain deeds called batannamas executed by the plaintiffs by which the Ranis were alleged to have relinquished their claims for consideration. He also pleaded that the acquisitions made by the Raja were accretions to the Raj and therefore belonged to the defendant by virtue of his right of ownership to the impartible Raj.

The history of the litigation is elaborately set out in 61 Cal 711.¹ The decision of the Calcutta High Court was affirmed substantially by the Privy Council in 59 I A 331.² The decree granted by the Calcutta High Court so far as it is relevant to the present dispute was passed in 1933 and awarded to the assessee a number of moveable properties which were held not

1. Shiva Prasad Singh v. Prayag Kumari Debi, (1935) 22 A I R Cal 89=154 I C 479=61 Cal 711.

2. Shiba Prasad Singh v. Prayag Kumari Debi, (1932) 19 A I R P O 216=138 I C 861 = 59 Cal 1399=59 I A 331 (P O).

to belong to the Raj such as tents, jewel-
eries and cash in till or deposits in the
Banks or money lent out to various deb-
tors. In case the moveables could not be
returned in specie the Court fixed a valua-
tion thereof. The total of the moveables,
including arrears of maintenance, came to
Rs. 25,40,401. The Court also awarded
sums as damages for each item of move-
ables which were ordered to be returned,
the damages being damages for detention.
The total of such damages is stated to be
Rs. 22,34,031. It also appears that during
the pendency of, or before the litigation
was started the Raja had taken possession
of the cash and bank deposits which were
ultimately decreed to the assessee and had
also realized loans from the debtors. After
the decree was passed by the Subordinate
Judge the defendant agreed to pay certain
sums in part liquidation of the decretal
dues. He paid Rs. 18,28,626, towards the
principal amount and Rs. 8,47,611 towards
damages. It may be stated here that the
principal amount was to carry interest at
6 per cent. per annum generally but no
interest was fixed on the damages. Subse-
quently, there was a compromise between
the parties by which the claim of the
assessee was adjusted by fixing the total dues
which then remained payable at a sum of
Rs. 18,00,000 the assessee receiving Rs. 2
lakhs in cash and the Raja taking over the
liability to pay Rs. 4,40,000 to the credi-
tors of the assessee thus leaving the balance
to be paid to the assessee of a total of
Rs. 11,60,000. It was provided in the com-
promise petition by para. 6 that all pay-
ments which will be made by the judgment
debtor in the future would be credited in
the proportion of six annas and ten annas,
that is to say six annas will be set off
towards the principal amount which was
fixed at Rs. 7,16,463-1-9 and the remaining
10 annas will be set off against the damages
balance amounting to Rs. 10,83,536-14-3.

The question formulated above arose out
of the assessment for the year 1937-38
with regard to the previous year 1343 B. S.
In the previous year the assessee admittedly
received a sum of rupees one lakh which
according to the terms of the compromise
just set out was credited in the proportion
of six annas towards the capital (Rs. 37,500)
and the balance (Rupees 62,500) towards
damages. The Income-tax Department taxed
the assessee on among other items this sum
of Rs. 62,500 which was asserted as being
income received by the assessee in the pre-

vious year. The contention of the assessee
that this amount was not income but
merely an amount received by her on ac-
count of damages awarded to her for the
detention of her properties was overruled.
The question for consideration therefore is
whether the sum of Rs. 62,500 received by
the assessee by way of damages awarded to
her by a decree in the circumstances stated
above is assessable to income-tax. As has
been pointed out by the Lord President in
(1935) 19 Tax Cas 13³ at p. 18

the question is never more embarrassing than
when it is concerned with payments in the nature
of compensation or damages. The Income-tax
Rules are of little assistance when it becomes
necessary to distinguish between a capital receipt
and a revenue one.

A large number of cases reported in Tax
Cases have clustered round this difficult
problem and it will serve no useful purpose
to go through them all. The cases may be
divided into three groups. The first group
consists of cases arising out of a claim by
or against a trustee who has been negligent
in the discharge of his trust and has been
ordered to repay the amount with interest
or who if found to have committed a frau-
dulent breach of trust has been ordered to
pay damages. In the former class of cases
the portion of the amount received or paid
as interest has been held to be assessable
to income tax but in the cases where
damages were awarded income-tax was
held not to be exigible. The earliest case
which is usually considered in this group is
the case in (1917-19) 7 Tax Cas 30.⁴ This
case and the later cases on the same topic
were reviewed exhaustively in a recent
decision reported in (1936) 20 Tax Cas 455,⁵
a decision of the Court of Appeal consisting
of Lord Wright, M. R., Slesser L. J. and
Romer L. J. and this has been again
recently considered by Finlay J. in (1937)
21 Tax Cas 354⁶ where it is pointed out
that in such cases the principle deduced
from the case in (1873) 8 Oh 309⁷ applies.
There James L. J. in the well-known
passage pointed out that

If an executor commits a breach of trust, he and
all those who are accomplices with him in the
breach of trust are all and each of them bound to
make good trust funds and interest.

3. *Rentfrew Town Council v. Commissioner of Inland Revenue*, (1935) 19 Tax Cas 18.

4. *Schulze v. S. W. Benstead*, (1917-19) 7 Tax Cas 30.

5. *Commissioners of Inland Revenue v. Barnato*, (1936) 20 Tax Cas 455.

6. *Barlow v. Commissioners of Inland Revenue*, (1937) 21 Tax Cas 354.

7. *Vyse v. Foster*, (1873) 8 Oh 309=27 L T 774=21 W R 207.

It is also pointed out that if an executor or trustee makes profit by an improper dealing with the assets or the trust fund that profit he must give up to the trust, and also account for trade interest at 5 per cent. If this passage is kept in view the apparent contradictions in the decisions are easily reconcilable because it shows that in England where the trustee committed a breach of trust or behaved in a negligent or careless manner he is bound under the law or the rule of law to pay interest, but where the trustee commits a fraudulent breach of trust no interest can be awarded but only damages. In (1936) 20 Tax Cas 455⁵ already referred to, the Court decided that the interest which fell to be taxed was interest payable under a contract, because the obligation in respect of this interest was fixed by admission No. 9 representing the consent agreement of the parties at the stage when the case was before Romer J. (See per Lord Wright towards the end of his judgment.) Slessor L. J. in his judgment pointed out that it is important to turn to the statement of claim upon which Captain Barnato ultimately succeeded in obtaining money through the process of the order of the Court, the investigation and the ultimate compromise, to see whether there is any suggestion in that statement of claim that damages in the sense in which they were claimed, or said to have been claimed, in (1899) 2 Ch 629⁸ were ever demanded at all and he pointed out that the whole matter was put as on a basis of wrongful accounting and failure to account for matters which ought to have been accounted for and made this important observation:

It seems to me that such a demand for an account and inquiry as to the administration of the trusts and the partnership is wholly different from a claim sounding in damages or anything like damages.

Towards the end of his judgment he also indicates that

where on the consideration of the realities of the case, it emerges that the money is paid as interest and not paid merely as a means of measuring damages, there it can properly be said that it satisfies the requirement of Case 3, R. 1 of Sch. D, that the tax shall extend to "any interest of money." Romer J., who had made the order under which the amount was claimed by the assessee, pointed out that his order contained certain admissions as to the principle upon which the accounts and inquiries that were going to be directed should be ascertained and that it was agreed that the trustees should be charged with compound interest at 4½ per cent. per annum on all

or any moneys found due to the plaintiff from time to time until payment.

This group therefore deals with that class of cases where interest is payable either under a contract or under a rule of law. The second group of cases deals with the situation where damages pure and simple have been awarded. The Lord President has given a number of illustrations to appreciate this question in (1935) 19 Tax Cas 13⁹ at p. 18 where he says thus:

Take, for instance, the case of a transport company which unavoidably incurs liability for damages to persons injured by accident. The damages are revenue charges because they are expenses inseparably connected with the conduct of the business from year to year. Thus, in a case of serious injury resulting in payment of a thousand pounds or two by the company, the sum paid will be treated as a revenue charge in the company's accounts. But how will the matter stand as regards the liability to income-tax of the payee? It would appear to be all a question of circumstances. If he is permanently disabled, the damages would appear to be a capital increment in so far as he is concerned, but if he is only knocked out for, say, six months, during which time he loses, say professional income, the damages look like a revenue receipt just as the professional income (if earned) would have been: see (1931) S O 156.⁹ It would be easy to multiply examples. In other words, annual payments may be capital payments, and a single payment may be a revenue charge in the accounts of the payer, and it may be either a capital or a revenue receipt in the hands or accounts of the payee according to the circumstances of the payee and the character of the injury.

In (1917-19) 7 Tax Cas 30⁴ Lord Johnston observed:

The question is whether a sum paid under decree *eo nomine* as interest on a principal sum recovered by the pursuers in an action, was interest in their hands which fell to be assessed to income-tax. Where a pursuer recovers damages with interest from that date of decree, I do not think that that interest is chargeable. It is part of the damages. But where a sum is due on a definite date, with interest from the date of advance and decree goes out the case is different. The interest ought to have been in the creditor's hands on the stipulated date, and is none the less interest when it is recovered along with the principal under the decree. Between these two cases there may be many, some partaking more of the characteristics of the one, some more of those of the other;

and at the same page he later on observed that in the circumstances of the case there was restored to the trust a principal sum which ought throughout to have been in trustee's hands and bearing interest, and there was also restored to the trust a sum representing that interest at the rate of 3½ per cent. so that when it reached the hands of the trustees it was a surrogatum for that which ought to have termly reached the hands of the trustees and have been applied by

8. In re National Bank of Wales, (1899) 2 Ch 629 = 81 L T 863 = 48 W R 99 = 68 L J Ch 634.

9. Burma Steamship Co. v. Inland Revenue, (1931) S O 156 = 1931 S C L T 116 = 16 Tax Cas 67.

them as income, in which case it would have been subject to income-tax, and when it did reach their hands I think they were equally bound to apply it in accounting with the beneficiaries as income, and I am unable to see any sound reason for holding that it did not become liable to income-tax in the hands of the trustees when received.

These remarks were approved by Slesser L. J., in his judgment in the *Barnato case*.⁵ In (1920-24) 8 Tax Cas 595¹⁰ a firm of contractors made a claim for costs, loss and damage against the railway company. The matter was referred to arbitration and the arbiter awarded the firm a certain sum mainly as damages, together with interest thereon at 5 per cent. The Lord President in considering the question of assessability of the damages said :

I think it may be safely taken that the award was not an adjustment of a contract debt at contract rates, but was substantially an assessment of compensation to the contractors for their outlays and losses under the particular circumstances in which those outlays and losses were incurred. It is impossible of course to know precisely the reasons which influenced the arbiter in taking the plan of fixing three capital sums in the first instance as at the date of the lodging of the amended claim, and then adding interest on those sums from that date until payment. It is enough that that was the mode he thought fair for the purpose of assessing compensation to the contractors in the circumstances of the case before him.

He then points out :

Now it is familiar that an assessment of the kind may contain as one of its constituent elements an allowance in respect that the claimant has lain for a long time out of his remedy. The propriety of such an allowance may depend on the character of the claim, and its amount may depend on many considerations of which time is only one. But an interest calculation is a natural and legitimate guide to be used by an arbiter in arriving at what he thinks would be a fair amount. In most cases in which such an allowance is a constituent of an award it does not separately appear, but is slumped along with other elements in the gross sum decreed for ; but there is nothing to prevent an arbiter, if he thinks it just and reasonable in a particular case, to make the allowance in the form of an actual interest calculation from a past date until the sum fixed as at that date is paid. In all such cases however — whether the allowance is wrapped up in a slump award or is separately stated in the decree — the interest calculation is used in *modus estimationis* only. The interest is such merely in name, for, it truly constitutes that part of the compensation decreed for which is attributable to the fact that the claimant has been kept out of his due for a long period of time.

(1929) 14 Tax Cas 580¹¹ has an important bearing on the question which is now before us. In that case a naturalized Bri-

tish subject, domiciled and ordinarily resident in the United Kingdom, had at various dates deposited securities, stocks and shares in banks in Germany with instructions to collect the interest thereon ; he died during the Great War. Before the termination of the war however the interest and dividend in respect of the securities were duly collected by the Bank but owing to the legal position created by the war the owner or his representatives could not deal with his accounts in the German Bank. As a result of the Peace Treaty and by virtue of an award by the mixed Arbitral Tribunal the sums due to the deceased were paid over to his representatives along with compensation, the compensation being the sum calculated upon the basis of interest in respect of that sum. Rowlatt J. pointed out that although the German law recognized the security as remaining the property of its owner, Mr. Kay, but not so as to bear interest :

The Treaty did not give Mr. Kay any right to interest, nor did it declare the Treuhänder a trustee so as to found any consequential claim for interest, it did not empower the Tribunal to give interest as such, or to make any declaration as to the character of the purpose for which the Treuhänder had held the money. The Treaty gave compensation, and the tribunal which assessed the principal sum has assessed it on the basis of interest. I think this sum first came into existence by the award, and no previous history or anterior character can be attributed to it. It is exactly like damages for detention of a chattel, and unless it can be said that damages for detention of a chattel can be called rent or hire for the chattel during the period of detention, I do not think this compensation can be called interest.

The case was taken to the Court of Appeal and the Master of the Rolls in the course of his judgment dealing with the nature and quality of the compensation which was paid under Article 297 of the Treaty observed :

But is it interest? Is that its quality, or is it compensation estimated and measured in terms of interest? It appears to me quite clear that, apart from Art. 297, no such sum could have been recovered. It could not have been recovered according to English law as interest. In the case of the *London, Chatham and Dover Railway v. The South Eastern Railway Company* which was before the House of Lords, (1893) A C 429,¹² there was a delay in payment of an important sum by one railway to another, and the creditor sought to recover interest in consequence of the delay. It was pointed out that interest, according to our law, depends upon, first, a contract express or implied, and, secondly the Statute of 3 and 4 William IV, Chap. 42, under which you can make interest payable in respect of a debt or sum cer-

10. Commissioners of Inland Revenue v. Ballantine, (1920-24) 8 Tax Cas 595.

11. Simpson v. Maurice's Executors, (1929) 14 Tax Cas 580=45 T L R 581.

12. (1893) A C 429=63 L J Ch 93=1 R 275 = 69 L T 687=58 J P 36.

tain, payable by virtue of a written instrument at a certain time, or after a demand has been made giving notice that interest will be charged. Now it is quite clear that there was no contract made by the Germans to pay this interest. The duty to pay compensation was imposed upon them by the Treaty. The Statute does not apply it, and the root of the payment is the duty to pay compensation. So far as English law goes, as pointed out by Lord Herschell and the others, and much as they would desire to impose a liability to pay interest, yet interest cannot be given under English law by way of damages for the detention of the debt;

and he concluded his remarks thus:

For withholding this sum, for preventing Mr. Kay, or his executors, exercising the power of disposition over his property, the Germans have been compelled to pay compensation. The way to estimate that compensation or damages—the sensible way no doubt—would be by calculating a sum in terms of what interest it would have earned. That has been done, but the sum that was paid has not been turned into interest so as to attach income-tax to it.

Lawrence L. J. and Russell L. J. came to the same conclusion. This group then deals with that class of cases where damages are awarded either on calculations based on interest or otherwise but where interest as such was neither payable under any law nor demandable by virtue of any contractual obligation incurred by the parties. The third group of cases is illustrated by (1928) 12 Tax Cas 1169¹³ and (1931) 16 Tax Cas 67.⁹ The facts of the former case were that during a coal strike in 1920 two ships belonging to the appellant company, which were ready to proceed to sea with cargoes of coal, were detained in port by order of the Government for periods of 15 and 19 days. The Company received from the Government a certain sum as compensation for the loss of use of the ships and for wages. The Court of Appeal confirmed the decision of Rowlatt J. and held that the compensation received by the company was properly assessed to excess profits duty as a trading receipt of the company. The Master of the Rolls pointed out that looking at the nature of the undertaking which the Ensign Company was carrying on, that it was to make use of their vessels day by day, and to make use of the earnings which they secured to make a profit,

it seems to me that, looked at from a business point of view, all that has happened is that the two vessels arrived much later at the ports to which they were consigned than they would have done, with the consequent result that for the certain

number of days which they were late they could not possibly make any earnings, and it is in respect of that direct loss by reason of the interference with the rights exercised on behalf of His Majesty that they made a claim and have been paid compensation;

and later on he came to the conclusion that the view adopted by Rowlatt J. was correct when he states:

I think I ought to regard this sum, as the Commissioners have obviously regarded it, as a sum paid which to the shipowners stands in lieu of the receipts of the ship during the time of the interruption,

and therefore

this sum falls into the trading receipts earned by these two ships, as would the receipts from a charter for the 15 or the 19 days if there had been separate charters for those respective periods entered into by the shipowners for the ships for that time.

In (1931) 16 Tax Cas 67⁹ the appellant company jointly with another company bought a motor vessel secondhand and immediately placed it in the hands of repairers for overhaul. But the time stipulated for completion of the overhaul was exceeded and the owning companies claimed from the repairers damages calculated by reference to the estimated profit which would have been earned by the vessel had she been trading during the excess time taken for overhaul. The claim having been compromised and the repairers having paid certain sums towards the amount agreed upon, the question arose whether the sum was assessable to income-tax. The Court of Session, Scotland, came to the conclusion that the amount received was a trading receipt and should be included in the computation of the company's profits. This group therefore concerns with the receipts of damages or compensation in the course of business or trade carried on by a trader.

The present case falls, in my opinion, within the second line of cases referred to by me above. The amount of Rs. 60,500 was received as damages for detention of the moveable properties of the Rani "for the wrongful withholding of possession by the defendant" (per Sir Dinshah Mullah at p. 357 of 59 I A 331² while delivering the judgment of their Lordships in the Jharra Raj case). The Raja was bound under no contract to pay any interest to the Rani for these properties. Indeed the Raja was claiming these properties as his own and his title to retain possession of these properties was ultimately disposed of by a decree of the Court affirmed by their Lordships of the Judicial Committee. The matter

13. *Ensign Shipping Co. Ltd. v. Commr. of Inland Revenue*, (1928) 12 Tax Cas 1169 = 139 L T 111 = 17 Asp M C 472 = 13 Ll L Rep 312.

is made clear by the mode of accounting which was ordered by the decree of the Calcutta High Court in respect of the payments which had been made by the defendants during the pendency of the appeal. Regarding the amount in the Bank, the Subordinate Judge credited the payments which were made by the defendant in the first instance against the damages which had been adjudged as due to the assessee. This was overruled by the Calcutta High Court in these words :

This is in clear contravention of what is provided for in Mr. Bose's decree and in the High Court's decision and what has been approved and confirmed by the Judicial Committee. . . . The interest that has been awarded in plaintiffs' favour in this case is not an interest provided for in any contract between the parties, express or implied, but by way of damages only. The payments that were made were not payments made against interest expressly and there has been no agreement between the parties and no order of Court under which such payments or any of them, if made, were to be credited against interest. A right of a creditor to appropriate a payment against unliquidated damages and when no interest was in fact running under any contract, express or implied, is a thing unknown to law.

Such being the nature of the sum awarded as damages I think the present case clearly falls within the rule laid down in (1929) 14 Tax Cas 580.¹¹ It may be pointed out that the decision of the House of Lords referred to by the Master of the Rolls in (1893) A C 429¹² was followed in this Court in 12 Pat 216.¹⁴ In a recent case decided by their Lordships of the Judicial Committee in 65 I A 66¹⁵ Sir Shadi Lal delivering the judgment of the Board cited with approval the decision of the House of Lords in (1893) A C 429¹² and also the decision of Lord Tomlin in (1929) A C 631¹⁶ and came to the conclusion that

in the absence of any usage or contract, express or implied or of any provision of law to justify the award of interest on the decretal amount for the period before the institution of the suit, interest for that period could not be allowed by way of damages caused to the respondents for the wrongful detention of their money by the railway company.

For the reasons given above I would answer the question formulated at page 8 of the paper-book in the negative. The

14. J. H. Pattinson v. Bindhya Dohl, (1938) 20 A I R Pat 196=146 I O 56=12 Pat 216 = 14 P L T 149.

15. B. N. Ry. Co. Ltd. v. Ruttanji Ramji, (1938) 25 A I R P O 67 = 173 I O 15 = 65 I A 66 = I L R (1938) 2 Cal 72=82 S L R 374 (P C).

16. Maine and New Brunswick Electrical Power Co. Ltd. v. Alice M. Hart, (1929) 16 A I R P C 185=119 I O 615 = (1929) A C 631 = 98 L J P O 146=141 L T 370.

assessee is entitled to Rs. 500 as costs from the Commissioner.

Harries C. J. — I agree.

Fazl Ali J. — I agree.

D.S./R.K. Answer in the negative.

* * A. I. R. 1939 Patna 667

FULL BENCH

HARRIES C. J., FAZL ALI AND
AGARWALA JJ.

Babu Lachmeshwar Prasad Shukul and
others — Appellants.

v.

Babu Girdhari Lal Chaudhuri and
others — Respondents.

In the matter of Federal Court Appeals
Nos. 10, 14 and 17 of 1939, Decided on
26th September 1939.

(a) Civil P. C. (1908), O. 45, R. 7—"Date of
decree" means date on which judgment was
pronounced and not date when decree was
signed.

The phrase "date of the decree" in O. 45, R. 7
(1) means the date which the decree bears or the
date upon which judgment was pronounced. The
starting point of time in O. 45, R. 7 is therefore
the date which the decree bears and not the date
when the decree was actually signed. [P 669 C 2;
P 670 C 1]

(b) Civil P. C. (1908), O. 45, R. 7 (1) as
amended in 1920—Meaning of O. 45, R. 7 (1)
explained — R. 9 of Privy Council Rules gives
Court power in Privy Council appeals to extend
time for making deposit of printing costs beyond
limits fixed by O. 45, R. 7 (1) (*Obiter*).

The meaning of O. 45, R. 7 (1) of the Civil P. C.,
as it now stands, is plain. An extension of time
may be granted for deposit of printing charges
after the expiry of ninety days upon cause being
shown, but such extension of time cannot exceed
sixty days, and if this further period of sixty days
has elapsed, the Court has no power under the
rule as it stands to grant further time. The words
are mandatory and limit the discretion of the
Court. But R. 9 of the Privy Council Rules gives
the Court in Privy Council matters a power in
proper cases to extend time before making a
deposit of printing costs beyond the limits fixed
by O. 45, R. 7 (1): *A I R 1927 Bom 217*; *A I R*
1938 Mad 796 and *A I R 1939 All 299, Rel. on*;
Case law referred. [P 670 C 1, 2; P 671 C 1]

* * (c) Federal Court Rules, O. 9, R. 1 —
High Court has power in proper cases to extend
time fixed by O. 45, R. 7, Civil P. C., for
depositing printing costs in Federal Court
appeals (Per Harries C. J. and Fazl Ali J.;
Agarwala J. Dissenting.).

(Per Harries C. J. and Fazl Ali J.) — What
O. 9, R. 1 of the Federal Court Rules means is
that Order 45 of the Code of Civil Procedure as
amended or modified by any Order in Council and
in particular as modified and adapted by the
Government of India (Adaptation of Indian Laws)
Order, 1937, shall govern the procedure in Federal
Court appeals. As O. 45, R. 7 of the Code of Civil
Procedure has been modified by Order in Council

of 9th February 1920, so as to give the Court power to extend time to make a deposit of printing costs in Privy Council appeals, such power is also given to the Court in relation to Federal Court appeals by reason of O. 9, Rule 1 of the Federal Court Rules. Such power however should be exercised with great caution and only where there are cogent reasons for doing so. In short, it is only where the justice of the cases demands that the Court should extend time that such extension should be given. Time may be extended if owing to the fact that the appellant who was the karta of the family was incapacitated by small-pox, the money was not paid within the period allowed by law. Similarly though the High Court is not closed during the vacation, and the money can be deposited and, if tendered, will be accepted, time may be extended if failure to deposit printing costs during vacation is due to honest impression on the part of the appellant that if the money was deposited on the opening day of the Court it would be accepted as being within time. This is not an ordinary case of ignorance of the law but a mistake due to the failure of the Court in making the position clear. [P 672 C 1, 2 ; P 673 C 1, 2]

(Per *Agarwala J.*).—Neither para. 9 nor any of the other paragraphs of the Order-in-Council of 1920 applies to appeals to the Federal Court and, consequently, High Court has no power to extend the time prescribed by Order 45 of the Code in the case of appeals to the Federal Court. [P 677 C 1]

(d) Limitation Act (1908), S. 4 — S. 4 does not apply to deposit of costs (Per *Agarwala J.*).

An application under S. 4 means an application to the Court to take some step which the Court is empowered to take only on being requested to do so, such as execute a decree, set aside an execution sale, etc. When making a deposit of costs the appellant does not move the Court to do anything. Hence S. 4 does not apply to deposit of costs. [P 677 C 1, 2]

(e) General Clauses Act (1897), Sec. 10 — Office in Sec. 10 does not include office of Court — Deposit of printing costs in case of Federal Court appeal made on day on which High Court reopens after annual vacation is in time under S. 10 (Per *Agarwala J.*).

An act directed or allowed to be done or taken in an office is used in S. 10 in contradistinction to an act directed or allowed to be done or taken in a Court. "Office" does not include the office of a Court. Hence the fact that the office of a Court remains open while the Court itself is closed for judicial business will not deprive a litigant of the extended time for doing an act to which S. 10, General Clauses Act, applies. The High Court is closed for ordinary business during the annual vacation. Hence printing costs deposited on day when Court reopens will be within time under Sec. 10 : *A I R 1923 Pat 150, Rel. on.* [P 677 C 2]

T. N. Sahai (in No. 10), Nitai Chandra Ghosh (in No. 14) and S. K. Mitra and P. Jha (in No. 17) —

for Appellants.

Hasan Jan and P. N. Gour (in No. 10), T. N. Sahai (in No. 14) and B. C. De and A. K. Mitra (in No. 17) —

for Respondents.

Harries C. J.—These are three applications filed by the appellants in the three appeals praying that the amounts of printing costs in connexion with these three appeals to the Federal Court be accepted and, if necessary, time for depositing the same be extended. The facts of the three cases differ materially and will be considered later. There was however considerable delay in all three cases in making the necessary deposits, and the first point which has to be determined is whether this Court can extend the time fixed by law for depositing these printing costs. If the Court has no such power, then it matters little what the facts of any particular case may be if the deposit has not been made within the period stipulated. The three applications first came before a Bench of this Court, and having regard to the general importance of the question that Bench referred the matter to a larger Bench. These applications accordingly have been heard by this Full Bench. A right of appeal to the Federal Court is given by S. 205, Government of India Act, 1935. That Section is in these terms :

(1) An appeal shall lie to to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, within the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.

In all these cases certificates were given by this Court that the cases involved a substantial question of law as to the interpretation of the Government of India Act, and such is the sole ground of appeal in each case. The Federal Court have drafted rules governing the procedure to be followed in appeals to that Court. O. 9 of these rules makes O. 45, Civil P. C., applicable to appeals to the Federal Court with certain modifications. O. 9 is in these terms:

1. Where a certificate has been given under Sec. 205 (1) of the Act, the provisions of O. 45 of the Code, as modified and adapted by the Government of India (Adaptation of Indian Laws) Order, 1937, shall apply in relation to appeals to the Federal Court.

2. Subject to the provisions of Secs. 4 and 12, Limitation Act, 1908, applications under R. 2 of the said Order 45 shall be presented within ninety days from the date of the signing of the decree or order appealed from.

The Government of India (Adaptation of Indian Laws) Order, 1937, adds a rule No. 17 to O. 45, Civil P. C., and makes some other slight amendments to that order. This rule No. 17, which is added to O. 45, Civil P. C., is in these terms:

Where a certificate has been given under Sec. 205 (1), Government of India Act, 1935, the provisions of this Order shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council and references in this Order to His Majesty in Council and to any Order of His Majesty in Council shall be construed as references to the Federal Court and the rules of the Federal Court:

Provided that

(a) R. 3 of this Order shall have effect as if at the end of sub-r. (1) thereof there were inserted the words "apart from any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder;" (b) where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in R. 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent.

The Government of India (Adaptation of Indian Laws) Order, 1937, makes only formal amendments to the wording of O. 45 R. 7, Civil P. C., which deals with time for making deposits of printing costs. The material portion of that Rule reads as follows:

(1) Where the certificate is granted, the applicant shall, within ninety days or such further period, not exceeding sixty days, as the Court may, upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date . . . (b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit . . .

The words "His Majesty in Council" must be read as Federal Court. In cases where the only ground of appeal taken is that a question of law on the interpretation of the Government of India Act has been wrongly decided the word "certificate" in relation to Federal Court appeals must mean the certificate granted under S. 205 (1), Government of India Act. In such cases no certificate such as that contemplated by O. 45, R. 3 is necessary by reason of proviso (b) of R. 17 which has been added to O. 45, Civil P. C., by the Government of India (Adaptation of Indian Laws) Order,

1937. It will be seen from the terms of O. 45, R. 7 that printing costs in Privy Council appeals had to be deposited within 90 days of the date of the decree or within a further period of 60 days if so allowed by the Court or within six weeks from the date of the certificate whichever was the later date. In all three cases now before the Court the money was tendered after the expiration of 150 days from the date of the decree and long after the expiration of six weeks from the date of certificate. It has been held repeatedly that "the date of the decree" in this Rule means the date when judgment was actually pronounced, because that latter date is the date which the decree bears: see 14 C W N 420¹ following a decision of their Lordships of the Privy Council in 7 Cal 547.²

It was contended by the applicants however that a different meaning should be given to the phrase "date of the decree" in this Rule as applicable to Federal Court appeals. O. 9, R. 2 of the Federal Court Rules deals with applications to this Court in Federal Court matters under O. 45, R. 2, that is applications similar to applications for leave to appeal to His Majesty in Council. In this Rule of the Federal Court Rules it is stated that such applications are to be made within 90 days from the date of the signing of the decree or order appealed from. It was therefore contended that the starting point from which time ran in such applications was the date when the decree was actually signed and not the date upon which the judgment was pronounced. There is a clear difference in the wording of O. 45, R. 7 (1), Civil P. C., and O. 9, R. 2 of the Federal Court Rules. The words in O. 45, R. 7, Civil P. C., are however clear and it is not open to this Court to place any other construction upon them than that which has been placed by all the Courts in India in the past. The phrase "date of the decree" in O. 45, R. 7 (1), Civil P. C., means the date which the decree bears or the date upon which judgment was pronounced. Whether the words "date of signing of the decree" appearing in O. 9, R. 2 of the Federal Court Rules mean something different from the date of the decree is a difficult question; but the point does not arise in this case, and it is therefore unnecessary

1. *Harendra Lal Roy v. Hari Das Debi*, (1910) 14 C W N 420=5 I O 844.

2. *Owners of the Ship "Brenhilda" v. British India Steam Navigation Co.*, (1881) 7 Cal 547=8 I A 159 (P O).

for me to offer any opinion upon the question. It is sufficient to say that the starting point of time in O. 45, R. 7, Civil P. C., is undoubtedly the date which the decree bears and not the date when the decree was actually signed. As I have previously stated, in all these cases no money was tendered for printing costs within 90 days of the date of the decree, and no application was made in any of the cases to extend the time after the expiration of the 90 days. In fact, more than 60 days had elapsed after the expiration of the period of 90 days from the date of the judgments before any of these applications were made. In these circumstances, has the Court any power further to extend the time for the deposit of such printing costs?

It was contended on behalf of the applicants that the words "within 90 days or such further period not exceeding 60 days as the Court may upon cause shown allow from the date of the decree complained of" are directory and not mandatory. It is said that normally the deposit should be made within such period but the discretion of the Court is not limited, and the period could be extended in proper cases. O. 45, R. 7 (1), Civil P. C., was amended by Act 26 of 1920. Previous to the amendment the deposit for printing costs had to be made within six months from the date of the decree or within six weeks from the date of the grant of certificate whichever was the later date. By the amending Act of 1920 the words "within 90 days or such further period not exceeding 60 days as the Court may upon cause shown allow" were substituted for the words "within six months." Their Lordships of the Privy Council in 10 Cal 557³ held that the words "within six months" were directory and not mandatory, and the Court could allow further time to deposit printing costs in exceptional cases where there were cogent reasons for so doing. It is argued that the amendment merely amounts to substituting words which are directory only for words which had been previously held to be only directory. In my view the meaning of O. 45, R. 7 (1), Civil P. C., as it now stands, is plain. An extension of time may be granted for deposit of printing charges after the expiry of 90 days upon cause being shown, but such extension of time cannot exceed 60 days, and if this further period of 60 days has elapsed, the Court has no power

under the rule as it stands to grant further time. The words are, in my view, mandatory and limit the discretion of the Court. If the period of 90 days from the date of the decree has expired, the Court can at most grant a further extension of 60 days. Once that period has elapsed, the Court has no power as the rule stands to grant any further time.

The matter however does not rest there as far as appeals to His Majesty in Council are concerned. On 9th February 1920 the date upon which the amendment of O. 45, Rule 7 (1), to which I have referred, took effect, His Majesty in Council issued an order rescinding previous rules, orders and regulations relating to appeals to His Majesty in Council and substituting for them other rules regulating the mode, form and time of such appeals. By the terms of this Order in Council of 9th February 1920 all Courts in India are bound to observe the rules therein contained. R. 9 of this Order in Council of 9th February 1920 reads as follows :

Where an appellant, having obtained a certificate for the admission of appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an order admitting the appeal), the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and may give such directions as to the costs of the appeal and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires.

In appeals to His Majesty in Council this Rule empowers Courts in India to cancel certificates already given in certain cases. It is to be observed that no such power was given to the Courts under O. 45, Civil P. C. This rule does not compel Courts to cancel certificates in case of failure to make deposits of printing costs. The words used are "may cancel" and not "shall cancel." In such cases if the Court does not cancel the certificate it may make such other order, as, in the opinion of the Court, the justice of the case requires. It was strongly urged on behalf of the applicants that this Rule gives the Court in Privy Council matters a power in proper cases to extend time before making a deposit of printing costs beyond the limits fixed by O. 45, R. 7 (1) and in my view this contention is well-founded. R. 9 of the Privy Council Rules allows the Court either to cancel the certificate or make such other order as the justice of the case demands.

3. *Burjore v. Bhagana*, (1884) 10 Cal 557=11 I A 7 (P O).

It appears to me that the framers of this Rule contemplated that the justice of the case might require a further extension of time, and that being so the Court was expressly granted the power to grant such extension in spite of the mandatory words contained in O. 45, R. 7, Civil P. C. The words used in R. 9 are sufficiently wide to give the Court power to extend time for making deposits of printing costs in proper cases beyond the limits fixed by O. 45, R. 7, Civil P. C. It must be remembered that S. 112, Civil P. C., contemplates a possible conflict between the rules contained in the Code and the rules framed by His Majesty in Council. That Section expressly enacts that

nothing contained in the Code shall be deemed to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

In other words, if there is a conflict between the rules contained in the Code and the rules issued by His Majesty in Council, the latter will prevail. In my view therefore the Court has power in proper cases in appeals to His Majesty in Council to extend time for making deposits of printing costs beyond the limits fixed by the Code. There has been considerable conflict of judicial opinion upon this point. Benches of this Court in 9 P L T 305⁴ and A I R 1929 Pat 431⁵ have held that the Court has no power to extend time for the deposit of printing costs beyond the limits fixed by O. 45, R. 7, Civil P. C. It would appear however that the Benches did not consider the effect of Rule 9 of the Order in Council dated 9th February 1920, and dealt with the matter as if it was entirely governed by the provisions of O. 45, R. 7, Civil P. C. In 39 C W N 651⁶ Rankin C. J., and Ghose J. of the Calcutta High Court held that O. 45, R. 7, Civil P. C., and R. 9 of the Privy Council Rules, 1920, did not give the Court power to extend time beyond the limits defined in O. 45, R. 7, Civil P. C., and a similar view was expressed by the Lahore High Court in A I R 1935 Lah 733.⁷ On the other hand, the High Courts of Bom-

bay, Madras and Allahabad have taken a different view. In 51 Bom 430⁸ a Full Bench held that the effect of R. 9 of the Order in Council, 1920, was to give power to the Court in proper cases to extend the time beyond the limits fixed by the Code. A similar view was expressed by a Madras Full Bench in I L R (1938) Mad 1007⁹ and by a Full Bench of five Judges of the Allahabad High Court in A I R 1939 All 299.¹⁰ This latter case overruled the earlier Full Bench case in 55 All 432¹¹ in which it was held, Niamatullah J. dissenting, that R. 9 of the Order in Council of 1920 gave the Court no discretion to extend time beyond the limits fixed by O. 45, R. 7, Civil P. C. I respectfully agree with the views expressed by the learned Judges in the Bombay, Madras and Allahabad Full Bench cases, and I am of opinion that in Privy Council appeals this Court has power in proper cases to extend time for making deposit of printing costs beyond the limits fixed by O. 45 R. 7, Civil P. C.

The next question to be determined is whether this power is given to the Courts in proceedings relating to appeals to the Federal Court. As I have stated previously, O. 9, Rule 1 of the Federal Court Rules provides that the provisions of O. 45 of the Code, as modified and adapted by the Government of India (Adaptation of Indian Laws) Order, 1937, shall apply in relation to appeals to the Federal Court.

The word "Code" is defined in the Federal Court Rules in O. 1, R. 2. The definition is as follows :

In these rules, unless the context otherwise requires "Code" means the Civil Procedure Code, 1908, as amended or modified by any Order in Council or by or under any Central Act.

Rule 9 of the Order in Council of 9th February 1920 does, in my view, modify O. 45, R. 7, Civil P. C., because it empowers the Court in proper cases to grant further time to deposit printing costs, though such power is expressly confined within certain limits in O. 45, Rule 7. If O. 45, R. 7, as modified by R. 9 of the Order

8. Nilkanth Bulwant v. Sachidanand Vidya Narshimha, (1927) 14 A I R Bom 217=101 I O 555=51 Bom 430=29 Bom L R 852 (F B).

9. Ramayya v. Lakshmayya, (1938) 25 A I R Mad 796=177 I O 188=I L R (1938) Mad 1007=(1938) 2 M L J 128 (F B).

10. Bishnath Singh v. Court of Wards Estate of Sri Ram Chandra, (1939) 26 A I R All 299=181 I O 878=I L R (1939) All 549=1939 A L J 278 (F B).

11. Bahadur Lal v. Judges of the High Court, Allahabad, (1938) 20 A I R All 241=143 I O 559=55 All 432=1938 A L J 207 (F B).

4. Ramani Ranjan Billas Upadhyay v. Durga Dutt, (1927) 14 A I R Pat 830=105 I O 585=9 P L T 805.

5. Kamala Kanta Singh v. Bindhumukhi Dass, (1929) 16 A I R Pat 431=128 I O 769.

6. Govind Narain Singh v. Shamlal Singh, (1935) 89 C W N 651.

7. Munna Lal v. Gajraj Singh, (1935) 22 A I R Lah 733=159 I O 282.

in Council of 9th February 1920 is to apply to Federal Court appeals, then this Court has power in proper cases to extend the time for depositing printing costs in Federal Court appeals. It has been contended, however, that O. 9, R. 1 of the Federal Court Rules only contemplates one modification of O. 45 of the Code, that is the modification made by the Government of India (Adaptation of Indian Laws) Order 1937, and that being so, it is urged that the context requires that the word "Code" appearing in O. 9, R. 1 of the Federal Court Rules should be read as the Civil Procedure Code, 1908, and not as the Civil Procedure Code, 1908, as amended or modified by any Order in Council. In short, it is urged that as one modification only is mentioned all other modifications of the Code previously made by Orders in Council must be disregarded. If other modifications of the Code were contemplated by the framers of the Federal Court Rules, it is contended that it would have been sufficient to say in O. 9, R. 1 that "the provisions of O. 45 of the Code shall apply in relation to appeals to Federal Court" as by the definition of the word "Code" means the Code of Civil Procedure, 1908, as amended or modified by any Order in Council which would include the Government of India (Adaptation of Indian Laws) Order, 1937.

In my view the word "Code" in O. 9 R. 1 of the Federal Court Rules must be given the meaning given to that word in the definition contained in the Rules. There is nothing in the terms of O. 9 R. 1 of the Federal Court Rules which demands that the word "Code" should be given any meaning other than the meaning given in the definition. In my judgment what O. 9 R. 1 of the Federal Court Rules means is that O. 45, Civil P. C., as amended or modified by any Order in Council and in particular as modified and adapted by the Government of India (Adaptation of Indian Laws) Order, 1937, shall govern the procedure in Federal Court appeals. As O. 45, R. 7, Civil P. C., has been modified by Order in Council of 9th February 1920, so as to give the Court power to extend time to make a deposit in Privy Council appeals, such power is also given to the Court in relation to Federal Court appeals by reason of O. 9 R. 1 of the Federal Court Rules. To hold otherwise would be to deprive an appellant to the Federal Court of a right which he undoubtedly has in connexion with appeals

to His Majesty in Council. It is to be observed that R. 9 of Order in Council of 9th February 1920 only empowers the Court to extend time when the justice of the case requires it, and it is clear that this power should only be exercised in exceptional cases. In 10 Cal 557³ a case on O. 45 R. 7, Civil P. C., before the amendment of 1920, their Lordships of the Privy Council held that time should not be extended beyond six months unless there were cogent reasons for doing so, and this has been emphasized in the Full Bench cases of Bombay, Madras and Allahabad, to which I have referred. All the Courts which have held that a Court has power to extend the time to make a deposit in Privy Council appeals, have also held that such power should be exercised with great caution and only where there are cogent reasons for doing so. In short, it is only where the justice of the case demands that the Court should extend time that such extension should be given. It will be therefore necessary to consider the particular facts of each of these cases to see whether such cogent reasons exist which demand that the Court should exercise its discretion in favour of the appellants and extend time for making the deposit of printing costs.

Federal Court Appeal No. 10 of 1939.—The facts in the application in Federal Court Appeal No. 10 of 1939 can be shortly stated as follows: This Court delivered judgment on 19th December 1938, and granted a certificate that the case involved a substantial question of law as to the interpretation of the Government of India Act. On 13th March 1939 the decree of the High Court was actually signed and on 27th March 1939 the appellants made an application to this Court under O. 45, R. 2, Civil P. C. On 12th April 1939 notice was served upon the appellants by this Court of the amount of the deposit necessary for printing costs. The appellants did not deposit the money, and on 31st July 1939 the office placed the matter before a Bench for orders. On 1st September 1939 the appellants filed an application in this Court intimating that he was then in a position to pay the money and that time for acceptance of the same should be extended, and this is the application now before the Court. The date of the decree and certificate is 19th December 1938, and the applicants should have deposited this sum within 90 days of 19th December 1938. The 90 days expired on 28th March and no application

was made to the Court to extend the time. The further period of sixty days expired on 27th May and no application of any kind was made until 1st September and no explanation has been given for the delay beyond a vague statement that there was difficulty in obtaining the money. The amount involved was Rs. 253.3.0 and in my view, there are no cogent reasons in this case why the Court should exercise its discretion and extend the time. There has been great delay and in my view, the application to extend time for making the deposit should be rejected.

Federal Court Appeal No. 14 of 1939. — In this case judgment of the High Court was delivered on 23rd January 1939, and a certificate given under S. 205 (1), Government of India Act, 1935. On 13th March 1939, the decree was signed, and on 21st April 1939, the appellants filed a petition in this Court under O. 45, R. 2, Civil P. C. On 11th May 1939, this appeal was consolidated with another appeal (Federal Court Appeal No. 13 of 1939) and an order was made apportioning the costs. On 11th May 1939, the office served an estimate of the printing costs upon the appellants and that estimate was for Rs. 93.3.0. On 24th July 1939, which was the opening day of the Court after the long vacation, this money was tendered but was refused by the Court as the tender was out of time. On 25th July 1939, the appellants filed this application praying for extension of time to deposit the money if such extension was necessary.

According to the appellants, appellant 1 contracted small-pox shortly after 11th May 1939, and was seriously ill for a considerable time. Appellant 2 who is the son of appellant 1, attained majority shortly before 11th May 1939, and it is said that he had to attend on his father and further that he was ignorant of matters connected with the limitation. Further it is said that after the attack of small-pox appellant 1 developed a scrotal tumour which incapacitated him for some time. For these reasons it is said that the appellants were unable to come to Patna and instruct lawyers to make the deposit before 24th July 1939; more than 150 (one hundred and fifty) days elapsed from the date of the decree, but, in my view, there are cogent reasons in this case why time should be extended. The facts mentioned by the appellants have been verified by affidavit, and it is to be noted that these facts are not contradicted by the

respondents. If appellant 1 who was the karta of the family was incapacitated by small-pox, then there was good reason why the money was not paid within the period allowed by law. There seems to be no reason to doubt that appellant 2 was too inexperienced to take any steps to make the deposit or to apply for an extension of time. For these reasons I would extend the time for making the deposit and direct that the money tendered on 24th July 1939, be accepted.

Federal Court Appeal No. 17 of 1939. — In this case the judgment of the High Court was delivered on 17th January 1939, and a certificate given under S. 205 (1), Government of India Act, 1935. The decree was signed on 13th February 1939, and on 11th May 1939, the appellants filed a petition under O. 45, R. 2, Civil P. C. The High Court vacation was from 12th May 1939 to 23rd July 1939. On 29th May 1939, notice of the amount of printing costs, namely Rs. 210, was served upon the appellants, and on 24th July 1939, (that is, on the opening day of the Court after the vacation) the money was tendered and accepted by the learned Registrar subject to any orders passed by a Bench of the Court. One hundred and fifty days expired on 16th June 1939, that is during the vacation, and it was urged on behalf of the appellants that as the Court was closed they could not make a deposit until the opening day of the Court.

In my judgment this Court is not closed during the vacation, and the money can be deposited and, if tendered, will be accepted. It will be observed that the notice of the amount of printing costs was actually sent by the office on 29th May 1939, and that was during the vacation. It has been expressly decided in this Court in 8 P L T 779¹² that a deposit for printing costs may be made when the Court is not sitting but when the office is open. I am satisfied however that there has been considerable misunderstanding as to what business the office of this Court transacts during the vacation. In 2 Pat 264,¹³ the question arose as to whether appeals could be filed during the vacation, and certain correspondence is referred to in that report from which it is clear that the position with regard to this

12. *Jai Kissen v. Baljnath Ram Marwari*, (1927) 14 A I R Pat 892 = 103 I O 213 = 8 P L T 779.

13. *Anand Ram v. Ramghulam Sahu*, (1929) 10 A I R Pat 150 = 71 I O 426 = 2 Pat 264 = 8 P L T 820.

office during the vacation was far from clear. I am satisfied that there is considerable confusion even today, as no orders have been issued as to what the Court will or will not do during the vacation. The appellants in this case state that they were under the impression that if the money was deposited on the opening day of the Court, namely 24th July 1939, it would be accepted as being within time. Such has been the view of a large number of litigants, and they are not entirely to blame for such a view. The matter has not been made clear in the past, and that being so I am quite prepared to believe that the appellants honestly believed that they could deposit this money on the opening day of the Court. This is not an ordinary case of ignorance of the law, and to a large extent the mistake committed by the applicants was due to the failure of the Court in making the position clear. That being so, I am prepared to hold that there are cogent reasons in this case for extending the time for making a deposit, and accordingly I would direct the office to accept the deposit which was tendered on 24th July 1939.

For the reasons which I have given, I would therefore refuse to extend the time in Federal Court Appeal No. 10 of 1939 and dismiss the application. I would however extend the time in Federal Court Appeals Nos. 14 and 17 of 1939 and direct the office to accept the money tendered. In all the circumstances, I would make no order as to costs of these applications.

Fazl Ali J.—I agree.

Agarwala J.—I agree to the order proposed. As however the reasons for my conclusion differ widely from those of my Lord the Chief Justice, I propose to state them in detail and to analyze the law bearing on the question at issue. The ordinary appellate jurisdiction of the Federal Court is described in S. 205, Government of India Act, 1935, and the Federal Legislature has been empowered to enlarge this jurisdiction by S. 206. S. 205 (1) gives a right of appeal to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Act or any Order-in-Council made thereunder, and casts upon the High Court the duty to consider, in every case, whether or not such a question is

involved, and of its own motion to give or withhold a certificate accordingly. Where a certificate is given, any party in the case may appeal to the Federal Court, (1) on the ground that any question as to the interpretation of the Government of India Act or of an Order-in-Council made thereunder has been wrongly decided; (2) on any ground on which that party could have appealed to His Majesty in Council if no such certificate has been given; and (3) with the leave of the Federal Court, on any other ground: [Sec. 205 (2).]

By the Government of India (Adaptation of Indian Laws) Order, 1937, S. 111-A has been added to the Code and by it Ss. 109, 110 and 111 of the Code have been declared to apply to appeals to the Federal Court as they apply in relation to appeals to his Majesty in Council, provided that

(a) so much of the said Sections as delimits the cases in which an appeal will lie shall be construed as delimiting the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said Act, or any Order-in-Council made thereunder, has been wrongly decided:

(b) in determining under cl. (c) of S. 109 whether the case is a fit one for appeal, and, under S. 110, whether the appeal involves a substantial question of law any question as to the interpretation of the said Act, or any Order-in-Council made thereunder shall be left out of account.

As to the procedure in appeals to the Federal Court none of the provisions of the Civil Procedure Code apply to any proceedings in the Federal Court unless expressly incorporated in the Rules of the Federal Court (O. 11, R. 5). The procedure in the Federal Court in relation to appeals from that Court to His Majesty in Council is prescribed by O. 32 of these Rules which applies the provisions of O. 45 of the Code, with certain modifications. So far as appeals from the High Courts to the Federal Court are concerned, O. 9, R. 1, provides:

Where a certificate has been given under S. 205 (1) of the Act, the provisions of O. 45 of the Code, as modified and adopted by the Government of India (Adaptation of Indian Laws) Order, 1937, shall apply in relation to appeals to the Federal Court.

The only alteration in O. 45 of the Code effected by the Adaptation of Laws Order, so far as appeals to the Federal Court are concerned, is the addition of R. 17 which is in these terms:

17. Where a certificate has been given under S. 205 (1), Government of India Act, 1935, the provisions of this Order (i. e. O. 45 of the Code) shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council and references in this Order to

His Majesty in Council and to any Order of His Majesty in Council shall be construed as references to the Federal Court and the rules of the Federal Court.

Provided that :

(a) Rule 3 of this Order shall have effect as if at the end of sub-rule (1) thereof there were inserted the words apart from any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder ;

(b) where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in R. 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent.

Rule 2 of O. 45 of the Code provides :

Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of.

Rule 3 (1) requires the petition to, (1) state the grounds of appeal, and (2) pray for a certificate either: (a) that as regards amount or value and nature, the case fulfils the requirements of S. 110, or (b) that it is otherwise a fit one for appeal to the Federal Court. R. 3 (1) is to be read as if, at the end of it, there were inserted the words "apart from any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder:" [Proviso (a) to R. 17].

And where such a question is the only one to be raised in the appeal, (i) it is not necessary to pray for the certificate referred to in R. 3 (1), and (ii) the appellant is not required to furnish security for the respondent's cost: [Proviso (b) to R. 17].

In cases in which the certificate mentioned in R. 3 (1) is required, and is refused the petition for leave to appeal must be dismissed: [R. 6]. Where the certificate is granted the applicant is required to (i) furnish security and (ii) deposit the amount required for certain expenses: [R. 7 (1)].

The security must be furnished and the deposit made within: (a) 90 days (or such further period, not exceeding 60 days, as the Court may upon cause shewn allow) from the date of the decree complained of, (b) or within 6 weeks from the date of the grant of the certificate, whichever is the later date: [R. 7 (1)].

A question has been raised whether "the date of the decree" referred to in R. 7 (1) is the date on which the decree is actually signed or the date which the decree bears. The decrees in these present cases being decrees of the High Court to which the

Code of Civil Procedure applies bear date the day on which the judgments were pronounced, as required by O. 20, R. 7 of the Code. It may be contended that if the Federal Court Rules had intended to provide that limitation should run from the date on which the decree was actually signed they would have said so, as in O. 9, R. 2 which deals with limitation for an application under O. 45, R. 2, and provides that the period shall run from the date of signing the decree or order appealed from. In the present cases this point is not of any importance because whether the period of limitation for making the deposits required by R. 7 (1) be reckoned from the date which the decrees bear or from the date on which they were signed, the deposits were beyond the period prescribed by that Rule. Nor are we concerned with the alternative period, viz. six weeks from the date of the certificate, as no certificate under R. 3 (1) was required or granted. S. 205 (1), Government of India Act, 1935, and O. 45, R. 17, proviso (b) of the Code, introduced by the Adaptation of Laws Order, having made it quite clear that when the only ground of appeal is that a question of law as to the interpretation of the Act or any Order in Council made thereunder has been wrongly decided, the aggrieved party, in such a case, has an unrestricted right of appeal which is not dependent on the grant of a certificate under O. 45, R. 3.

In all these three cases the only ground of appeal is that a question of law as to the interpretation of the Act has been wrongly decided, and in each case "the date of the decree" is 13th March 1938, which was the date on which judgment was delivered in each of the cases, although in the case of Appeal No. 10 the decree was actually signed on 19th December 1938, in the case of Appeal No. 14 on 23rd January 1939, and in the case of Appeal No. 17 on 17th January 1939. In Appeal No. 10 the costs were not tendered until 1st September 1939; in No. 14 the deposit was tendered on 24th July 1939, but refused by the office; and in No. 17 the deposit was tendered on 24th July 1939, and accepted by the office subject to objection. In none of the cases, therefore, has the deposit been made within the 90 days prescribed by Rule 7 (1), or even before the expiry of the further 60 days which the Court might, upon cause shewn, have allowed. The Court's annual vacation was from 12th

May to 22nd July 1939, and the 23rd was Sunday. During the vacation a Bench of two Judges was sitting to deal with criminal work and other work of an urgent nature. Throughout the vacation the office was open.

Two questions arise for decision : (1) Is this Court empowered to extend the period of limitation beyond the 60 days mentioned in R. 7 (1)? and (2) In the circumstances of these cases should that power be exercised in favour of any of the present appellants? The view taken in this Court, so far as appeals to His Majesty in Council are concerned, is that this Court has no power to extend time beyond the period of sixty days prescribed by R. 7 (1), A I R 1927 Pat 332,¹² A I R 1929 Pat 431.⁵ The same view was taken in 44 All 216,¹⁴ A I R 1935 Lah 733,⁷ 55 Mad 835¹⁵ and 4 Rang 265.¹⁶ The contrary view was taken in 51 Bom 430⁸ and in later Full Bench decisions of the Allahabad and Madras High Courts, A I R 1939 All 299¹⁰ and I L R (1938) Mad 1007.⁹ Prior to 1920 the period prescribed by O. 45, R. 7, was six months. It was held by the High Courts that the Court had a discretion to extend this period. In 1920 the period was reduced to 90 days and the further period to which the Court might extend the time was expressly limited to 60 days. This Court and the Rangoon Court, and the Allahabad and Madras Courts in their earlier decisions, held in the cases referred to above, that it does not lie within the discretion of the Court to extend the time beyond 60 days. The Bombay High Court, and the High Courts of Allahabad and Madras in their later decisions, take the contrary view. This view is based on para. 9 of an Order-in-Council dated 9th February 1920, which is an Order "for regulating the mode, form and time of appeal to be made from the decisions of any Court of Judicature in India" to His Majesty in Council. It has been held that para. 9 of this Order confers upon the High Courts a discretion to extend the time prescribed by Order 45, R. 7 (1), Civil P. C. for the furnishing of security or deposit of costs in appeals to the Privy Council.

It is now contended that para. 9 also

14. Ram Dhar v. Prag Narain, (1922) 9 A I R All 43=65 I C 249=44 All 216=20 A L J 13.

15. Poornananthachl v. Gopalaswami Odayar, (1932) 19 A I R Mad 484=138 I C 663=55 Mad 835=62 M L J 665.

16. J. N. Surty v. T. S. Chettyar Firm, (1927) 14 A I R Rang 20=98 I O 417=4 Rang 265.

enables the High Courts to extend the time prescribed by O. 45 for the furnishing of security or deposit of costs in appeals to the Federal Court. This contention is founded on O. 9, R. 1, of the Rules of the Federal Court and the definition of "Code" in O. 1, R. 2 of those Rules. "Code" is there defined as "the Civil Procedure Code, 1908, as amended or modified by any Order-in-Council or by or under any Central Act," unless the context otherwise requires. O. 9, R. 1 of the Rules of the Federal Court applies to Civil appeals to that Court the provisions of "O. 45 of the Code as modified and adapted by the Government of India (Adaptation of Indian Laws) Order, 1937." It is argued that the word "Code" in this Rule must be read in the sense assigned to it in O. 1, R. 2, and that when so read it includes para. 9 of the Order-in-Council dated 9th February 1920. The answer to that argument is that the Adaptation of Laws Order of 1937 is also an Order-in-Council and if all Orders-in-Council were intended to be included in the word "Code" in O. 9, R. 1, the words "as modified and adapted by the Government of India (Adaptation of Indian Laws) Order, 1937" in that Rule are redundant. I am supported in my conclusion that the word "Code" in O. 9, R. 1 is not used in the wider sense in which it is defined in O. 1, R. 2, by the following consideration. If para. 9 of the Order-in-Council of 1920 applies to appeals to the Federal Court then the whole of that Order applies. Now para. 1 of that Order-in-Council provides :

Applications to the Court for leave to appeal to His Majesty in Council shall be made within 90 days of the decree or order to be appealed from, subject to Ss. 4, 5 and 12, Limitation Act, 1908.

This must be compared with O. 9, R. 2 of the Rules of the Federal Court :

Subject to the provisions of Ss. 4 and 12, Limitation Act, 1908, applications under R. 2 of the said O. 45 shall be presented within 90 days from the date of the signing of the decree or order appealed from.

If the Order-in-Council of 1920 applies to appeals to the Federal Court it was entirely unnecessary to state in O. 9, R. 2, that Ss. 4 and 12, Limitation Act, apply to applications to prefer such appeals, for these Sections would apply by reason of para. 1 of the Order-in-Council. Furthermore, while the Order-in-Council expressly applies Sec. 5, Limitation Act, to appeals to His Majesty in Council, O. 9, R. 2 of the Rules of the Federal Court deliberately omits any reference to that Section and also prescribes that the period of limitation shall be

"ninety days from the date of the signing of the decree or order appealed from" and not, as provided in the Order-in-Council, "ninety days of the decree or order to be appealed from" which, by reason of O. 20, R. 7 of the Code, means ninety days from the date on which the judgment was pronounced. I would therefore hold that neither para. 9 nor any of the other paragraphs of the Order-in-Council of 1920 applies to appeals to the Federal Court and, consequently, that this Court has no power to extend the time prescribed by O. 45 of the Code in the case of appeals to the Federal Court.

It remains to consider the question whether, apart altogether from judicial discretion, a litigant has a right to an extension of the prescribed time. In this connexion Sec. 4, Limitation Act, 1908, and Sec. 10 General Clauses Act, 1897, require consideration. Sec. 4, Limitation Act, 1908, provides :

4. Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

The furnishing of security or the depositing of costs is not, in my view, an "application", which means, as I understand the word in this Section, an application to the Court to take some step which the Court is empowered to take only on being requested to do so, such as execute a decree, set aside an execution sale, etc. When making a deposit of costs the appellant does not move the Court to do anything. Furthermore, it is noticeable that although the Rules of the Federal Court provide that S. 4, Limitation Act, shall apply to the period of 90 days prescribed for an application under O. 45, R. 2 [see Rules of the Federal Court, O. 9, R. 2] they make no such provision with respect to the action to be taken under R. 7 (1). S. 148 of the Code does not apply because the periods of 90 and 60 days in O. 47, R. 7 are fixed by the Code and not by the Court. The relevant portions of S. 10, General Clauses Act, 1897, are as follows :

10 (1). Where, by any Central Act . . . made after the commencement of this Act, any act . . . is directed or allowed to be done or taken in any Court or office . . . within a prescribed period, then, if the Court or office is closed . . . on . . . the last day of the prescribed period, the act . . . shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open :

Provided that nothing in this Section shall apply

to any act . . . to which the Limitation Act, 1877 (now the Act of 1908) applies.

(2) This Section applies to all Central Acts . . . made on or after the fourteenth day of January 1887.

As S. 4, Limitation Act, does not, in my view, apply to a deposit of costs, there is nothing in the Limitation Act which applies to the making of such a deposit, and the matter is governed by S. 10, General Clauses Act.

The next question is whether the appellants are entitled to an extension of time under this Section. First, with regard to the expression "Court or office." Here, I think, an act directed or allowed to be done or taken in an office is used in this Section in contradistinction to an act directed or allowed to be done or taken in a Court, and that "office" does not here include the office of a Court, for when a litigant is required to do a particular act to further his suit or appeal, it is really in Court that he is required to do it although for the sake of convenience and to save the time of Judges it is in fact done in the office of the Court. The office of the Court is merely the hand with which the Court performs some of its functions. If this be so, the fact that the office of a Court remains open while the Court itself is closed for judicial business will not deprive a litigant of the extended time for doing an act to which S. 10, General Clauses Act, applies.

It has been pointed out that in Appeals Nos. 14 and 17 the office of the Court served estimates of costs on the appellants during the vacation and it was suggested that this indicates that the Court was not closed within the meaning of Sec. 10. As I have stated above, two Judges sit during the vacation to deal with criminal work and other urgent work. They do not necessarily sit every day of the vacation. Usually there is so much criminal work for them to do that no other work is dealt with unless it is really of an urgent nature. In practice the only civil work which is ordinarily entertained in the vacation consists of applications for stay of execution or sale, and it cannot be overlooked that it is not only those Judges who are not on vacation duty who avail themselves of the vacation but also the majority of advocates, who are officers of the Court. In these circumstances it seems to me that the Court is closed for ordinary business during the annual vacation. This conclusion is in accordance with the decision of the Taxing Judge of this Court in 2 Pat 264.¹³ The facts of that

case were as follows : A memorandum of appeal properly stamped in accordance with the then current Court-fees Act was presented to the Assistant Registrar on 18th August 1922 during the vacation. On that date the Registrar, who is the officer whom this Court has appointed to receive memoranda of appeal was not in Patna. An amendment of the Court-fees Act which enhanced the fees payable on memoranda of appeal came into operation on the 24th August. The Court re-opened, after the vacation, on 23rd October. The question for decision was whether the presentation to the Assistant Registrar before the amendment was a valid presentation or not. In the course of his judgment the Taxing Judge observed:

There are ample authorities to shew that a memorandum of appeal presented during the vacation to the proper officer appointed in that behalf will be a valid presentation although it is open to the appellant to present a memorandum of appeal on the first day of the opening of the Court under the law of limitation if the time fixed for the filing of the same expires during the vacation. This is for the benefit of litigants. But there is nothing to prevent the presentation of a plaint or memorandum of appeal during a vacation or even on a Sunday, provided it is presented to a proper officer.

This case decided (1) that although presentation to a proper officer on a *dies non* is a valid presentation, (2) a presentation on the re-opening day is a presentation within time even when the prescribed period of limitation has expired. This latter proposition proceeds on the view that the Court is "closed," within the meaning of S. 4, Limitation Act, during the vacation, although the vacation Judges attend Court for urgent judicial business. In another case, 8 P L T 779,¹² a Division Bench held that where the Court is not sitting but the office is open, the time for a deposit of the printing costs of a Privy Council appeal cannot be deemed to expire on the next day when the Court actually sits. The learned Judges refer neither to the decision in 2 Pat 264¹³ nor to S. 10, General Clauses Act. Their decision is apparently based on a distinction between the Court and the office of the Court, a distinction, which I have already indicated above, should, in my view, be held not to exist.

In this view of the matter I would hold that in Appeal No. 14 the deposit was tendered in time and was wrongly refused by the office; and that in Appeal No. 17 the deposit was made in time. In each of these appeals the deposit should be accepted. With regard to Appeal No. 10 I would hold

that as no deposit was made within the prescribed period it cannot be accepted as the Court has no power to extend the time beyond the 60 days, which have elapsed.

D.S./R.K.

Answered accordingly.

* * A. I. R. 1939 Patna 678

FULL BENCH

HARRIES C. J., FAZL ALI AND
AGARWALA JJ.*Ramkhelawan Singh* — Petitioner.

v.

Monilal Sahu and others —

Opposite Party.

Civil Revn. No. 426 of 1938, Decided on
26th September 1939.

* * (a) Civil P. C. (1908), O. 47, R. 1 and S. 151—Application to set aside order dismissing appeal for non-filing of appellant's list within time cannot be entertained under O. 47, R. 1 — It can however be entertained under S. 151 : 4 Pat 704 = A I R 1926 Pat 27 = 91 I C 483, Overruled.

An application to set aside an order dismissing an appeal for non-filing of the appellant's list within the time allowed cannot be entertained, under O. 47, R. 1, Civil P. C. Though O. 41, R. 19 which is the only provision in the Code for the restoration of the appeal does not apply to such a case, such application may be entertained under S. 151 of the Code : 4 Pat 704 = A I R 1926 Pat 27 = 91 I C 483, Overruled ; 24 Cal 350 (F B), held not good law; A I R 1932 Cal 770; A I R 1921 Bom 20 and A I R 1931 Sind 153, Rel. on.
[P 680 C 2; P 681 C 1]

(b) Civil P. C. (1908), O. 47, R. 1 — Words "any other sufficient reason" — Meaning.

Rule 1 of O. 47 must be read as in itself definitive of the limits within which review of decree or order is now permitted and the words "any other sufficient reason" mean a reason sufficient on grounds analogous to those specified in R. 1: A I R 1922 P C 112 and A I R 1934 P C 213, Rel. on.
[P 680 C 1]

(c) Civil P. C. (1908), O. 47, R. 1 — New matter or evidence should be discovered by party applying for review and not by Court — Error should be apparent on face of record and not one caused by Court.

Under O. 47, R. 1 the new matter or evidence should have been discovered by the party applying for review and not by the Court whose order is to be reviewed; and secondly, the error referred to in this provision should be one apparent on the face of the record and not one caused by the Court not being apprised at the time of the dismissal of the appeal of the circumstances which prevented the appellant from taking the necessary steps.
[P 680 C 2]

(d) Civil P. C. (1908), S. 151—Matters to be considered in applying S. 151 stated.

Section 151 should be applied with great caution and only when the ends of justice require its application. In order to decide whether the ends of justice require the application of this Section to a particular case, the Court has to keep in view not only the interest of the applicant but also that of

the other party who may be affected by the order sought to be made under this Section. [P 681 C 2]

Jafar Imam, Mehdi Imam, Harinandan Singh and Akhauri Badri Nath Sinha
— for Petitioner.

D. N. Varma — for Opposite Party.

Fazl Ali J. — This case has been referred to a Full Bench in the following circumstances: The petitioner had filed an appeal to this Court against a decree passed by the Subordinate Judge of Arrah and this appeal was numbered as First Appeal No. 3 of 1938. On 5th May 1938, the appeal was laid by the Registrar before a Bench of this Court for final order with a note pointing out that the petitioner had failed to comply with several orders calling upon him to supply the appellant's list. On that date no one appeared for the petitioner and the appeal was dismissed. On 11th June 1938, the petitioner made an application for the restoration of the appeal. This application bore a stamp of Rs. 3 and purported to have been made under O. 41, Rr. 17 and 19 and S. 151, Civil P. C. The Stamp Reporter noted on the application that the court-fee was insufficient, his view being that such an application could have been made only under O. 47, R. 1 of the Code. The matter was then placed before my brother Agarwala and myself and we decided to refer it to a Full Bench. The reasons which led us to make the reference as well as the point of law which we decided to refer are set out in the following extract from our order:

The Stamp Reporter suggests that the application is in fact one for review of the order dismissing the appeal and that a court fee of about Rs. 405 is leviable. On behalf of the petitioner, on the other hand, it is contended that this is an application for restoration of the appeal on which Rs. 3 stamp is leviable. In 4 Pat 704¹ the cases in this Court for and against the view of the Stamp Reporter are enumerated. It will appear that from the institution of the Court up to 1923 applications such as the present were always treated as applications for review. In 1924 a Bench of which Sir Jwala Prasad was a member took another view although Sir Jwala Prasad had been a member of at least one of the Benches which had decided the other way in earlier cases. The earlier cases of this Court applied the Full Bench decision in 24 Cal 350.² In 59 Cal 1334,³ it was pointed out that the decision in 24 Cal 350² was based on the language of an earlier Code of Civil Procedure and held that

the application was not an application in review. The question is continually arising in this Court and it is desirable that the matter should be settled one way or the other.

The question which requires consideration is whether an application to set aside an order dismissing an appeal for non-filing of the appellant's list within the time allowed can be entertained, unless it be treated as an application for review under O. 47, R. 1, Civil P. C. We refer the matter to a Full Bench under Ch. 5, R. 4 of the Rules of this Court.

In 23 Cal 339⁴ at p. 341 a Bench of the Calcutta High Court had held that an application for re-admission of an appeal dismissed for the appellant's failure to deposit the costs for the preparation of the paper-book was not an application for review, but an application under the rules of the High Court. This decision was overruled in 24 Cal 350² by a Full Bench of five Judges who held that the remedy of the appellant in such a case was to apply for a review and the reasons they gave in support of this view were as follows:

Under the Code there are only two ways known to the law by which a judgment and decree of a Divisional Bench of this Court can be set aside in India. These two methods are described in Ss. 558 and 623 of the Code. The present case is clearly not one in which default was made in appearing at the hearing of the case, for the record shows that the pleaders on both sides were in attendance and heard. It seems to us therefore that the view expressed in the reference is correct, and that the case in 23 Cal 339,⁴ at page 341 so far as it decides the contrary is wrongly decided.

In this Court before 1924 there was on the whole a tendency to follow the practice which had prevailed in the Calcutta High Court since the decision of the Full Bench; but in some cases it was observed that the dismissal of an appeal for failure to file the appellant's list or deposit the printing cost within the time allowed by the Court could be set aside under O. 41, R. 19, read with S. 151, Civil P. C. In 1924 the question as to what was the proper procedure for setting aside such a dismissal was directly raised before a Division Bench of this Court in 4 Pat 704¹ and the learned Judges who sat on the Bench held, following the decision in 24 Cal 350,² that an application to set aside the dismissal must be regarded as one for review under O. 47, R. 1. The learned Judges recognized that the order dismissing the appeal was no longer a decree under the amended Code, but they pointed out that it was still a judgment. The correctness of this decision has been recently doubted in 59 Cal 1334³ in which

1. Anant Potdar v. Mangal Potdar, (1926) 13 A I R Pat 27=91 I O 488=4 Pat 704=7 P L T 291.

2. Fatmunnissa v. Deoki Pershad, (1897) 24 Cal 350=1 O W N 21 (F B).

3. Haridas Devl v. Sajanmohan, (1932) 19 A I R Cal 770=188 I O 893=59 Cal 1334=55 O L J 814=96 O W N 564.

4. Ramhari Sahu v. Madan Mohan Mitter, (1896) 23 Cal 339.

it has been held that an application for restoring an appeal dismissed for default in the payment of initial deposit is not an application for review but an application under O. 41, R. 19 read with S. 151 of the Code. The same view seems to have been taken by the Bombay High Court in 45 Bom 648⁵ and by the Judicial Commissioners of Sind in A I R 1931 Sind 153.⁶ The question which has now to be decided by this Bench is which of the two conflicting views is correct. O. 47, R. 1 provides that a party aggrieved by a decree or an order specified in cls. (a), (b) and (c) of R. 1 may apply for review on any of the following grounds: (1) on the ground of the discovery of new or important matter or evidence which after the exercise of due diligence was not within the knowledge of the party or could not be produced by him at the time when the decree was passed or order made; (2) on account of mistake or error apparent on the face of the record; and (3) for any other sufficient reason.

It seems to me that grounds 1 and 2 would not be ordinarily applicable to cases where an appeal is dismissed for the appellant's failure to file the list or to deposit the printing cost. In such cases the appellant usually applies for the restoration of the appeal on the ground that there was sufficient cause for his not depositing the printing cost or filing the list, as the case may be, within the time prescribed by the Court; and therefore if the application can be treated as an application for review it can be treated as such only on ground No. 3. It has however been clearly pointed out by the Judicial Committee in 49 I A 144⁷ and 15 P L T 763⁸ that R. 1 of O. 47 must be read as in itself definitive of the limits within which review of decree or order is now permitted and the words "any other sufficient reason" mean a reason sufficient on grounds analogous to those specified in R. 1. In view of these decisions it is no longer possible to hold that an application like the present can be treated as an application for review. As was remarked by the

learned Judges of the Calcutta High Court in 59 Cal 1334,⁹

it would require no ordinary flight of imagination to treat a failure to deposit initial cost as being an omission of the same kind or description as an omission to produce a matter or evidence subsequently discovered or a mistake or error apparent on the face of the record.

The points which we must bear in mind are firstly that under O. 47, R. 1 the new matter or evidence should have been discovered by the party applying for review and not by the Court whose order is to be reviewed; and secondly, that the error referred to in this provision should be one apparent on the face of the record and not one caused by the Court not being apprised at the time of the dismissal of the appeal of the circumstances which prevented the appellant from taking the necessary steps. That being so, in my judgment the decisions in 24 Cal 350² and 4 Pat 704¹ can no longer be relied on as good authorities on the subject.

The next question to be considered is whether in a case like the present the applicant has any remedy at all. It is plain that O. 41, R. 19 which is the only provision in the Civil Procedure Code for the restoration of the appeal does not apply to such a case. R. 19 enables the Court of appeal to re-admit an appeal which is dismissed under Rule 11, sub-r. (2) or R. 17 or R. 18. R. 11 and R. 17 provide for cases where on the date fixed, or another date to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing. R. 18 provides for cases where it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit within the period fixed the sum required to defray the cost of serving the notice. In the present case the appeal was dismissed not under any specific provision of the Code but under one of the rules framed by the High Court (Part 2, Chap. 9, R. 23). Are we then to hold that the petitioner is without any remedy, even if he is able to convince the Court that he was prevented by sufficient cause from filing the appellant's list or depositing printing cost within the time fixed by the Court? Unfortunately in our rules there is no rule corresponding to O. 41, R. 19, but I am unable to hold that merely because there is no rule on the subject, this Court is powerless to grant any relief in such cases. In my opinion the failure to file a list or deposit the printing costs stands on no worse footing than the

5. *Sonubai v. Sivajirao Krishnarao*, (1921) 8 A I R Bom 20 = 60 I O 919 = 45 Bom 648 = 23 Bom L R 110.

6. *Mt. Dhayani v. Ishak*, (1931) 18 A I R Sind 153 = 134 I C 1169.

7. *Chhajju Ram v. Neki*, (1922) 9 A I R P O 112 = 72 I O 566 = 3 Lah 127 = 49 I A 144 (P C).

8. *Bisheshwar Pratap Sahi v. Parath Nath*, (1934) 21 A I R P O 213 = 151 I C 41 = 56 All 634 = 61 I A 378 = 15 P L T 763 (P C).

default referred to in Rr. 11, 17 and 18 of O. 41 and I find it difficult to hold that if there had been any rule in the Code corresponding to R. 23 (Ch. 9) of this Court, there would not have been any corresponding provision for restoring the appeal for sufficient cause. In my view if we have power to dismiss an appeal for the appellant's failure to file the appellant's list or deposit the printing cost, we have also power to restore the appeal in a proper case. S. 151 expressly saves the inherent power of the Court and every Court must be deemed to possess as inherent in its very constitution all such powers as are necessary to do right and undo a wrong in the course of the administration of justice. Thus, in my judgment, the answer to the question referred to this Bench is that an application to set aside an order dismissing an appeal for not filing the appellant's list within the time allowed may be entertained under S. 151 of the Code and generally speaking such an application cannot be made under O. 47, R. 1 of the Code.

I shall now proceed to deal with the facts of the present case in order to decide whether this particular appeal should be restored. It appears that on 3rd March 1938 an advocate, Mr. N. C. Roy who appeared for the petitioner applied for the inspection of documents and on 4th March the documents were actually inspected. Notwithstanding this fact, the appellant's list was not filed in time and on 4th April 1938 the Registrar directed the appellant to file it within 14 days of the date. On 25th April the list still not being filed the Registrar recorded the following order in the order-sheet:

Time has been twice allowed for the purpose of filing the appellant's list. The last order, though peremptory, has not been carried out. Final adjournment for seven days is given for compliance, failing which the appeal will be laid before the Bench with a recommendation for dismissal.

On 3rd May the Registrar directed the appeal to be laid before the Bench as the final order for filing the list had been disregarded and the appeal was dismissed by the Bench on 5th May. It is stated by the petitioner in his affidavit that his advocate was fully instructed to file a list and he was in no way responsible for his appeal not being prosecuted properly but this is not borne out by the contents of a letter which was written to him by Mr. Roy on 8th May 1938. This letter which has been quoted in the petitioner's affidavit runs as follows:

Dear Ramkhelawan Babu,

I wrote to you a few days ago that unless list in your F. A. 3/38 was filed immediately, your appeal would be dismissed on 5th May, but when the High Court closed, the appeal (F. A. 3/38) came up before the Bench. I was, as you know, unwell and so did not go to Court, but I instructed somebody to apply for time. The Judges however have dismissed the appeal as the list has not been filed. An application for restoration should be filed soon. The petition should be drafted and kept ready at once. The High Court is closed and I shall leave Patna within five or six days. My fees Rs. 43 (as I wrote to you before) together with the fees for preparing the list should be paid now. The list should be kept ready and this may be prepared by us during this vacation. Please therefore come with sufficient money and do not spoil the case. Unless money is paid nothing will be done. One of your men saw me on 3rd May, but he told me he was going to Muzaffarpur.

This letter shows that the advocate had given due warning to the petitioner in a previous letter and that his fees as well as the fees for preparing the list had not been paid. The petitioner filed a fresh affidavit on the date on which this application was heard to the effect that he had paid a sum of Rs. 36.1.0 to his advocate, but the advocate is now dead, and, in view of the fact that the statement in question was not made in the petition itself which was filed during his lifetime, I am not prepared to act upon it or hold that the advocate did not act honestly and that he was negligent in the discharge of his duty towards his client. It is to be borne in mind that S. 151 should be applied with great caution and only when the ends of justice require its application. In order to decide whether the ends of justice require the application of this Section to a particular case, we have to keep in view not only the interest of the applicant but also that of the other party who may be affected by the order sought to be made under this Section. In my opinion upon the materials on the record it is difficult to hold that the petitioner has made out a sufficient cause for restoring the appeal and I would therefore dismiss this application with costs.

Harries C. J. — I agree.

Agarwala J. — I agree.

D.S./R.K. *Application dismissed.*

A. I. R. 1939 Patna 682

ROWLAND AND CHATTERJI JJ.

*Ram Ran Bijaya Prasad Singh —**Defendant — Appellant.*

v.

*Abdul Ghani Khan and others —**Plaintiffs — Respondents.*

Appeal No. 630 of 1938, Decided on 11th September 1939, from appellate decree of Sub-Judge, Arrah, D/- 6th July 1938.

Custom — Right of burial — Local custom to bury dead cannot be said to exist unless Court is satisfied of its reasonableness and its certainty as to extent and application.

A Court should not decide that a local custom, to bury dead, exists unless the Court is satisfied of its reasonableness and its certainty as to extent and application. Where all that a Judge finds is that the customary right of burial exists over a portion of the disputed plot but he is unable to ascertain the limits of that portion, the extent of land over which the supposed customary right exists being uncertain, the custom is not established : 23 Bom 666, *Expl.* [P 683 C 1]

S. M. Mullick and B. P. Sinha —

for Appellant.

Md. Hasan Jan and Syed Hasan —

for Respondents.

Judgment. — This is an appeal by the defendant in a representative suit brought under O. 1, R. 8, Civil P. C., by the plaintiffs on behalf of all the Mahomedans of Bhojpur Jadeed. The defendant-appellant is the proprietor of the village and the disputed plot bearing survey No. 1303 in khata 322 with an area of 7.56 acres stands in the Record of Rights entered as parti kadim gair mazrua malik with trees on it similarly entered. The claim of the plaintiffs was that the plot belonged to them as a Mahomedan graveyard and they prayed to recover exclusive possession of the entire plot by dispossessing the defendant. Alternatively the plaintiffs asked for a declaration of their right by custom or easement to bury their dead in this plot. The Munsif held that the survey entry was correct and the plaintiffs had no right either to the trees or the land; that a market or bazar had been held on the suit land from time immemorial; that there were a few graves, but that the plaintiffs had not adduced instances sufficient to establish any customary right of burying the dead. On these findings he dismissed the whole suit with costs. The Subordinate Judge who heard the appeal has stated the point for decision before him in these terms :

Whether the plaintiffs have acquired any right by custom to bury the dead in the disputed plot 1303 or any portion thereof.

He does not directly state as a point for decision the claim of the plaintiffs to possess the entire plot as a graveyard to the exclusion of the proprietor's right to use it for other purposes; but in his judgment he does not accept the contention which was argued before him that the Record of Rights was incorrect and that the plot was kabristan. He agreed with the finding of the Munsif that the defendant was still using and from time immemorial had used, a part of the suit land for holding a market. He accepted the evidence that there were pucca graves at three or four places in the disputed plot and that in the immediate vicinity of each of those pucca graves burials had been made for many years past till now. He found that

the user of a portion of the disputed plot by the Musalmans as a graveyard was ancient, exclusive and continuous and that with the owner's knowledge,

and concluded that "the plaintiffs have acquired a customary right to bury the dead in a portion of the disputed plot," namely, the area "in and about the graves already existing and as near them as possible." As a result he has given them a declaration of that right. Against this decision the defendant has appealed and the plaintiffs have preferred a cross-objection.

The main points taken in the appeal of the defendant are that no such customary right can in law be acquired in land owned by another; that the facts found do not warrant in law a finding of the existence of such a custom, and that the judgment and decree are vague and incapable of execution for want of a finding as to the situation and dimensions of the portion of the disputed land over which the plaintiffs had established their rights. The lower Court's view that a customary right to bury the dead may exist appears to be supported by 23 Bom 666;¹ but the correctness of that decision seems to be doubted by Mookerjee J. in A I R 1921 Cal 569.² But it is not necessary here to decide whether as an abstract proposition of law such a customary right can be acquired in another's land; for assuming the law to be as stated in the Bombay decision we are of opinion that the appeal must succeed on the second of the grounds above stated. The learned

1. Mohidin v. Shivlingappa, (1899) 23 Bom 666 = 1 Bom L R 170.

2. Gopal Krishna v. Abdul Samad, (1921) 8 A I R Cal 569 = 66 I C 640 = 34 C L J 319.

Judges of the Bombay High Court accepted it as a correct statement of the law that a Court should not decide that a local custom, such as that set up in this case, exists unless the Court is satisfied of its reasonableness and its certainty as to extent and application.

Now in the present case on the Subordinate Judge's own finding the supposed custom seems lacking in certainty as to extent. All that he finds is that the customary right of burial exists over a portion of the disputed plot. He is unable to ascertain the limits of that portion. He arbitrarily defines the limits as being "in and about the graves already existing." But he loses sight of the fact that within a big plot of 7.56 acres these graves lie in scattered places and not in one continuous block. He proceeded to fix the limits relying on the case in 23 Bom 666.¹ There however the finding of the Courts below was that the right of burial existed "round about the darga in the land in dispute." It was on the basis of that finding that the High Court limited the right to "burying near the darga." This decision does not justify the course adopted by the learned Subordinate Judge in the present case. On the facts as found by him the extent of land over which the supposed customary right exists is uncertain. That being so, the custom is not established.

It has also been argued before us that the alleged custom is unreasonable as the plaintiffs' own evidence shows that there are four or five other graveyards in the village and the plot claimed is of no less than 7½ acres. Apparently this contention has some force, but it involves several questions of fact which were not raised in the Courts below. Firstly, we do not know the extent of the village. Secondly, we have no idea of the Mahomedan population of the village. Thirdly, the other graveyards may have been intended for the use of the people of adjoining villages also. In the absence of any finding on such question of fact we cannot pronounce any opinion on the supposed unreasonableness of the custom.

However, the appeal succeeds on the other ground already dealt with. It may be observed that as regards the graves and chabutras actually existing Mr. Mullick for the appellants conceded that his client is not entitled to interfere with these; but there was no case made out of his having attempted to do so and for any relief regarding them alone the plaintiffs have no

cause of action. The decision of the Subordinate Judge is set aside and that of the Munsif restored. The cross-objection fails and is dismissed. In the circumstances parties will bear their own costs throughout.

D.S./R.K.

Appeal allowed.

A. I. R. 1939 Patna 683

HARRIES C. J. AND FAZL ALI J.

Patna City Municipality—Defendant 2
— Appellant.

v.

Dwarka Prasad Sinha and others,
Plaintiffs and another, Defendant 1
— Respondents.

Letters Patent Appeal No. 9 of 1938,
Decided on 8th August 1939, from decision
of Dhavle J., D/- 5th May 1938.

(a) Bihar and Orissa Municipal Act (7 of 1922), S. 62—Municipality has no unrestricted right to sell or lease road or its portion if it is still required for purposes of Act.

The phrase "may sell, lease, exchange or otherwise dispose of any land" is wide enough to cover "road"; but even if it be held that the word "land" does include a road, yet the Municipality has not an unrestricted right to sell or lease a road or any part of it if such road is still required for the purposes of the Act, that is, as a public road.

[P 685 O 1]

(b) Bihar and Orissa Municipal Act (7 of 1922), Sec. 62 — Commissioner can dispose of land whether acquired or become vested by reason of S. 58.

Section 62 does empower the Commissioners to dispose of land whether acquired by them or whether such land has become vested in them by reason of S. 58.

[P 686 O 1]

(c) Bihar and Orissa Municipal Act (7 of 1922), Ss. 172 (f) and 185—Commissioner has no unrestricted power to sell or lease any roadway which is being used by public as public highway or thoroughfare.

Clause (f) of S. 172 must be read with the preceding clauses and in fact in the opening portion of cl. (f) there is a reference to land which has been acquired under cl. (e). The phrase "any land used by the Commissioners for a public road" cannot mean that the Commissioners may sell any roadway which is being used by the public as a public highway or thoroughfare. S. 185 and the bye-law made thereunder show clearly that Municipality have not an unrestricted right to deal with roadways. If they cannot grant a license to a person to occupy a piece of road for more than a year, then surely they cannot sell a piece of road or lease it for a period of years to enable the lessee to erect buildings necessary for the sale of articles. S. 185 clearly shows that the power of sale or for leasing given in Sec. 172 (f) must be confined to cases which come within the general scope of that later Section.

[P 686 O 2; P 687 O 1, 2]

(d) Highway—Owner of land abutting roadway has right of access to it.

The owner of land abutting a roadway is entitled to access to that roadway at all points on his boundary. [P 687 C 2]

Sir Sultan Ahmad, Rai Gursaran Prasad, Saiyid Ali Khan, Rai Parasnath and Girijanandan Prasad — *for Appellant.*

P. R. Das, B. P. Sinha and D. L. Nandkeolyar — *for Respondents.*

Harries C. J.—This is a Letters Patent appeal from a judgment of Dhavle J. in second appeal reversing a decree of the lower Appellate Court and restoring the decree of the learned Munsif which was in favour of the plaintiffs. The plaintiffs were the owners of a property abutting on to Convent Road, Patna City. Between the metalled portion of the road-way and the plaintiffs' boundary was a strip of land upon which a kachcha drain was at one time situate. Between that drain and the plaintiffs' boundary wall was a narrow strip of land which has given rise to the dispute in the present case. The Patna City Municipality which was defendant 2, executed a lease in favour of defendant 1 for a period of five years with a certain option to renew. Upon this strip of land defendant 1 has erected a petrol pump and the other constructions complained of, and the suit was brought by the plaintiffs for their removal.

The plaintiffs at first alleged that they were the owners of the narrow strip of land between the kachcha drain and their boundary wall, but eventually they gave up that claim. They however alleged that the Patna City Municipality had no right to lease the land in question to defendant 1 and that the latter had no right whatsoever to erect the structures complained of and thus obstruct the plaintiffs' access to the road-way. The main defence relied upon was that the Patna City Municipality had a right by statute to lease or otherwise dispose of this land and that the plaintiffs had no right to object to what had been done in pursuance of the lease granted to defendant 1.

The learned Munsif held that the Municipality had no right, in the circumstances of this case, to deal with this land to the detriment of the plaintiffs and accordingly ordered demolition of the offending structures. The learned District Judge came to a contrary finding and dismissed the claim. In second appeal Dhavle J. held that the Municipality could not give defendant 1 a right to erect these structures and accordingly he reversed the decision of the lower Appellate Court and restored the decision

of the Munsif. On behalf of the Patna City Municipality Sir Sultan Ahmed has argued that this strip of land could be leased by the Municipality and that defendant 1 could erect the structures now complained of. In this Court an attempt was made to show that this strip of land was something apart from Convent Road; but it is to be observed that throughout the proceedings in the lower Courts it had always been conceded that this disputed strip of land formed part of the road-way and was the property of the Municipality by reason of the fact that the road vested in them. S. 58, Bihar and Orissa Municipal Act, 1922, provides for the vesting of certain property in the Municipal Commissioners. Sub-cl. (a) provides that inter alia all roads within the Municipality, including the soil, the pavements, stones and other materials thereof, and all drains, bridges, trees, erections, materials, implements and other things provided for such roads are to vest in the Municipality. The word "road" is defined in S. 3 (24) of the Act and the definition is in these terms:

'Road' means any road, bridge, footway, lane, square, court, alley or passage which the public, or any portion of the public, has a right to pass along, and includes, on both sides, the drains or gutters and the land up to the defined boundary of any abutting property, notwithstanding the projection over such land of any platform, verandah or other superstructure.

It was the case of the Municipality that Convent Road was vested in the Commissioners, and such has never been disputed by the plaintiffs. By reason of the definition to which I have just referred, the Convent Road includes on both sides of it the drains or gutters and the land up to the defined boundary of the abutting property. Some attempt was made in this Court to show that the kachcha drain lying between the metalled portion of the road and the plaintiff's boundary was the defined boundary of the abutting property. In other words, Sir Sultan Ahmed has suggested that the strip of land lying between the drain and the plaintiffs' property is the property abutting on to the road and the side of the drain is the boundary of the road. This point was made for the first time in this Letters Patent Appeal and has never been taken in the Courts below. Throughout the proceedings it seems to have been conceded by all parties that the defined boundary of this road on the side of the plaintiffs' property was the boundary wall of the plaintiffs' compound. In face of the fact that it

has always been the Municipality's case that this strip formed part of the road, they cannot now be heard to say that the strip is vested in them as property other than part of the road. In my view there can be no doubt that the plaintiffs' compound wall is one of the defined boundaries of the Convent Road, and therefore all land up to that boundary will form part of the road.

Sir Sultan Ahmed has further argued that even if this strip of land be regarded as part of the road, nevertheless the Municipality had a perfect right to lease it to defendant 1. He contends that the Municipality has power to sell or lease any public road or part thereof, and he relies upon Ss. 62 and 172 (f), Bihar and Orissa Municipal Act, 1922. It will be convenient to deal first with the argument based on S. 62 of the Act.

Section 62 provides that the Commissioners at a meeting may purchase or take on lease any land for the purposes of this Act, and may sell, lease, exchange or otherwise dispose of any land not required for such purposes or which has been acquired by them for the purpose of being leased. According to the appellants, this gives the Municipality an unrestricted right to sell, lease or exchange or otherwise dispose of any road. On behalf of the respondents it has been argued that Sec. 62 has no reference whatsoever to roads, and it only gives the Municipality powers to sell land which does not include roads. There is no exhaustive definition of "land" in the Act, and the phrase "may sell, lease, exchange or otherwise dispose of any land" seems to be wide enough to cover "road"; but even if it be held that the word "land" does include a road, yet the Municipality has not an unrestricted right to sell such road. At its very highest, the power given to the Municipality by S. 62 is to sell, lease, exchange or otherwise dispose of any land not required for any of the purposes of the Act. If such land is still required for any of the purposes of the Act, then it cannot be disposed of under the powers given by S. 62.

In the present case the Municipality made no effort to show that this strip of land was no longer required for any of the purposes of the Municipal Act, and indeed it would be very difficult for the Municipality to establish such a case. The streets in Patna City are notoriously narrow, and it would be practically impossible to satisfy any independent body that any strip form-

ing part of such roads no matter how narrow, was not urgently required for the use of the public. It was never the case of the Municipality that this strip was not required as a road or for other purposes of the Act; the Municipality's contention has always been that they have a right to lease or sell the public road or any portion of it and that there is no real restriction to that right. The contention that the Municipality has an unrestricted right to sell a road, way or any portion thereof is a startling one, and in my view, is contrary to the plain terms of Sec. 62. That Section only gives them a right to sell or lease land if such land is no longer required for the purposes of the Act. Where a road is still required as a road, the Municipality have no right to sell it under the powers given by S. 62.

The Commissioners are given certain powers by S. 178 to close a road temporarily for certain purposes. It is expressly provided that if the Commissioners so close any road, they shall be bound to provide reasonable means of access for persons occupying holdings adjacent to such road. If the Municipality had an unrestricted right to sell or lease roads, it seems somewhat strange that they have only a power to close roads temporarily, and such they can only do if they provide owners of adjacent property with means of access. It would appear that if the Municipality do not possess an unrestricted right to close a road, then they cannot possess an unrestricted right to sell or lease a road which might result in its being closed permanently. Placing the most favourable construction to the Municipality upon S. 62, it cannot give them a right to lease a road or any part of it if such road is still required for the purposes of the Act, that is, as a public road. The Municipality have not established or even tried to establish that this strip is no longer required for the purposes of the Act, and accordingly they had no power to sell it under S. 62.

The respondents have suggested that an extremely narrow construction must be placed upon S. 62 of the Act. That Section gives the Commissioners a right to purchase or lease land for the purposes of the Act, and it then goes on to give them a right to sell, lease, exchange or otherwise dispose of any land not required for such purposes. It was argued that the power of sale, lease or exchange is confined to land which has been acquired by the Municipality under this Section and does not extend

to land which is vested in the Municipality by reason of S. 58 of the Act. In short, it was argued that the power to sell or lease was the power to sell or lease lands which had been purchased for a specific purpose and which were no longer required for such purpose. This, in my view, is too narrow a construction, because the Section in terms says that the Commissioners may sell, lease or exchange any land subject always that such is not required for the purposes of the Act. In my view the Section does empower the Commissioners to dispose of land whether acquired by them or whether such has become vested in them by reason of S. 58; but such construction does not assist the Municipality for the reason which I have already stated that it has not been established that this particular strip was not required for the purposes of the Act. For these reasons I am satisfied that S. 62 of the Act did not give the Municipality a right to execute the lease in favour of defendant 1.

Sir Sultan Ahmed for the appellant relied also upon S. 172 (f), and he argued that this cl. (f) gave the Municipality an unfettered right to dispose of any road-way whether such was required or not for the purposes of the Act. S. 172 (f) is in these terms:

The Commissioners may—

(f) subject to the provisions of any rule prescribing the condition on which property vested in the Commissioners may be transferred, lease, sell or otherwise dispose of any property acquired by the Commissioners under cl. (e) or any buildings erected thereon or any land used by the Commissioners for a public road, and in doing so, impose any condition as to the removal of any building existing thereon, as to the description of any new building to be erected thereon, as to the period within such new building shall be completed, and as to any other matter that they deem fit.

It is said that this clause in terms gives the Commissioners a right to sell any land used as a public road subject to the provisions of any rule prescribing the conditions on which property vested in the Commissioners may be transferred. It is said that no such rules have been drafted.

If this clause was intended to give the Commissioners an unrestricted right to sell any road or portion of the road, it appears to me extremely strange that it should have been placed in the Section in which it is found. The previous clauses refer to road improvements and improvements to property abutting on the highway. In short, cls. (a) to (e) are clauses relating to schemes of town development and improvement.

That being so, it would be natural to find that the last cl. (f) had also some reference to road improvement and development. The marginal note to this clause is: "Power to construct, improve and provide sites on public roads"; and if this note formed part of the Section it would conclude the matter against the Municipality. It has however been held that a marginal note does not form part of the Section, and accordingly it cannot be looked at for the purposes of construing this particular Section. It is however permissible to examine the other clauses and to consider whether cl. (f) is to be divorced from its context or must be read with the other clauses.

In my judgment, cl. (f) of S. 172 of the Act must be read with the preceding clauses and in fact in the opening portion of cl. (f) there is a reference to land which has been acquired under cl. (e). The Commissioners are given power to transfer, lease or sell or otherwise dispose of any property acquired under clause (e) and any buildings erected thereon, that is, property which the Commissioners have acquired as being necessary for the purposes of any scheme or work undertaken or projected in exercise of the powers conferred by the preceding clauses. Immediately following this power of sale is the power to sell any land used by the Commissioners for a public road: and this, it is said on behalf of the Municipality, gives the latter an unrestricted right to sell any road or part of it.

The phrase "any land used by the Commissioners for a public road" is not a happy one if it was intended to mean any public roadway. A public road is used by the public and not by the Commissioners other than as member of the public. In this clause the land contemplated is land used by the Commissioners for a public road. It is difficult to say with any certainty what this provision means; but I am satisfied that it does not empower the Commissioners to sell any public road. It may mean that the Commissioners have power to sell any land which they have acquired under cl. (e) and which they have used as a roadway for the purposes of a road development scheme. Again, it may possibly mean some road or part of a road which has ceased to be a road or part of a road by reason of the road development scheme. In my view it is not necessary to decide precisely what these words mean; and it is sufficient for this case to hold that the words cannot mean that the Commissioners

may sell any roadway which is being used by the public as a public highway or thoroughfare. If this clause gives the Commissioners an unrestricted right to sell a road, then it is in conflict with S. 62, if "land" in this latter Section includes a roadway. As I have stated, Sec. 62 only empowers the Municipality to sell land if it is no longer required for the purposes of the Act; whereas it is said that S. 172 (f) gives them the power to sell a road without any restriction whatsoever.

Section 185 (b) of the Act empowers the Commissioners to make by-laws consistent with the Act to prevent, prohibit or regulate the use or occupation of any or all public roads or places by any person for the sale of articles or for the exercise of any calling or for setting up any booth or stall, and to provide for the levy of fees for such use or occupation. Under this Section the Municipality have framed certain by-laws which were published under Government Notification No. 2374 L. S. G., dated 27th February 1932. These by-laws provide :

1. No person shall be permitted to use or occupy any part of any public road or place for the sale of articles or the exercise of any calling or the setting up of any booth or stall unless he has previously obtained from the Municipal Commissioners a licence in form A appended to these by-laws :

Provided that no licence shall be granted for the erection of a permanent booth or stall.

2. Such licence may be granted for such specified period, not exceeding one year, as may be determined by the Municipal Commissioners and all such licences shall expire not later than the last day of the year within which they were granted.

These by-laws made under S. 185 restrict the rights of the Municipality to grant licences. In no case can they grant a licence for the erection of any permanent booth or stall and the maximum period for which they can grant a licence for a temporary booth or stall is one year. In the present case the Municipality have granted a lease for five years with powers to renew which gives the lessee a right to erect permanent structures for the sale of petrol. It is clear that a licence for five years could not be given and I cannot understand how something far more substantial, namely a lease can be validly granted. Sec. 185 and the by-law made thereunder show clearly that the Municipality have not an unrestricted right to deal with roadways. If they cannot grant a licence to a person to occupy a piece of road for more than a year, then surely they cannot sell a piece of road or lease it for a period of years to enable a

lessee to erect buildings necessary for the sale of articles. It seems to me that S. 185 of the Act clearly shows that the power of sale or for leasing given in Sec. 172 (f) must be confined to cases which come within the general scope of that latter Section.

Section 172 (c) empowers the Commissioners to turn, divert, discontinue or close any public road vested in them. The words are very wide and according to Sir Sultan Ahmed empower the Commissioners to close any public road if they so think fit. I have already pointed out that the power of the Commissioners to close roads even temporarily is strictly limited : see S. 178, and therefore cl. (c) of S. 172 must be read in its context. In short, it must be held that the power given to the Commissioners to turn, divert, discontinue or close any public road is a power to do so when they are carrying out the road development or road improvement scheme. If the wide words in cl. (c) must be given that limited construction it appears to me that the words in cl. (f) must also be given a similarly restricted meaning.

In my judgment the Municipality had no power under the Municipal Act to lease this land and accordingly defendant 1 had no right whatsoever to make the structures complained of.

The owner of land abutting a roadway is entitled to access to that roadway at all points on his boundary. It was suggested that the plaintiff-respondents had no real complaint in this case, because they had or could have access to their property. In my view it matters not whether access can be given to them, because these buildings seriously infringe one of their most valuable rights, namely a right of access to the highway along the whole length of their boundary. In my view these constructions are a serious infringement of the plaintiffs' rights, and that being so, the latter was entitled to insist on their removal.

For the reasons which I have given, I am satisfied that Dhavle J. was right in holding that the Municipality had exceeded their rights in leasing the property to defendant 1 and that the lease gave the latter no right to erect these structures to the prejudice of the plaintiffs. That being so, I would dismiss this appeal with costs.

Fazl Ali J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1939 Patna 688

WORT AG. C. J. AND MANOHAR LALL J.

*Ram Ranbijay Prasad Singh —**Defendant — Appellant.*

v.

*Mt. Bachia Kuari — Plaintiff —**Respondent.*

Appeal No. 681 of 1937, Decided on 28th September 1938, from decision of Addl. Dist. Judge, Shahabad, D/- 19th June 1937.

(a) Limitation Act (1908), Art. 145—Applicability — Art. 145 does not apply to suit for return of money deposited with employer as security for good conduct.

Article 145 under which time runs from the date of deposit or pawn does not apply to a suit by a legal representative for return of money deposited by the deceased with his employer as security for good conduct, as there is no cause of action at the date of deposit in such a case and the Limitation Act provides for time running only after the cause of action has arisen. [P 688 C 2]

(b) Succession Act (1925), S. 214—"Debtor"—Employer taking deposit from employee for good conduct becomes debtor to employee's estate.

When the employer takes a deposit of money from the employee for good conduct he is obliged to return the sum of money when the employment ceases by the death of the employee and so becomes a debtor to the estate of the deceased within the meaning of S. 214. [P 688 C 2]

S. M. Mullick and B. P. Sinha —

*for Appellant.*Phulan Prasad Varma—*for Respondent.*

Wort Ag. C. J. — This is an appeal by the defendant arising out of an action in which the legal representative of one Ganga (deceased) sued for the return of a sum of money deposited by Ganga with the defendant, his employer, as security for good conduct. Ganga died in the year 1923. It is clear therefore that unless Art. 145, Limitation Act, applied the action was barred by limitation. It may very well be that Art. 145 when speaks of the deposit and pawnee recovering moveable property deposited or pawned that may include money or coin. Their Lordships of the

Privy Council in 28 I A 227¹ have held that the words "moveable property" in Article 89 was sufficiently wide to cover money. But even assuming that that construction can be placed upon Art. 145 the point is one which seems to be fatal to the plaintiff's case. The period from which limitation runs under Art. 145 is the date of the deposit or pawn. That means to say that, although no cause of action arose in this particular case at the date of the deposit, yet time was running against the plaintiff or his legal representative. That makes the application of Art. 145 impossible as a general principle. Now the Limitation Act provides for time running only after the cause of action has arisen, and I think it may be taken as quite certain that if any other construction than that is to be placed upon a particular Article, it will be clear the Legislature never intended that that Article should apply to the facts of such a case as this.

There is yet another thing which is fatal to the plaintiff's case. Sec. 214, Succession Act, provides that "no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof except on the production of the succession certificate." I have repeated merely the relevant words of that Section. It is contended on behalf of the plaintiff-respondent that the defendant was not the debtor of Ganga. That is an impossible contention. When Ganga left his employment or died (as in this case) the defendant was obliged to return the sum of money deposited with him; in other words, he became the debtor either to Ganga or to his estate. The appeal succeeds and is allowed and the plaintiff's action dismissed with costs throughout.

Manohar Lall J. — I agree.

D.B./R.K.

Appeal allowed.

1. Asghar Ali Khan v. Kurshed Ali Khan, (1901) 24 All 27=28 I A 227=8 Sar 142 (P O).

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